

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIARRA D SPINKS
Claimant

APPEAL NO. 09A-UI-15505-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

Original Claim: 08/30/09

Claimant: Appellant (1)

Section 96.6-2 – Timeliness of Appeal
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Diarra D. Spinks (claimant) appealed a representative's October 2, 2009 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Menard, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 17, 2009. The claimant participated in the hearing. Tiffany Neeley appeared on the employer's behalf; two witnesses were available on behalf of the employer but did not testify. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

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

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last known address of record on October 2, 2009. The claimant received the decision on October 3. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by October 12, 2009. The appeal was not filed until it was postmarked on October 14, 2009, which is after the date noticed on the disqualification decision.

The notice provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day. October 12 was Columbus Day, which is not a state holiday, although the United States Postal Service does not operate. For purposes of this appeal, the administrative law judge assumes without deciding that while Columbus Day is not a specified state holiday for extending the computation of time to the next working day, that under Iowa Code §4.1(34) it is a "day appointed or recommended by the . . . president of the United States as a day of fasting or thanksgiving," which would extend the deadline for an appeal to the next working day, October 13. The claimant went out of town on or about

October 8 without filing her appeal, and returned home on or about October 12. On October 13 she went to her mother's office to use the computer to print out an appeal form, which she completed and signed on that date. The appeal was then mailed on October 14.

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, regardless of whether the appeal is only a day late as compared to a week, a month, or a year late. The appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that the 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).

DECISION:

The representative's October 2, 2009 decision (reference 02) is affirmed. The appeal in this case was not timely, and the decision of the representative has become final and remains in full force and effect. Benefits are denied.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw