

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSHUA J SPENCER
Claimant

APPEAL NO. 11A-UI-01192-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIDSTATES BUILDERS INC
Employer

OC: 11/28/10
Claimant: Respondent (1)

Section 96.6-2 – Timeliness of Protest
Section 96.5-1 – Voluntary Quit
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated January 18, 2011, reference 03, which held the employer failed to file a timely protest. After due notice, a telephone conference hearing was scheduled for and held on March 4, 2011. The claimant participated. The employer participated by Craig Wampler, president. The record consists of the testimony of Craig Wampler. Official notice is taken of the administrative records.

ISSUE:

Whether the employer filed a timely appeal.

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:

On January 18, 2011, a representative issued a decision that held that the employer failed to file a timely protest. The decision also states that the decision would become final unless an appeal was postmarked by January 28, 2011, or received by the appeal section on that date. The employer's appeal was filed on January 31, 2011.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the employer timely appealed the representative's decision. Iowa Code section 96.6-2 provides that unless the affected party (here, the employer) 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 record shows that the appellant did have a reasonable opportunity to file an appeal postmarked as timely.

The administrative law judge concludes that the employer's failure to have the appeal timely postmarked within the time prescribed by the Iowa Employment Security Law was not due to error, misinformation, delay, or other action of the United States Postal Service pursuant to 871 IAC 24.35(2). The employer elected to file its appeal by fax. Although fax filings are permitted, the fax was not received until January 31, 2011. Since the employer's appeal is not timely, the administrative law judge has no jurisdiction to rule on whether the employer filed a timely protest.

DECISION:

The employer failed to file a timely appeal from the representative's decision dated January 18, 2011, reference 03. That decision, which concluded that the employer failed to file a timely protest, remains in full force and effect.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw