

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JAMES P WHITNEY
Claimant

ADVANCE MILLWORK INC
Employer

APPEAL 18A-UI-10477-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/29/18
Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.23 – Substitution of Wages Due to Receipt of Workers' Compensation

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 24, 2018, (reference 01) unemployment insurance decision that denied the request to substitute wages in calendar quarters prior to the base period. The parties were properly notified about the hearing. A telephone hearing was held on November 5, 2018. Claimant participated and testified. Workforce Advisor Grant Elliot testified on behalf of the claimant. Employer participated through Chuck Hennes and Tracy Strang. Claimant's Exhibit A and Department's Exhibit D-1 were received into evidence.

ISSUE:

Is the appeal timely?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An unemployment insurance decision denying benefits and claimant's request to substitute quarters outside of his base period was mailed to the claimant's last known address of record on September 24, 2018. Claimant received the decision within the appeal period. The decision contained several incorrect dates involving his base period and dates when worker's compensation benefits were denied, confusing claimant. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by October 4, 2018 and claimant saw that deadline.

Claimant went in to his local office for assistance with filing his appeal and attempted to speak with a workforce advisor, Grant Elliot, with whom he had been working on issues outside of the scope of his appeal. Elliot was not available, but claimant was able to locate the proper appeal paperwork and speak to Elliot's supervisor. The supervisor advised claimant to fill out the paperwork to the best of his ability. The claimant continued to try to reach out to Elliot, but the two often had difficulty connecting as claimant did not always return Elliot's calls in a timely manner. The appeal was not filed until October 19, 2018, which was when claimant was able to meet in person with Elliot, who was able to confirm that the only way to remedy the decision

was to file an appeal. Claimant did not attempt to reach out to the appeals bureau for assistance and did not attempt to fill out the paperwork on his own.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal is untimely.

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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 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 record shows that the appellant did have a reasonable opportunity to file a timely appeal.

Receiving bad advice from a representative of Iowa Workforce Development could constitute a good cause reason for failing to file an appeal in a timely manner. However, the claimant in this case was not given bad advice. Claimant was specifically told by an IWD supervisor that he should fill out the appeal paperwork to the best of his ability. Despite this advice, claimant did not attempt to fill out the paperwork, nor did he reach out to the Appeals Bureau with any questions. Rather, claimant waited until a specific IWD employee was available to help him, but the two could not connect until more than two weeks after the appeal was due.

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 Iowa Admin. Code r. 871-24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 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. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The September 24, 2018, (reference 01) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs