

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PETER NGUYEN
Claimant

OMG MIDWEST INC
Employer

APPEAL 17A-UI-03201-SC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/11/16
Claimant: Appellant (1)

Iowa Code § 96.6(2) - Timeliness of Appeal
Iowa Code § 96.5(5) – Severance Pay Deduction

STATEMENT OF THE CASE:

Peter Nguyen (claimant) filed an appeal from the February 13, 2017, reference 05, unemployment insurance decision that denied benefits for the week ending December 31, 2016. After due notice was issued, a hearing was held by telephone conference call on April 14, 2017. The claimant participated. The employer participated through Human Resources Generalist Courtney Maxwell. The hearing was interpreted by Vietnamese interpreter Julian (employee number 9239) from CTS Language Link. Department's Exhibit D1 and D2 were received.

ISSUE:

Is the claimant's appeal timely?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On February 13, 2017, Iowa Workforce Development (IWD) mailed six disqualification and overpayment unemployment insurance decisions to the claimant's last known address of record.¹ The decisions contained a warning that an appeal must be postmarked or received by the Appeals Bureau by February 23, 2017. On February 22, 2017, IWD mailed an unemployment insurance decision to the claimant's last known address of record notifying him that he was not eligible for benefits for the week ending January 21, 2017. It contained a warning that an appeal needed to be postmarked or received by the Appeals Bureau by March 5, 2017. On March 1, 2017, IWD mailed an unemployment insurance decision to the claimant's last known address of record notifying him that he had been overpaid unemployment insurance benefits for the same week. It contained a warning that an appeal needed to be postmarked or received by the Appeals Bureau by March 11, 2017. The claimant did not file his appeals until March 21, 2017, which is after the dates noticed on the disqualification and overpayment decisions, because he was re-employed as of January 16, 2017 and did not have time to appeal the decisions he received.

¹ The reference 04 decision had an incorrect decision date of December 11, 2016 and stated an appeal was to be filed by February 20, 2017 to be timely. However, the agency error was not prejudicial to the claimant.

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 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 record shows that the appellant did have a reasonable opportunity to file a timely appeal. The claimant was unable to state when he received each of the decisions. However, he was mailed eight adverse decisions over a three-week period. He did not appeal any of the decisions until ten days after the last decision's appeal time had expired. He delayed in filing because he was working, but he had options to mail or fax the appeal to the Appeals Bureau before or after work.

The administrative law judge concludes that the 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 February 13, 2017, reference 05, 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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