

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LETICIA S PENA
Claimant

APPEAL NO. 10A-UI-06503-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOC SERVICES
Employer

OC: 11/08/09
Claimant: Respondent (1-R)

Section 96.4(3) – Able and Available
Section 96.6(2) – Timeliness of Appeals

STATEMENT OF THE CASE:

IOC Services filed an appeal from a representative's decision dated April 14, 2010, reference 02, which held that Leticia Pena satisfied the availability requirements of the law effective April 11, 2010. After due notice was issued, a hearing was held by telephone at 9:00 a.m. on June 25, 2010. The employer participated by Jamie Briesch, Team Member Relations Supervisor. Ms. Pena responded to the notice of hearing but was not available at the number provided at the scheduled time of the hearing. She did not contact the Appeal Bureau until approximately 10:22 a.m. She indicated she missed the hearing because she did not have her telephone turned on. The administrative law judge concluded that she did not have good cause for not participating as it was her responsibility to make sure she was ready to receive the call at the scheduled time. For this reason, the hearing record was not reopened.

ISSUE:

At issue in this matter is whether the appeal filed herein was timely.

FINDINGS OF FACT:

The administrative law judge, having considered all of the evidence in the record, finds that: A decision allowing benefits to Ms. Pena was mailed to the employer's last-known address of record on April 14, 2010. The employer received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by April 24, 2010. Because the due date fell on a Saturday, it would be extended to the following Monday, April 26, 2010. The appeal was not filed until April 28, 2010, which is after the date noticed on the disqualification decision.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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. 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 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 871 IAC 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).

The only other determination made by Workforce Development concerning Ms. Pena's employment with IOC Services was made on December 15, 2009 and held that she was still employed in an on-call capacity. She became separated from the employment on January 12, 2010. Workforce Development has not adjudicated the separation from employment. Therefore, the matter shall be remanded to Claims to investigate and issue a determination regarding the separation from employment.

DECISION:

The representative's decision dated April 14, 2010, reference 02, is hereby affirmed. The appeal in this case was not timely and the decision of the representative remains in effect. Ms. Pena satisfied the availability requirements of the law effective April 11, 2010. This matter is remanded to Claims to adjudicate Ms. Pena's January 12, 2010 separation from IOC Services.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs