

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID R SITRICK

APPEAL NO. 11A-UI-02628-VST

BRAM ENTERPRISES LLC
Employer

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/12/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated October 29, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 23, 2011. Claimant participated. Employer participated by Ryan Irwin, owner. The record consists of the testimony of Ryan Irwin. Official notice is taken of agency records.

ISSUE:

Whether the employer filed a timely appeal.

FINDINGS OF FACT:

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

On October 29, 2010, a representative issued a decision that held that the claimant was eligible for unemployment insurance benefits. The decision also states that the decision would become final unless an appeal was postmarked by November 8, 2010, or received by the Appeals Section on that date. The employer's appeal was filed on March 4, 2011.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the employer timely appealed the representative's decision. Iowa Code § 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 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 filing is accepted, the employer has an obligation to make certain the fax was received. The employer could not provide such nor was there evidence that the appeal was postmarked in a timely manner. The appeal was apparently discovered during a field audit and forwarded to the Appeals section on March 2, 2011. The Appeals section received the appeal on March 4, 2011. Since the employer's appeal is not timely, the administrative law judge has no jurisdiction to rule on the merits of the employer's claim that the claimant is not eligible for unemployment insurance benefits.

DECISION:

The employer failed to file a timely appeal from the representative's decision dated October 29, 2010, reference 01. That decision, which concluded that the claimant was eligible to receive unemployment insurance benefits, remains in full force and effect.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs