IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

68-0157 (9-06) - 3091078 - EI

ADAM E PONSOR
Claimant

RIPKE LAWN SERVICE LLC
Employer

APPEAL NO: 18A-UI-07435-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/11/17
Claimant: Respondent (1)

Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer filed an appeal from the July 20, 2017, (reference 02) unemployment insurance decision that allowed benefits and concluded the employer filed an untimely protest. The parties were properly notified about the hearing. A telephone hearing was held on July 27, 2018. The claimant registered for the hearing but was unavailable when called. The employer participated through Jason Ripke, owner. The administrative law judge took official notice of the administrative record, including the Notice of Claim and protest. Department Exhibit D-1 and D-2 were received into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

NOTE TO EMPLOYER: To become a SIDES E-Response participant, you may send an email to iwd-sidesinfo@iwd.iowa.gov. To learn more about SIDES, visit http://info.uisides.org.

ISSUE:
Is the appeal timely?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An initial unemployment insurance decision (reference 02) resulting in the claimant receiving benefits and the employer being liable for potential charges due to an untimely protest was mailed to the employer's last known address of record on July 20, 2017. Owner, Jason Ripke, utilizes his home address as the employer's address of record. His wife, Heather, is secretary of the company and collects mail daily or every other day.

The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by July 30, 2017. Because July 30, 2017 was a Sunday, the final day to appeal was July 31, 2017. Mr. Ripke didn't know when the initial decision was received but stated he and his wife were in Colorado and getting married during the prescribed period to appeal, and no one checked the mail. The business was still in operation during Ripke's absence from the office but does not have anyone review mail for potentially urgent matters while they are away.

He stated that upon returning to town, the employer attempted to file an appeal in 2017, after the due date, but had no copy, other details or evidence available.

The employer then filed its appeal via email (Department Exhibit D-1) after receiving a statement of charges for the first quarter of 2018, which showed charges associated to the claimant. The appeal was not filed until July 12, 2018, which is almost one year after the date noticed on the initial decision.

Mr. Ripke asserted that 10 days is insufficient to respond to an initial decision, and that the employer did file an appeal previously. He further stated his company should not be charged for the claimant's unemployment benefits even if it responded late, because it submitted a separation agreement to Iowa Workforce Development (See Reference 03 decision) which confirmed the claimant quit the employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant's appeal is untimely.

Iowa Code section 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. *Gaskins v.*

Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); *Johnson v. Board of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the employer witness and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not established that it attempted to file a timely appeal before July 12, 2018 (Department Exhibit D-1).

The undisputed evidence is the employer was out of the office/out of town during a period of time that coincided with the notice of claim and initial decision being rendered. The employer's choice to not to designate someone to check employer mail during the Ripke's absence while they were married was a business decision.

No detail or specific evidence was presented that the employer did not receive the initial decision within the prescribed time to appeal or even that a prior appeal attempt was made before the receipt of 2018 first quarter statement of charges. The agency at no time received the Employer's appeal except the one that was sent by email on July 12, 2018. Any appeal that may have been sent by mail prior to this time was not received. There is thus no evidence of a postmark, legible or otherwise, in the record. Cases such as this are governed by Iowa §622.105. That section provides:

Evidence of date mailed.

> 1. Any report, claim, tax return, statement, or any payment required or authorized to be filed or made to the state, or any political subdivision which is transmitted through the United States mail or **mailed but not received** by the state or political subdivision or received **and the cancellation mark is illegible, erroneous or omitted,** shall be deemed filed or made and received on the date it was mailed if the sender establishes by competent evidence that the report, claim, tax return, statement, or payment was deposited in the United States mail on or before the date for filing or paying. In the event

> of nonreceipt of any such report, tax return, statement, or payment, the sender shall file a duplicate within thirty days of receiving written notification of nonreceipt of such report, tax return, statement, or payment. Filing of a duplicate within thirty days of receiving written notification shall be considered to be a filing made on the date of the original filing.
> 2. For the purposes of this section "competent evidence" means evidence, in addition to the testimony of the sender, sufficient or adequate to prove that the document was mailed on a specified date which evidence is credible and of such a nature to reasonably support the determination that the letter was mailed on a specified date.

So where there is no legible postmark, or the appeal letter is missing, only then is evidence taken about *when* the document was placed in a receptacle. But even then there has to be more than just the "testimony of the sender." *Lange v. Iowa Dep't of Revenue*, 710 N.W.2d 242, 247-49 (Iowa 2006); *accord Hagen v. Iowa Dental Bd.,* 13-0162 (Iowa App., 2013)(testimony that license renewal was mailed *per* office practice, while sufficient to satisfy common law presumption, is insufficient to satisfy622.105 which governs appeals to administrate agencies). Iowa Code §622.105 applies exactly in cases such as this: when the allegedly mailed appeal was not received. Based on the evidence presented in this case, the testimony of Mr. Ripke, (who could not provide proof, a copy or details of the 2017 appeal) is insufficient.

Therefore, based on the evidence presented, the administrative law judge concludes the record shows that the appellant did have a reasonable opportunity to file a timely appeal. The administrative law judge is sympathetic to the employer, but based on the evidence presented, concludes that the employer's failure to file a timely appeal was not due to any Agency error or misinformation or delay or other action of the United States Postal Service, which under 871 IAC 24.35(2) would excuse the delay in filing the appeal.

DECISION:

The July 20, 2017, (reference 02) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/rvs