

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LORI K HERNANDEZ
Claimant

APPEAL NO: 10A-UI-13824-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMPLOYER'S SERVICE BUREAU INC
Employer

OC: 09/06/09

Claimant: Appellant (2/R)

Section 96.19-38-b – Eligibility for Partial Unemployment Insurance Benefits
Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Lori K. Hernandez (claimant) appealed a representative's May 10, 2010 decision (reference 03) that concluded she was not qualified to receive unemployment insurance benefits in relation to her employment with Employer's Service Bureau, Inc. (employer) because she was not able and available for work. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 18, 2010. The claimant participated in the hearing. Joe Rausenberger 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 or are there legal grounds under which it should be treated as timely? Was the claimant employed by the employer for less than her usual hours and wages even though she remained able and available for work, and was she therefore eligible for full or partial unemployment insurance benefits?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on May 10, 2010. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 20, 2010. The appeal was not treated as filed until it was received by fax on October 7, 2010, which is after the date noticed on the disqualification decision. While the local Agency office claimstaker did not initial the claimant's appeal form in the space provided, the appeal was dated May 12, 2010, and the local Agency office claimstaker indicated that the claimant had in fact presented her appeal to the local Agency office at that time, and that the local Agency office had believed that someone in that office had faxed the claimant's appeal to the Appeals Section at that time.

The employer is a contract labor provider, providing employees to the employer's Clinton, Iowa business client. The business client has a varying number of labor positions available for each

shift, each day, usually between 40 and 70. The employer's employees wishing to work are to report to the business client's gate by a specified time each day; the first employees who report up to the number of positions the business client has available are allowed to work; employees who arrive after the number of positions has been filled are turned away.

The claimant began working for the employer at this business client on November 3, 2008. Her last day of work was May 10, 2010. She worked on the second shift, Monday through Friday, when work was available. The punch in time for second shift work was 2:20 p.m.; she was advised to be at the gate no sooner than 1:55 p.m. if she wished to be possibly selected for work.

The claimant had established an unemployment insurance benefit year effective September 6, 2009. She reopened that claim by filing an additional claim effective April 18, 2010. She filed weekly claims seeking at least partial unemployment insurance benefits for the weeks ending April 24, May 1, and May 8. She did not file a weekly claim for the week ending April 17, as she had called in sick at least four of the days that week.

The claimant worked no hours the week ending April 24; she had reported to the business client's gate by approximately 2:00 p.m. each of those days, but by the time her vehicle got to the gatehouse, the employer had filled the business client's work positions for the shift, and she was turned away. Likewise, the claimant worked no hours the week ending May 1; again she had reported to the business client's gate by approximately 2:00 p.m. each of those days, but by the time her vehicle got to the gatehouse, the employer had filled the business client's work positions for the shift, and she was turned away. During the week ending May 8 the claimant worked three days, May 3, May 4, and May 5. On May 6 she arrived at the gatehouse by about 2:00 p.m. but was turned away, and on May 6 she called in sick.

The claimant worked on May 10, but called in sick on May 11, May 12, and May 13; she was turned away for lack of work on May 14. She did not file a weekly claim for unemployment insurance benefits for the week ending May 15. It appears there was a separation from employment after May 14, 2010, but that separation has not yet been adjudicated.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. 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 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 not 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 due to Agency error, misinformation, delay, or other action pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, Beardslee, supra; Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

The unemployment insurance law provides that a claimant is deemed qualified for partial unemployment insurance benefits if she is not employed at her usual hours and wages and earns less than her weekly benefit amount plus \$15.00. Iowa Code § 96.19-38-b.

Beginning on or about April 18, 2010, the employer was not providing the claimant with substantially the same employment as it provided during her base period. Implicit with the concept of allowing benefits for a claimant whose full-time hours with her employer have been reduced is the expectation that she remain available for work on the same basis as when she was previously working full time and earning the wage credits on which her unemployment insurance benefits are based. Iowa Code § 96.4-3; 871 IAC 24.22(2)(a). The claimant was reporting to the business client's gate sufficiently prior to the scheduled start time for the shift, and was therefore making herself available on the same basis as she had previously been working; the fact that she was not within the first 40 to 70 employees to arrive does not render her unavailable for work. She was able and available for the majority of the workweeks each of the three weeks in question. 871 IAC 24.22(2)(h)¹. Consequently, the claimant is qualified to receive full or partial unemployment insurance benefits for those three weeks upon the filing of her additional claim effective April 18, 2010, provided she was otherwise eligible.

An issue as to whether there was a separation from employment arose during the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

¹ She was not able and available for the majority of the weeks ending April 17 and May 15 because of calling in sick the majority of the workdays for those weeks, therefore she would not have been eligible for any unemployment insurance benefits those weeks, but as she did not make weekly claims for those weeks, the issue is moot.

DECISION:

The unemployment insurance decision dated May 10, 2010 (reference 03) is reversed. The appeal in this case is treated as timely. The claimant is eligible for partial unemployment insurance benefits for the period of April 18 through May 8. The matter is remanded to the Claims Section for investigation and determination of the separation issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css