

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GARY L ALBERTSON
Claimant

APPEAL NO. 10A-UI-17447-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

OC: 03/29/09
Claimant: Appellant (1)

Section 96.4-3 – Able and Available
Section 96.6-2 – Timely Appeal

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated November 4, 2009, reference 04, which held claimant ineligible for unemployment insurance benefits for the period of July 19, 2009, through August 1, 2009. After due notice, a telephone conference hearing was scheduled for and held on February 5, 2011. Claimant participated. The record consists of the testimony of Gary Albertson. Official notice is taken of agency documents.

ISSUES:

Whether the claimant filed a timely appeal; and

Whether the claimant was able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The claimant established an original claim for benefits with an original claim date of March 29, 2009. This claim was due to claimant's separation of employment from Hy-Vee. The claimant subsequently obtained employment with a Burger King restaurant located in Ottumwa, Iowa, which is where the claimant was living at the time. The claimant's employment with Burger King was part-time employment.

The claimant decided to move from Ottumwa, Iowa, to Albia, Iowa, in early July 2009. He made the move during the week of July 5, 2009, through July 11, 2009. The distance from his new home to his employment with the Burger King restaurant was twenty miles one-way. The claimant informed the employer that it no longer made economic sense for him to drive from Albia to Ottumwa, Iowa, to work. He could not afford the costs of transportation. The employer did not put the claimant on the schedule from July 19, 2009, through August 1, 2009.

On November 4, 2009, a representative issued a decision that held that the claimant was not eligible for unemployment insurance benefits from July 19, 2009, through August 1, 2009. The decision also states that the decision would become final unless an appeal was postmarked by

November 4, 2009, or received by the Appeals Section on that date. The claimant's appeal was filed on December 22, 2010. He filed his appeal after he received a second statement dated December 16, 2010, concerning an overpayment in the amount of \$532.00, which included benefits paid for the period of July 19, 2009, through August 1, 2009.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code section 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by 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 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 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 issue in this case is whether the claimant had a reasonable opportunity to assert an appeal in a timely fashion from the decision dated November 4, 2009. The administrative law judge asked the claimant several times throughout the course of the hearing when he received the decision stating he was disqualified for benefits for the period of July 19, 2009, through August 1, 2009. The claimant's answers varied. The correct address was used but the claimant said he did not "believe" that he ever received this decision. What is puzzling is that there are three companion cases with this case and in each instance, the claimant says he either did not receive the decision or he does not recall if he received the decision or he does not believe he received the decision or he did receive the decision, but he does not know when. All decisions were sent to the same address. Why he did not receive these four decisions but did receive the second statement on the overpayment is not entirely clear. The administrative law judge has concluded that she will accept the claimant's testimony that he does not "believe" he received the decision and will treat the appeal as timely.

The next issue is whether the claimant is able and available for work. In order for an individual to be eligible to receive benefits, the individual must be able to work; available for work; and earnestly and actively seeking work. Iowa Code section 96.4-3. The evidence in this case established that the claimant was not available for work during the period of July 19, 2009, through August 1, 2009. The claimant testified that he had moved from Ottumwa, Iowa, to Albia, Iowa, and that he informed his employer he could not afford to drive the distance from home to work. The claimant was, therefore, not available for work for personal reasons. If a

claimant is not willing to work hours in which work was available from his employer, he is not considered able and available for work. See 871 IAC 24.23(16).

DECISION:

The decision of the representative dated November 4, 2009, reference 04, is affirmed. The claimant is not eligible for unemployment insurance benefits for the period of July 19, 2009, through August 1, 2009.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css