

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KAREN E GERDES
Claimant

APPEAL NO: 09A-UI-09449-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GREAT RIVER MEDICAL CENTER
Employer

OC: 04/26/09
Claimant: Appellant (1)

Section 96.19-38-b – Eligibility for Partial Unemployment Insurance Benefits
Section 96.4-3 – Able and Available
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Karen E. Gerdes (claimant)) appealed a representative's June 10, 2009 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits due to her employment with Great River Medical Center (employer) being on the same on-call basis as it had been during her base period, so as to render her otherwise unable and unavailable for work. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 17, 2009. The claimant participated in the hearing. Kelly Augustine appeared on the employer's behalf. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant's appeal timely? Was the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on June 10, 2009. The claimant received the decision; on her appeal form she indicated she received the decision virtually immediately after it was issued. The claimant's testimony at the hearing on the question of when she received the decision varied and was conflicting. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by June 20, 2009. The appeal was not filed until it was signed on June 30 and delivered to a local Agency office on July 1, 2009, which is after the date noticed on the disqualification decision.

The claimant started working for the employer on August 16, 2004. As of January 9, 2005 she went to working on a PRN (*Pro re nata* – commonly used in medicine to mean "as needed") basis as a diagnostic imaging assistant and, as of May 19, 2008, as a certified nursing aide

(CNA) in the employer's hospital. As of the date of the hearing she continues to work on the PRN basis, frequently working between 10 and 15 hours per week.

The claimant went to the PRN status when she started full-time work at another employer (General Electric Company) in January 2005. She worked full time for that employer until November 30, 2007, at which point she was permanently laid off. The claimant had initially established a claim for unemployment insurance benefits effective April 29, 2007 due to a short-term layoff from her full-time employer. After her layoff, she reopened her claim by filing an additional claim effective December 2, 2007. She received partial benefits, after offset for her wages from this employer, for weeks in which her wages were less than her weekly benefit amount of \$334.00 plus \$15.00. After her initial claim year expired April 27, 2008, she established a second benefit year effective April 27, 2008. Her base period for that claim year was from January 1, 2007 through December 31, 2007, still including her wage credits from her prior full-time employer General Electric Company, so her weekly benefit amount was calculated to be \$426.00. She filed for and received unemployment insurance benefits for weeks in which her wages from her on-call employer were less than \$441.00 (\$426.00 + \$15.00).

The claimant exhausted her regular benefits in the April 27, 2008 claim year as of November 15, 2008. She then began receiving Tier One emergency unemployment compensation (EUC) benefits as of the week beginning November 22, 2008, again after adjustment for wages she was earning through her on-call employer. She exhausted her Tier One benefits, and effective April 19, 2009 began receiving Tier Two benefits. However, that second benefit year expired April 26, 2009.

The claimant then established a third unemployment insurance benefit claim year effective April 26, 2009. However, her base period for this third claim year is from January 1, 2008 through December 1, 2008; the only wage credits during this period are from the on-call employer. Her new weekly benefit amount was calculated to be \$105.00. She is seeking to receive unemployment insurance benefits for weeks in which her wages from the employer are less than \$120.00 (\$105.00 + \$15.00).

REASONING AND CONCLUSIONS OF LAW:

If a party fails to make a timely appeal of a representative's decision and there is no legal excuse under which the appeal can be deemed to have been made timely, the decision as to the merits has become final and is not subject to further review. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by 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 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 871 IAC 26.2(96)(1) and 871 IAC 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 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 then 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).

A party does not have a reasonable opportunity to file a timely appeal if the delay is due to Agency error or misinformation or to delay or other action of the United States postal service. 871 IAC 24.35(2). Failing to read and follow the instructions for filing an appeal is not a reason outside the appellant's control that deprived the appellant from having a reasonable opportunity to file a timely appeal. The appellant has not established that she did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the prescribed time was not due to a legally excusable reason so that it can be treated as timely. The administrative law judge further concludes that because the appeal was not timely, the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal, regardless of whether the merits of the appeal would be valid. See, Beardslee, supra; Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

However, in the alternative, even if the appeal were to be deemed timely, the administrative law judge would affirm the representative's decision on the merits. The substantive issue in this case is whether the claimant was eligible for partial unemployment insurance benefits effective April 26, 2009, and thereafter. The claimant is requesting partial unemployment insurance benefits for the weeks in which her wages were less than \$120.00. The unemployment insurance law generally provides that a claimant is deemed partially unemployed if she has been permanently or temporarily separated from one employer and earns less than her weekly benefit amount plus \$15.00 in other employment. Iowa Code § 96.19-38-b; see also Iowa Code § 96.3-3.

Iowa Code § 96.19-38-b provides in part:

- b. An individual shall be deemed partially unemployed in any week in which, while employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.

Iowa Code § 96.3-3 provides:

3. Partial unemployment. An individual who is partially unemployed in any week as defined in section 96.19, subsection 38, paragraph "b", and who meets the conditions of eligibility for benefits shall be paid with respect to that week an amount equal to the individual's weekly benefit amount less that part of wages payable to the individual with respect to that week in excess of one-fourth of the individual's weekly benefit amount. The benefits shall be rounded to the lower multiple of one dollar.

The Agency has interpreted these sections in defining a "week of unemployment" as "a week in which an individual performs less than full-time work for any employing unit if the wages payable with respect to such week are less than a specified amount," which would be the partial earnings allowance described above. 871 IAC 24.1(138). Under 871 IAC 24.1(135)(c), "full-time week" is defined as "the number of hours or days per week of full-time work currently established by schedule, custom or otherwise for the kind of service an individual performs for an employing unit."

For the claim for the benefit years beginning April 29, 2007 and April 27, 2008, the claimant's regular workweek was based her full-time base period wages from General Electric. In the present case for the benefit year beginning April 26, 2009, the claimant's regular workweek must be based upon her status as of the point she filed her claim for this benefit year. The evidence indicates that at that point, the claimant's only regular employment was working PRN or on call. This establishes the claimant's "regular workweek" for the current benefit year for determining whether she was partially unemployed under the statutes and rules. A person "whose wage credits earned in the base period of the claim consist exclusively of wage credits by performing on-call work . . . or any other individual whose work is solely on-call work during the base period, is not considered an unemployed individual . . ." for purposes of eligibility for unemployment insurance benefits. 871 IAC 24.22(2)i(3). The claimant is currently fully employed under her regular capacity with the employer for the current benefit year, and is not eligible for partial unemployment insurance benefits.

The claimant made some reference to a belief she was eligible for some additional continued benefits due to a provision of NAFTA (North American Free Trade Agreement). The administrative law judge wonders whether the claimant might be thinking of TRA (Trade Readjustment Allowances) under the Trade Adjustment Assistance program related to NAFTA. However, even if there is some provision under such a program for some type of benefit to the claimant, that is a separate type of benefit from unemployment insurance benefits which the claimant would need to separately apply for; those benefits are not part of the regular unemployment insurance benefit program, which is the program to which this decision applies.

DECISION:

The representative's June 10, 2009 decision (reference 01) is affirmed. The appeal in this case was not timely. Even if it were treated as timely, in her current benefit year the claimant is fully employed under her regular on-call arrangement with the employer, and is not eligible for unemployment insurance benefits.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed