

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARKETTA R NEUBAUER**  
Claimant

**APPEAL NO: 09A-UI-19528-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 10/19/08**

**Claimant: Appellant (1)**

Section 96.5-1 – Voluntary Leaving  
Section 96.6-2 - Timeliness of Appeal

**STATEMENT OF THE CASE:**

Marketta R. Neubauer (claimant) appealed a representative's December 19, 2008 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Wal-Mart Stores, Inc. (employer). Hearing notices were mailed to the parties' last-known addresses of record for a telephone hearing to be held at 11:00 a.m. on February 9, 2010. The claimant received the hearing notice and responded by calling the Appeals Section on January 22, 2010. She indicated that she would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, she did not participate in the hearing. Based on a review of the information in the administrative file and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant's appeal timely or are there legal grounds under which it can be treated as timely?

**FINDINGS OF FACT:**

The claimant had a separation from employment with the employer effective September 21, 2009. As a result, she established an unemployment insurance benefit year effective October 19, 2008. A notice of the filing of her claim was mailed to the employer on October 27, 2008. The employer responded by filing a protest to her claim on November 5, 2008, by the November 6 deadline for its response. As a result, a notice of unemployment insurance fact-finding interview was mailed to the parties on November 7, 2008, setting a date and time for the interview as December 18, 2008 at 11:20 a.m.

On November 12 and November 13, 2008, two decisions were issued indicating that as to two other separations from employment from other employers, the claimant was eligible to receive unemployment insurance benefits, respectively Electronic Data Systems (reference 01) and The Restaurant Company/Perkins Restaurant & Bakery (reference 03).

The claimant filed weekly claims for the weeks between October 19, 2008 and December 20, 2008; she received benefits for each of the weeks except for the week ending December 20, as prior to that date the employer's protest had not yet been addressed. When the claims representative attempted to call the claimant for the fact-finding interview, the representative discovered that the claimant's phone was not in service, and mailed her a letter giving her three days to provide any additional information.

Based upon the information available to the claimant representative at the time of the fact-finding interview, the decision in this case was issued and mailed to the claimant's last-known address of record on December 19, 2008. While there might have been some delay in her receiving the decision, she did receive the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by December 29, 2008, a Monday.

The claimant did not file an appeal until she hand-delivered the appeal to an Agency office on December 28, 2009. She indicated that she had been urged to make an appeal at that time by her college financial aid advisor and had been told that if she had not received the representative's decision before the deadline for appeal, she might still be able to appeal. However, the additional notifications had also been sent to the claimant regarding the disqualification decision and the resulting overpayment, including a representative's decision issued on July 16, 2009 (reference 04) that informed her that she was being held to be overpaid unemployment insurance benefits as a result of the decision that had determined that her separation from employment with the employer was disqualifying. She did not make any contact or attempt to appeal in response to those notifications.

#### **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. While the appellant may not have had a reasonable opportunity to file a timely appeal within the initial timeframe for appeal, she did have an opportunity to make an appeal that could have been deemed timely had she acted within a reasonable time after receiving notice of the decision. Delaying taking action as soon as she learned of the decision because of a mistaken belief it would not make a difference is not a legal justification to excuse the failure to act promptly.

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).

**DECISION:**

The representative's December 19, 2008 decision (reference 02) is affirmed. The appeal in this case was not timely, and the decision of the representative has become final and remains in full force and effect. Benefits are denied until the claimant has requalified.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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