

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

RUDY RIOS

Claimant

APPEAL 23A-UI-02655-CS

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACE CONSTRUCTION INC.

Employer

OC: 01/08/23

Claimant: Appellant (1R)

Iowa Code § 96.4(3) – Able and Available
Iowa Admin. Code r. 871-24.22(2)(I)-On-Call Workers
Iowa Admin. Code r. 871-24.23(26) – Able & Available – Part time, same hours and wages
Iowa Code § 96.1A(37)a & b – Total and Partial Unemployment
Iowa Code § 96.7(2)a – Same Base Period Employment
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

On March 10, 2023, the claimant/appellant filed an appeal from the February 13, 2023, (reference 02) unemployment insurance decision that denied benefits as of January 8, 2023 based on claimant still being employed in his job for the same hours and wages as in the original contract of hire. This hearing was originally scheduled for hearing on March 29, 2023. Claimant could not access the hearing and requested the hearing be reschedule for a later date. The hearing was rescheduled for April 24, 2023. Claimant did not appear and a default decision was issued. Claimant requested a re-hearing of the matter due to not being able to access the conference call because the system would not allow his call entrance into the conference. The administrative law judge granted the motion for re-hearing and granted the in person hearing request. The parties were properly notified about the hearing. An in person hearing was held at 502 East 9th Street, Des Moines, IA 50319 on June 13, 2023. The hearing was held together with appeals 23A-UI-02653-CS; 23A-UI-02656-CS; 23A-UI-02657-CS; and 23A-UI-02658-CS, and the record was combined. Claimant participated through attorney Peter Sand. Employer participated through Chief Financial Officer and Office Manager, Kay Haroldson. Exhibits A and B were admitted into the record.

ISSUES:

- I. Is claimant's appeal timely?
- II. Is the claimant able to work and available for work?
- III. Is the claimant partially, totally, or temporarily unemployed?
- IV. Is the claimant an on-call worker?
- V. Is claimant employed for the same hours and wages?

VI. Is the employer's account subject to charge?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The unemployment insurance decision was mailed to the appellant's address of record on February 13, 2023. The appellant did not receive the decision until approximately February 23, 2023. Claimant's mail is delivered to his father's house. Claimant's father gets the mail and then puts claimant's mail in a specific pile for claimant to check. Claimant checks the mail every other day but had not checked the mail since the beginning of February. Claimant's father was out of town for work and asked claimant to look through the father's mail to find something for him. When claimant was going through his father's mail he discovered the decision. Claimant contacted Investigator Troy Shelley of Iowa Workforce Development but is unsure when he first contacted him to discuss the amount he was overpaid benefits. On March 7, 2023, decisions (reference 02 and 03) were issued that informed claimant he was overpaid benefits. After exchanging emails with Investigator Shelley he filed an appeal of the (reference 01) decision on March 10, 2023. (Exhibit A). The deadline to file the appeal was February 23, 2023.

Claimant began working for the employer on December 1, 2022. Claimant was hired as a full-time iron worker. Claimant's hourly rate was \$30.76. Claimant filed for benefits for a second claim year with an effective date of January 8, 2023. (DBRO). Claimant's gross weekly benefit amount is \$551.00. (DBRO).

For the week of January 8, 2023, through January 14, 2023, claimant worked thirty-two hours and earned \$984.32 for the week. Claimant filed for benefits and incorrectly reported that he earned \$380.00 for the week. (DBRO). Claimant received a reduced benefit amount of \$308.00. (DBRO).

For the week of January 15, 2023, through January 21, 2023, claimant worked twenty-one hours and earned \$645.96 in wages for the week. Claimant incorrectly reported that he earned \$100.00 for the week. (DBRO). Claimant received \$551.00 in benefits for the week. (DBRO)

For the week of January 22, 2023, through January 28, 2023, claimant did not earn income and was attending apprenticeship school. Claimant reported \$0.00 in wages for the week and received his full benefit amount of \$551.00. (DBRO)

For the week of January 29, 2023, through February 4, 2023, claimant did not earn income and was attending apprenticeship school. Claimant reported \$0.00 in wages for the week and received his full benefit amount of \$551.00. (DBRO).

For the week of February 5, 2023, through February 11, 2023, claimant worked sixteen and a quarter hours and earned \$499.85 in wages for the week. Claimant incorrectly reported he earned \$50.00 in wages for the week. (DBRO). Claimant received a full benefit amount of \$551.00 for the week. (DBRO).

For the week of February 12, 2023, through February 18, 2023, claimant did not perform work for the week. The employer had a safety issue with one of their job sites and laid the workers off until the issue was resolved. Claimant received a full benefit amount of \$551.00. (DBRO). The decision denying benefits was issued February 13, 2023, prior to the close of the claimant filing his weekly claim for the week. A determination regarding this week has not been made and is being remanded to the Iowa Workforce Development's Benefits Bureau for an investigation and determination.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 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. Bd. 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 of the decision and the date this appeal was filed. Furthermore, claimant testified that he knew about the decision on February 23, 2023. Claimant waited an additional fifteen days before he filed an appeal of the decision. 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). The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes the failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation, or delay or other action of the United States Postal Service pursuant to Iowa Admin. Code r. 871-24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The February 13, 2023, (reference 02) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

REMAND:

The issue of whether claimant is eligible for benefits for the week of February 12, 2023, through February 18, 2023, is remanded to Iowa Workforce Development's Benefits Bureau for an investigation and determination on whether claimant is partially, temporarily or totally unemployed for the week. If the Benefits Bureau determines claimant is not eligible for benefits for the week of February 12, 2023, through February 18, 2023, they shall issue a decision reflecting an overpayment for the week.



Carly Smith
Administrative Law Judge

June 14, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.