

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ALISHA M WINGER
Claimant

DUBUQUE COUNTY
Employer

APPEAL NO. 21A-UI-05779-B2-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/29/20
Claimant: Appellant (1)

Iowa Code § 96.6-2 – Timeliness of Appeal
Iowa Admin. Code ch. 871 r. 24.23(10) – Leave of Absence
Iowa Code § 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Claimant filed an appeal from the July 27, 2020, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 29, 2021. The claimant did participate. The employer did participate through Tammy Freiberger.

ISSUES:

Whether the appeal is timely?

Whether claimant is able and available for work?

Whether claimant is on an approved leave of absence?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A decision was mailed to the claimant's last known address of record on July 27, 2020. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by August 6, 2020. The appeal was not filed until February 22, 2021, which is after the date noticed on the disqualification decision. Claimant stated that she believed she did receive the decision. She did not state why she did not file an appeal in a timely basis. Claimant continued filing weekly claims after this date, but stopped receiving money.

Claimant was employed by employer as a CNA working a PRN status with claimant signing a contract committing to a guaranteed 8 hour shift every other weekend. Claimant did not work at all after March 14, 2020 as claimant felt that she couldn't work because she was unable to do 8 hour shifts with her husband working and her not having childcare for her young children. Claimant asked for time off to remedy this situation.

Employer reached out to claimant asking that she return to work in June. Claimant stated she was having gynecological surgery and that she thought she could return after the surgery. Claimant's doctor gave claimant a full release to return to work on August 3, 2020. Claimant also indicated her return would be delayed as she was unsure of her husband's schedule and her husband's impending surgery.

Claimant was seen by her doctor on August 13. She told her doctor that she'd been having seizures. She believed that the seizures would be increased if claimant was forced to wear a mask at work. Claimant provided no documentation that the doctor agreed.

Employer asked claimant when the neurological appointment was that her doctor had referred her to. For nearly a month, claimant didn't provide information. Employer called back on September 10, and claimant stated she told employer it was to be on the 17th. Claimant never returned to work as she was terminated by employer on September 15, 2020 for failing to stay in contact.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6(2) provides, in pertinent part:

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. . . . 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 begin 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).

Pursuant to rules Iowa Admin. Code r. 871-26.2(96)(1) and Iowa Admin. Code r. 871-24.35(96)(1), appeals are considered filed when postmarked, if mailed. *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983).

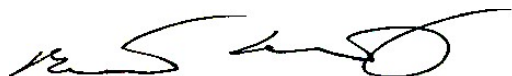
The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. *Franklin v. IDJS*, 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. IDJS*, 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. IESC*, 217 N.W.2d 255 (Iowa 1974); *Smith v. IESC*, 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 that 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 Section 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. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

Even if the matter was found to be timely, claimant has not shown that she was able and available to work at any time after March 14, 2020

DECISION:

The July 27, 2020, reference 01, decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.



Blair A. Bennett
Administrative Law Judge

May 6, 2021
Decision Dated and Mailed

bab/kmj