

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

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VICTORIA ARCHER

Claimant

and

IOWA FAITH & FREEDOM COALITION

Employer

HEARING NUMBER: 18BUI-03082DC

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 ALLOWED IF OTHERWISE ELIGIBLE**

This case was remanded to the Employment Appeal Board because the Board had not adequately addressed the reasons for its decision finding the Claimant's appeal to the Board timely. The Court stated: "The issues presented for review are: 1) whether the respondent erred in failing to issue a decision on the timeliness of the appeal from the ALJ; and 2) in the event the matter is remanded for further consideration of the timeliness issue, whether the remaining members of the respondent should be disqualified." *Ruling on Petition for Judicial Review*, p. 1. The Court order states "[t]he Court agrees with the petitioner that the respondent's decision on the issue of timeliness of the appeal from the ALJ to the respondent did not meet the requirements of Iowa Code §17A.16" and then quotes from subsection one of that Code section. *Ruling on Petition for Judicial Review*, p. 4. This quote sets out the drafting requirements for decisions. The Court concluded "remand should be ordered to allow [the agency] to properly exercise its discretion on the good cause issue." *Ruling on Petition for Judicial Review*, p. 5.

Two members of the Employment Appeal Board reviewed the entire record including the Claimant's evidence relating to the timeliness of her appeal. All evidence, including testimony, admitted before or considered by the Administrative Law Judge, the documents found at pages 169-174 of the certified record, as well as the decision of the Administrative Law Judge and all argument made by either party have been considered by us in making our determination.

Following the remand from the District Court the two undersigned members of the Board reconsidered the record in light of the Court order and the additional arguments. The two members made their determination without giving weight to the Board's prior determination on the issue of timeliness. In as much as our prior decision on the merits of the claim for benefits was not the subject of the appeal to Court or of a remand order we leave that portion of our prior decision unaltered. We of course would render the same opinion, as herein augmented on the timeliness question, were we to consider the question of benefits at this time. In as much as the decision on recusal was affirmed in the Court order we also leave that portion of our prior decision unaltered. In as much as the issue of timeliness of the appeal to the Administrative Law Judge was not the subject of the appeal to Court or of a remand order we also leave that portion of our prior decision unaltered. We now address only the reason for the remand, to wit, whether the Claimant had good cause for filing her appeal to this Board one day late. Our findings of fact and conclusions of law are thus restricted to that issue, since otherwise our prior decisions remain unaltered.

Board Chair Kim D. Schmett took no part in the consideration of this case at any stage of the proceeding.

#### **FINDINGS OF FACT:**

The Administrative Law Judge issued a decision in this case on April 14, 2017. (Cert. Rec. at p. 168). That decision denied benefits. That decision, as required by rule 871 IAC 26.17(1)(a), set forth the parties' appeal rights. The instructions on the front of the decision states:

#### **APPEAL RIGHTS:**

This Decision Shall Become Final, unless within fifteen (15) days from the mailing date below the administrative law judge's signature on the last page of the decision, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to:

**Employment Appeal Board**  
**4<sup>th</sup> Floor – Lucas Building**  
**Des Moines, Iowa 50319**  
**or**  
**Fax (515) 281-7191**

(Cert. Rec. at p. 163) (emphasis in original). The Claimant's appeal to the Board was due on Monday, May 1, 2017. On May 1 the Claimant attempted to file her appeal by FAX multiple times commencing at about 7 pm. (Cert. Rec. at p. 169-170). The fax number attempted was 515-281-7191. This is the Board's FAX number. The Board's fax machine malfunctioned and did not answer that night. The next day the Claimant successfully transmitted her appeal *via* fax to 515-281-7191.

#### **REASONING AND CONCLUSIONS OF LAW:**

We have found credible that the Claimant attempted her FAX on May 1 but the Board machine malfunctioned and refused to answer. This is completely consistent with past experience with the

fax machine located in the EAB's office. See *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W.2d 603, 606 (Iowa Ct. App. 1990) ("The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence."); Iowa Code §17A.14(5).

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The District Court order sets out the legal standard for good cause in this context:

As applied to the timeliness issue, presented, the precise issue was whether "good cause" existed for Archer's appeal being one day beyond the statutory deadline. See 486 IAC 13.1(16). Good cause in this context has been held to be akin to the showing necessary to set aside a default judgment. *Houlihan v. Employment Appeal Bd.*, 545 N.W.2d 863, 866 (Iowa 1996). More importantly, the issue of whether good cause exists for a delay in perfecting an appeal "is a fact issue within the discretion of the Board to decide." *Id.*

In order to justify a late appeal on this ground, the respondent would have had to conclude that Archer's "failure ... was not due to [her] negligence or want of ordinary care or attention, or to [her] carelessness or inattention. [She] must show affirmatively [s]he did intend to [timely file an appeal] and took steps to do so, but because of some misunderstanding, accident, mistake or excusable neglect failed to do so." *Id.* (quoting *Dealers Warehouse Co. v. Wahl & Assocs.*, 216 N.W.2d 391, 394 (Iowa 1974)).

*Ruling on Petition for Judicial Review*, p. 4-5. The rules of the Board, consistent with this, provide that good cause "may be generally defined as that reasonable excuse given, under the circumstances of the case, to excuse an action which was not taken when it should have been taken." 486 IAC 2.2 ("good cause").

In this case the Claimant was instructed by the written ALJ decision that she had until May 1 to file her appeal by letter or by fax. The Board's address and fax number were prominently displayed on page one of the Administrative Law Judge's decision under the heading "appeal rights." The Board rules define the "filing date" of an appeal to "be the date the document is postmarked, if filed by U.S. Postal Service; the date of the faxed document, if filed by facsimile transmission..." 486 IAC 2.2("filing date"). There is no time specified on the filing date regulation and the Board thus counts appeals transmitted after business hours to be filed on the date of the faxed document. Thus the Claimant by commencing her attempt to FAX at 7 p.m. took reasonable steps to perfect her appeal in time. The failure to perfect an appeal because the Board's fax machine malfunctioned was not a failure due to the Claimant's negligence, to want of ordinary care or attention, or to any carelessness or inattention on the part of the Claimant. The Employer argues that she should have started her attempts sooner. We think expecting the prominently displayed fax number to actually be working during the entire appeal period is perfectly reasonable, and that waiting did not display a lack of *ordinary* care. Indeed, in our experience, and judging by the case law the Courts' as well, waiting until the last day is common and consistent with ordinary care. Nor can we fault the Claimant for not seeking out an open post office after her attempts failed. To do so she would have to abandon her attempts to FAX the document while she drove into the night on a quest to find some post office that was still open and still postmarking documents. For if she merely found a kiosk, the meter mark would not be good enough. See *Huber v. American Accounting Ass'n*, 2014 IL 117293, 386 Ill. Dec. 670, 21 N.E.3d 433 (2014). Her care taken was ordinary; her choices made were reasonable under the circumstances. She did intend to file a timely appeal, she did take steps to do so, and because of

an “accident” of the agencies’ equipment – not even the Claimant’s accident – she was unable to perfect her appeal in time. This meets the *Houlihan* standard and we find the Claimant’s appeal to be timely.

We note this decision is consistent with prior decisions of IWD back when it was having notorious problems with the Appeals Bureau fax. See *e.g. Rollins v. TM1 Stop LLC*, 08A-UI-02013-MT, p. 1 (2008)(“Claimant’s appeal is timely as he faxed the appeal letter in on the last day it was due. The appeal was not received because of a malfunctioning fax machine.”) We have reached a similar conclusion here and find good cause for the one-day-late appeal.

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**DECISION:**

The Employment Appeal Board concludes that the Claimant has shown good cause for her late appeal. We find the appeal to the Board to be timely. In all other respects our prior decisions remain unaltered. Benefits are thus allowed.

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Ashley Koopmans

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James M. Strohman

RRA/ss