

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

KAREN SANDERSON

Claimant,

and

AASE HAUGEN HOMES INC

Employer.

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HEARING NUMBER: 09B-UI-06253

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.6-2

DECISION

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

On April 10, 2009 a representative's decision was mailed to Karen Sanderson (Claimant). The decision was mailed to the Claimant's last known address as supplied to Iowa Workforce. The decision contains a warning that any appeal must be postmarked or returned not later than ten days from the initial mailing date. The Claimant hand delivered the appeal to the Decorah Iowa Workforce office on April 20, 2009. The appeal was faxed to the Appeals Section at 7:40 am on April 21, 2009. Based on the credible evidence, the Claimant did file a timely appeal on April 20, 2008.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code 96.6 provides:

2. Initial determination. ... 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.

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 - but not conclusive - evidence of the date of mailing.

There is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and the Administrative Law Judge and this Board have no authority to change the decision of representative if a timely appeal is not filed. *Franklin v. Iowa Dept. Job Service*, 277 N.W.2d 877, 881 (Iowa 1979). The ten day period for appealing an initial determination concerning a claim for benefits has been described as jurisdictional. *Messina v. Iowa Dept. of Job Service*, 341 N.W.2d 52, 55 (Iowa 1983); *Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373 (Iowa 1979). The only basis for changing the ten-day period would be where notice to the appealing party was constitutionally invalid. *E.g. Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373, 377 (Iowa 1979). The question in such cases becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Employment Sec. Commission*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Employment Sec. Commission*, 212 N.W.2d 471 (Iowa 1973). The question of whether the Claimant has been denied a reasonable opportunity to assert an appeal is also informed by rule 871-24.35(2) which states that "the submission of any ... appeal... not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service."

As we have found the Claimant did deliver her appeal to the Decorah office on April 20. We base this on several items. First, the Claimant testified quite positively that she was in the local office on the 20th. Second, the appeal shows that it was signed on the 20th. Third, and much more important, the document has written on it "Fax to 515-242-5144 3 pages 4-20-09." It is true that the document does not have the customary stamp showing the date of hand delivery that a local office usually put on such appeal. But this is true whether the appeal was hand delivered on the 20th or the 21st. No matter when it was hand delivered we would normally expect such a stamp. None appears and so we look to the hand written notation we cited. Finally, the fax imprint reflects the number 3193870905 and a time of 07:40. We note that according to publically available information this number is the fax of the Decorah office. (<http://www.iowaworkforce.org/centers/files/offices.htm>). Moreover, that same information shows the hours of operation of that office to be 8:30 to 4:30. The fax therefore appears to have gone out before the Claimant could even have gotten in the office on the 21st.

Putting this together we conclude that the Claimant's testimony that she was in on the 20th is credible. It appears that the local office received the appeal on the 20th. It also seems more likely than not that the office attempted at some point to fax the appeal that day. We are aware that the Appeals Section is currently engaged in Herculean effort to deal with the current economic crisis. A busy fax would not be unusual. This would explain the "4-20-09" notation as well as how the fax from the local office was sent prior to opening the next day.

We are aware that the rules of Workforce describe an appeal as being filed by its delivery to the Appeals section. We leave for another day whether this rule is mandatory or whether it is merely directory – such as the requirement of a statement of grounds found in the same rule. We defer this question

because, regardless, the appeal was delivered to a local office and thus any delay in perfecting the appeal with the Appeals section then became the fault of the agency. This is the sort of error of Workforce that excuses the late faxing under rule 871-24.35(2). We find the Claimant's appeal timely.

DECISION:

The administrative law judge's decision dated May 19, 2009 is **REVERSED AND REMANDED**. The decision of the administrative law judge is not vacated at this time. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section. The administrative law judge shall issue a decision on the merits of this case. The Administrative Law Judge may in the Administrative Law Judge's discretion conduct an additional hearing if the judge deems it necessary to develop issues that were not adequately addressed in the first hearing because of the disposition of the issue of timeliness. After the hearing, if any, the administrative law judge shall issue a decision that provides the parties appeal rights

John A. Peno

Elizabeth L. Seiser

Monique F. Kuester

RRA/fnv