

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEVIN L SILVERS
Claimant

APPEAL NO: 13A-UI-08802-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

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

Section 96.4-3 – Able and Available
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Devin L. Silvers (claimant) appealed a representative's July 12, 2013 decision (reference 06) that concluded he was not qualified to receive unemployment insurance benefits as of June 9, 2013 "continuing until you provide proof that you are able to work." A hearing notice was mailed to the claimant's last-known address of record for a telephone hearing to be held at 9:00 a.m. on September 6, 2013, in conjunction with one related appeal, 13A-UI-08803-DT. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Based on a review of the information in the administrative file and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it can be treated as timely?

Was the claimant eligible for unemployment insurance benefits by being able and available for work for the period between June 9 and July 13, 2013?

FINDINGS OF FACT:

The claimant established an unemployment insurance benefit year effective December 16, 2012. He had a surgery on June 11, 2013, which rendered him unable to work for at least a period of time. The representative's decision was issued on July 12 concluding that "benefits are denied as of 06/09/13, and continuing until you provide proof that you are able to work." The deadline for appealing that decision was July 22, 2013, a Monday.

The claimant subsequently provided a doctor's note dated July 11, 2013 which indicated that the claimant was released as able to return to work with restrictions on July 12, 2013. A new representative's decision was then issued on July 19, 2013 (reference 07) which concluded "You are eligible to receive unemployment insurance benefits beginning 07/14/13 . . . our records indicate you are available for work and medically able to work." The decision implicitly

left the remainder of the period between June 9, 2013 and July 13, 2013 as subject to the disqualification imposed by the July 12, 2013 (reference 06) decision. The deadline for appealing the July 19 decision, such as by asserting that the effective date of the eligibility should have been sooner, was July 29, 2013, a Monday.

The claimant did not make his appeal until he mailed his appeal on July 30, 2013, apparently not appealing until that date until after receiving the resulting overpayment decision issued on July 22, 2013 (reference 08), the subject of the concurrently issued decision in 13A-UI-08803-DT, which concluded that he was overpaid benefits for the four-week period following June 9 as a result of the prior decisions that he was not able and available for work and therefore not eligible to receive unemployment insurance benefits for that period.

REASONING AND CONCLUSIONS OF LAW:

If a party fails to make a timely appeal of a representative's decision and there is no legal excuse under which the appeal can be deemed to have been made timely, the decision as to the merits has become final and is not subject to further review. Iowa Code § 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 then 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).

A party does not have a reasonable opportunity to file a timely appeal if the delay is due to Agency error or misinformation or to delay or other action of the United States postal service. 871 IAC 24.35(2). Failing to read and follow the instructions for filing an appeal is not a reason outside the appellant's control that deprived the appellant from having a reasonable opportunity to file a timely appeal. The appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the prescribed time was not due to a legally excusable reason so that it can be treated as timely. The administrative law judge further concludes that because the appeal was not timely, the administrative law judge lacks jurisdiction to make a determination with respect to the nature of

the appeal, regardless of whether the merits of the appeal would be valid. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

Therefore, the administrative law judge concludes that the determination that the claimant did not satisfy the requirement to be able and available for work between June 9 and July 13 has become final. Iowa Code § 96.4-3.

DECISION:

The appeal in this case was not timely, and the decision of the representative issued July 12, 2013 decision (reference 06), including to the extent it may have been modified by the July 19 decision (reference 07), has become final and remains in full force and effect. The claimant was not able to work and available for work for the period between June 9 and July 13, and not eligible for benefits during that period.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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