IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SOMVANG KEODOUANGSY
Claimant

BODEANS BAKING HOLDING COMPANY
Employer

APPEAL NO: 11A-UI-13402-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/15/11
Claimant: Appellant (1)

Section 96.5-2-a – Discharge
871 IAC 26.14(7) – Late Call
Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Somvang Keodouangsy (claimant) appealed a representative's September 21, 2011 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Bodeans Baking Holding Company, L.L.C. (employer). Hearing notices were mailed to the parties' last-known addresses of record for a telephone hearing to be held at 12:00 p.m. on November 3, 2011. The claimant received the hearing notice and responded by calling the Appeals Section on October 24, 2011. She indicated that she would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, the claimant did not participate in the hearing. The employer responded to the hearing notice and indicated that Jason Jauron would participate as the employer's representative. When the administrative law judge contacted the employer for the hearing, Mr. Jauron agreed that the administrative law judge should make a determination based upon a review of the available information. The administrative law judge considered the record closed at 12:10 p.m. At 12:13 p.m., the claimant called the Appeals Section and requested that the record be reopened. Based on a review of the available information 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 parties were properly notified of the scheduled hearing on this appeal. The claimant received the hearing notice prior to the November 3, 2011 hearing. The instructions on the notice indicate that the party is to be available at the scheduled day and time set for the hearing. Contrary to the recommendation on the hearing notice instructions, the claimant's phone was a cell phone. When the administrative law judge attempted to call the claimant for the hearing,

she was in a moving vehicle where she had poor reception and she missed the call. The claimant was not available for the hearing at the scheduled time for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice.

The representative's decision was mailed to the claimant's last-known address of record on September 21, 2011. The claimant received the decision. While the claimant indicated in her appeal that she does not "check my mail every day," no evidence was provided to rebut the presumption that the decision was not received with a short time after September 21 or at least sometime prior to October 1. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by October 1, 2011, a Saturday. The notice also provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was Monday, October 3. The appeal was not filed until it was it was hand-delivered to a local Agency office on October 11, 2011, which is after the date noticed on the disqualification decision.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied. After a hearing record has been closed the administrative law judge may not take evidence from a non-participating party but can only reopen the record and issue a new notice of hearing if the non-participating party has demonstrated good cause for the party's failure to participate. 871 IAC 26.14(7)b. The record shall not be reopened if the administrative law judge does not find good cause for the party's late contact. Id. Failing to read or follow the instructions on the notice of hearing are not good cause for reopening the record. 871 IAC 26.14(7)c.

The claimant was not available for the November 3, 2011 hearing until after the hearing record had been closed. Although the claimant intended to participate in the hearing, the claimant failed to read or follow the hearing notice instructions and was not available at the specified time for the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

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. While the claimant may have had an additional delay of a day or two in receiving the representative's decision because she does not check her mail every day, she has not established that she did not receive the decision until after October 1 and has not established a reasonable excuse for failing to file her appeal until over a week after the deadline. 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).

DECISION:

The representative's September 21, 2011 decision (reference 01) 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/css