

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TRAVIS L DAVIS
Claimant

APPEAL 17A-UI-02091-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE DEVELOPMENT
DEPARTMENT**

**OC: 12/18/16
Claimant: Appellant (1)**

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.4(3) - Able and Available
Iowa Admin. Code r. 871-24.2(1)e – Notice to Report
Iowa Admin. Code r. 871-24.23(11) – Failure to Report

STATEMENT OF THE CASE:

Travis L. Davis (claimant) filed an appeal from the January 24, 2017, reference 02, unemployment insurance decision that denied benefits because of a failure to report as directed. After due notice was issued, a telephone conference hearing was set for March 17, 2017. The claimant participated. Department's Exhibits D1 through D4 were received. Official notice was taken of the administrative record.

ISSUE:

Is the appeal timely?
Is the claimant able to and available for work?
Did the claimant fail to report as directed or offer a good cause reason for failure to do so?

FINDINGS OF FACT:

The claimant filed his original claim for unemployment insurance benefits the week of December 18, 2016. The administrative record shows that he filed for benefits for the weeks ending December 31, 2016 and January 7, 2017. He reported wages of \$171.00 for week ending December 31 and \$150.00 for week ending January 7.

An unemployment insurance decision disqualifying the claimant from benefits based on his separation from 3T Services was mailed to the claimant's address on January 6, 2017. The decision contained a warning that an appeal was to be filed no later than January 16, 2017. A Letter of Inquiry was mailed to the claimant's address on January 11, 2017 and contained a warning that a response was required by January 20, 2017. A second unemployment insurance decision finding the claimant was unavailable for work dated January 24, 2017 was mailed to the claimant's address with a warning that an appeal needed to be filed by February 3, 2017. The claimant stated he did not receive any of the documents mailed to his address.

The claimant was unable to inquire about his lack of benefits from the local office until February 23, 2017 because that was his first day off work after filing for benefits. He began a new job on December 23, 2016 working 40 hours a week earning \$16.50 an hour. That job ended on January 15, 2017. The claimant denied filing a continued weekly claim for benefits during those weeks. The claimant then took another job that began on January 20, 2017 and ended February 13, 2017. He worked 40 hours a week and earned \$16.50 an hour. He began a third job on February 15, 2017. The claimant filed his appeal on February 23, 2017 when he first went to Iowa Workforce Development (IWD) to inquire as to why he was not receiving benefits. The claimant filed his appeal at that time.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal is untimely and, even if it was timely, the claimant is not able to or available for work.

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 section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 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 section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 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 section 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 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. 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 claimant testified that he did not receive a copy of the unemployment hearing decision which was mailed to his address on January 24, 2017. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's testimony is not credible. The claimant's mailing address remained the same throughout the entire process. He received the hearing notice mailed to him on February 27, 2017 at the same address. The claimant denied receiving any of the three letters that required him to respond to IWD during the month of January. Additionally, other parts of the claimant's testimony were inconsistent with the administrative record. The claimant testified he did not make a weekly claim for benefits for the weeks ending December 31 and January 7; however, the administrative record shows that he clearly did file for benefits those weeks. Not only did the claimant file for benefits those weeks, he reported wages earned those weeks in the amounts of \$171.00 and \$150.00 but provided conflicting testimony when he stated that he worked 40 hours a week earning \$16.50 an hour which would result in wages of \$660.00 a week. Finally, the claimant last filed his continued weekly claim for benefits the week of January 7, 2017 and the following week is when he likely would have received the disqualification decision. Based on the claimant's inconsistent testimony with other information provided to the agency, his testimony is not found to be credible.

The claimant's failure to file his appeal within the ten days was not due to any agency error or misinformation or delay or other action of the United States Postal Service. Therefore, his appeal was not timely filed. The decision dated January 24, 2017, reference 02, remains in effect as the appeal was not timely filed.

In the alternative, even if the claimant's appeal had been timely filed, the claimant would not be eligible for benefits as he was not available for work for the weeks he filed continued weekly claims for benefits.

Iowa Code § 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.2(1)e provides:

e. In order to maintain continuing eligibility for benefits during any continuous period of unemployment, an individual shall report as directed to do so by an authorized representative of the department. If the individual has moved to another locality, the individual may register and report in person at a workforce development center at the time previously specified for the reporting.

The method of reporting shall be weekly if a voice response continued claim is filed, unless otherwise directed by an authorized representative of the department. An individual who files a voice response continued claim will have the benefit payment automatically deposited weekly in the individual's account at a financial institution or be paid by the mailing of a warrant on a biweekly basis.

In order for an individual to receive payment by direct deposit, the individual must provide the department with the appropriate bank routing code number and a checking or savings account number.

The department retains the ultimate authority to choose the method of reporting and payment.

Iowa Admin. Code r. 871-24.23 provides, in relevant part:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(11) Failure to report as directed to workforce development in response to the notice which was mailed to the claimant will result in the claimant being deemed not to meet the availability requirements.

(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

The claimant did not respond to the notice to report to IWD. However, even if it is accepted he did not receive the notice to report, the claimant was working full-time and removed from the labor market which rendered him unavailable for other work.

DECISION:

The January 24, 2017, reference 02, unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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