BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

NANCY L TREISE Claimant and **QHC FORT DODGE VILLA LLC** Employer	:	**HEARING NUMBER:** 17BUI-09132 **EMPLOYMENT APPEAL BOARD DECISION**

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.6-2, 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The decision of the claim representative was mailed to the Claimant's last known address on July 3, 2017. That decision stated that it became final unless an appeal was postmarked by July 13, 2017 (a Thursday). The Claimant received the decision before the deadline, and drafted an appeal before the deadline. The Claimant placed the appeal in a mail receptacle on July 13 but the envelope was postmarked on July 14, 2017. The record fails to disclose postal error in the handling of the Claimant's mail.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code 96.6 provides:

> 2. *Initial determination.* … 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.

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 - but not conclusive - evidence of the date of mailing.

There is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and the Administrative Law Judge and this Board have no authority to change the decision of representative if a timely appeal is not filed. *Franklin v. Iowa Dept. Job Service*, 277 N.W.2d 877, 881 (Iowa 1979). The ten day period for appealing an initial determination concerning a claim for benefits has been described as jurisdictional. *Messina v. Iowa Dept. of Job Service,* 341 N.W.2d 52, 55 (Iowa 1983); *Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373 (Iowa 1979). The only basis for changing the ten-day period would be where notice to the appealing party was constitutionally invalid. *E.g. Beardslee v. Iowa Dept. Job* Service, 276 N.W.2d 373, 377 (Iowa 1979). The question in such cases becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Employment Sec. Commission*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Employment Sec. Commission,* 212 N.W.2d 471 (Iowa 1973). The question of whether an appellant has been denied a reasonable opportunity to assert an appeal is also informed by rule 871-24.35(2) which states that "the submission of any …appeal…not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service."

The regulations of further provide:

> 871—24.35(96) Date of submission and extension of time for payments and notices.
>
> 24.35(1) Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:
>
> > a. If transmitted via the United States Postal Service on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
> >
> > b. If transmitted via the State Identification Data Exchange System (SIDES), maintained by the United States Department of Labor, on the date it was submitted to SIDES.
> >
> > c. If transmitted by any means other than those outlined in paragraphs 24.35(1)"a" and "b," on the date it is received by the division.

871 IAC 24.35. This regulation was applied and upheld in the case of *Pepsi Cola v. Employment Appeal Board,* 465 N.W.2d 674 (Iowa App. 1990). In that case an appeal was due on August 21. The appeal was metered marked that day, and placed in a mail receptacle on that day. But it was postmarked the next day. The Iowa Court of Appeals ruled:

> Section 4.35(96)(1) is absolutely clear on its face. The rule states that if appeal is transmitted by mail it will be considered received and filed "on the date it is mailed as shown by the postmark." …The rule then states that only "in the absence of a postmark" will the date as shown by the postage meter mark be considered the date of receipt and filing. We conclude that section 4.35(96)(1) is within the authority of the agency and that it controls in this situation. *See Cosper v. Iowa Dep't of Job Serv*., 321 N.W.2d 6, 8 (Iowa 1982). Because the envelope is postmarked August 22, the administrative law judge was correct in finding that he was without authority and in dismissing the appeal.

Pepsi Cola at 676.

These principles govern this matter - not the good cause rule which applies to late appeals to the Board. *C.f. Houlihan v. Employment Appeal Bd.*, 545 N.W.2d 863 (Iowa 1996)(15 day appeal deadline to Board extended for good cause under Board rule 3.1). The rules of Iowa Workforce Development do not give this Board the flexibility to extend the deadline for good cause. Under 24.35(1)"a" if the postmark is not legible, or not extant, then a postage meter mark is to be used. If there is no legible postage meter mark then the rule states the date of mailing is "the date entered on the document as the date of completion". The rule does not say that evidence should be taken to reconstruct the date of the postmark if it is not available. "[I]n the absence of a postmark" the rule mandates the use of "the date entered on the document as the date of completion". 871 IAC 24.35(1)"a". And the rule certainly never says the date the document is placed in the mail is to be used over the date appearing on a *legible* postmark. Where there is a legible postmark then, under the regulation, that date governs unless extended by operation of rule 24.35(2). The record fails to establish that any delay in this case was caused by an error of Workforce or by the postal service. Since the requirements of rule 24.35(2) are not satisfied, the Board is obliged to apply the ten day period and to reverse the administrative law judge.

Our approach is further bolstered by Iowa §622.105. That section provides:

> Evidence of date mailed.
>
> 1. Any report, claim, tax return, statement, or any payment required or authorized to be filed or made to the state, or any political subdivision which is transmitted through the United States mail or **mailed but not received** by the state or political subdivision or received **and the cancellation mark is illegible, erroneous or omitted,** shall be deemed filed or made and received on the date it was mailed if the sender establishes by competent evidence that the report, claim, tax return, statement, or payment was deposited in the United States mail on or before the date for filing or paying. In the event of nonreceipt of any such report, tax return, statement, or payment, the sender shall file a duplicate within thirty days of receiving written notification of nonreceipt of such report, tax return, statement, or payment. Filing of a duplicate within thirty days of receiving written notification shall be considered to be a filing made on the date of the original filing.
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> 2. For the purposes of this section **"competent evidence" means evidence, in addition to the testimony of the sender**, sufficient or adequate to prove that the document was mailed on a specified date which evidence is credible and of such a nature to reasonably support the determination that the letter was mailed on a specified

date.

So where there is no legible postmark, or the appeal letter is missing, only then is evidence taken about *when* the document was placed in a receptacle. But even then there has to be more than just the "testimony of the sender." *Lange v. Iowa Dep't of Revenue*, 710 N.W.2d 242, 247-49 (Iowa 2006). Granted Iowa Code §622.105 only applies when the appeal was not received or the postmark is illegible, and so that Code section is not technically applicable here. But we do think it would be an anomaly to require more than the "testimony of the sender" if there is no legible postmark, but to find sufficient this same "testimony of sender" when that testimony actually contradicts a legible postmark. The bottom line is that Code §622.105 does not help the Claimant, and we are confident that the approach set out by the regulation and *Pepsi Cola* is the correct one in this case.

Our reading may be technical but it is not without purpose. Clearly the reason that the postmark rather than placement in the mailbox is used is to avoid extended testimony about mailing. We have often seen contradictory and confusing *argument* submitted to us about just when an appeal was placed in a mail box. To avoid conundrums over detailed factual issues the rule provides for easily and objectively determined dates. The postmark, the postage meter mark, and the document date all provide a relatively easy means of determining mailing. A contrary approach would result in the use of resources to determine mailing dates rather than the basic issue to be decided in the case. The rule provides a reliable and quick means of determining filing date while maintaining fairness to the party who is expressly told in the decision that the postmark date is the one that counts. Based on this rule we reverse the Administrative Law Judge and find the appeal to the Administrative Law Judge untimely. We do not reach the merits of the case since benefits are denied based on the failure to file a timely appeal.

DECISION:

The administrative law judge's decision dated September 27, 2017 is **REVERSED**. The Employment Appeal Board concludes that the appeal to the Administrative Law Judge was untimely and that, as a result, there was no jurisdiction to entertain the Claimant's appeal. The decision of the claims representative made on July 3, 2017 is therefore affirmed. Accordingly, the Claimant is denied benefits until such time as the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

The Employer has requested this matter be remanded for a new hearing. The Board has issued a decision in favor of the Employer and so the remand issue is moot at this time.

The Employer submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. There is no sufficient cause why the new and additional information submitted by the Employer was not presented at hearing. Accordingly none of the new and additional information submitted has been relied upon in making our decision, and none of it has received any weight whatsoever, but rather all of it has been wholly disregarded.

The Board remands this matter to the Iowa Workforce Development Center, Benefits Bureau, for a calculation of any overpayment amount based on this decision.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv