

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAURA A MESSERSCHMIDT
Claimant

APPEAL NO: 11A-UI-10061-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 03/20/11
Claimant: Appellant (1/R)

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

STATEMENT OF THE CASE:

Laura A. Messerschmidt (claimant) appealed a representative's April 20, 2011 decision (reference 01), issued under a claim year effective March 20, 2011, which concluded she was not qualified to receive unemployment insurance benefits after an October 21, 2010 separation with Casey's Marketing Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 10, 2011. This appeal was consolidated for hearing with one related appeal, 11A-UI-10062-DT. The claimant participated in the hearing. The employer's representative received the hearing notice and responded by sending a statement to the Appeals Section indicating that the employer was not going to participate in the hearing. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the claimant, 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 April 20, 2011. No evidence was provided to rebut the presumption that the claimant received the decision within a short time thereafter. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by April 30, 2011. It further stated, "If this decision denies benefits and is not reversed on appeal, it may result in an overpayment which you will be required to repay." The appeal was not filed until it was postmarked on July 28, 2011, which is after the date noticed on the disqualification decision. The claimant submitted her appeal after receiving a second notice overpayment statement dated July 18, 2011. The claimant did not appeal until July because she had believed that some other intervening appeals decisions had resolved all of the issues regarding her eligibility and any overpayment of benefits. At the time of her July appeal the claimant also appealed another decision issued on April 20, 2011 (reference 03), issued under the March 20, 2011 claim year.

This decision concluded that the claimant was not eligible to receive unemployment insurance benefits as of March 20, 2011 due to a conclusion that she was unable to work due to illness. The claimant's appeal of that decision is addressed under 11A-UI-10062-DT.

A representative's decision had been issued on April 8, 2011 (reference 07), under a claim year effective May 21, 2010, which denied benefits as of October 24, 2010 because of a conclusion that the claimant was unable to perform work due to illness. The claimant appealed that decision, and an appeal hearing was held on May 27, 2011 under 11A-UI-05224-JTT. That judge issued a decision on May 31, 2011. Judge Timberland's decision in that case reversed the representative's decision as to the disqualification due to illness effective October 24, 2010, but remanded the matter to the Claims Section to determine whether the claimant was able and available for work effective May 29, 2011. That decision did not address the question of the October 21, 2010 separation from employment between the claimant and the employer, and made no reference to the April 20, 2011 (reference 01) decision regarding the separation from employment with the employer.

The May 27, 2011 hearing also included coverage of the claimant's appeal of a representative's decision issued on April 11, 2011 (reference 08), under the March 21, 2010 claim year, which had concluded that she was overpaid unemployment insurance benefits for the period of October 24, 2010 through December 25, 2010. That overpayment decision had been issued based upon the representative's decision of April 8, 2011 (reference 07) regarding the claimant being unable to work due to illness. Because Judge Timberland had reversed the decision regarding the claimant being unable to work, in 11A-UI-05225-JTT he also reversed the decision concluding that the claimant was overpaid unemployment insurance benefits because of being unable to work. The decision did not address the question of the October 21, 2010 separation from employment between the claimant and the employer, and made no reference to the April 20, 2011 (reference 01) decision regarding the separation from employment with the employer.

The May 27, 2011 hearing also considered a representative's decision which had been issued on April 11, 2011 (reference 03), this being under a prior claim year effective May 22, 2009, otherwise was a duplicate of the April 8, 2011 (reference 03), issued under the claim year effective May 21, 2010; this April 11 decision also denied benefits as of October 24, 2010 because of a conclusion that the claimant was unable to perform work due to illness. Judge Timberland's decision in that case, 11A-UI-05226-JTT, was similarly identical to his decision in 11A-UI-05224-JTT, and reversed the representative's decision as to the disqualification due to illness effective October 24, 2010, but remanded the matter to the Claims Section to determine whether the claimant was able and available for work effective May 29, 2011. That decision also did not address the question of the October 21, 2010 separation from employment between the claimant and the employer, and made no reference to the April 20, 2011 (reference 01) decision.

Finally, the May 27, 2011 hearing also included coverage of the claimant's appeal of a representative's decision issued on April 13, 2011 (reference 04), issued under the March 22, 2009 claim year, which had concluded that she was overpaid unemployment insurance benefits for the period of December 26, 2010 through April 11, 2011. That overpayment decision had been issued based upon the representative's decision of April 11, 2011 (reference 03) regarding the claimant being unable to work due to illness. Because Judge Timberland had reversed the decision regarding the claimant being unable to work, in 11A-UI-05227-JTT he also reversed the decision concluding that the claimant was overpaid unemployment insurance benefits because of being unable to work. This decision also did not address the question of the

October 21, 2010 separation from employment between the claimant and the employer, and made no reference to the April 20, 2011 (reference 01) decision regarding the separation from employment with the employer.

There was one other hearing having bearing on this matter, conducted on July 13, 2011 by Judge Scheetz. That hearing considered, under 11A-UI-08091-S2T, the claimant's appeal of a representative's June 10, 2011 (reference 05) decision which concluded that the claimant was not eligible to receive emergency unemployment compensation (EUC) benefits on her March 20, 2011 claim because she was monetarily eligible for regular benefits under that claim year; Judge Scheetz affirmed that disqualification. The hearing also considered, under 11A-UI-08092-S2T, the claimant's appeal of a representative's June 13, 2011 (reference 06) decision which concluded that since the claimant was not eligible to receive EUC benefits on her March 20, 2011 claim, that she was overpaid those EUC benefits she had been paid; Judge Scheetz affirmed that disqualification. Neither of those decisions considered the separation from employment with this employer, and neither made any reference to the April 20, 2011 (reference 01) decision regarding the separation from employment with the employer.

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. Here, the claimant did not understand that even if the disqualification for

being unable to work was reversed, a disqualification due to the separation from employment itself could also result in her being required to repay the benefits she had already received. She did not appeal until she received a further request for recovery of the overpayment of benefits, but the appeal was not filed until July 28, 2011, after the date noticed on the disqualification decision. The failure to realize the legal reality of the effect of the separation disqualification decision is not a ground to excuse the failure 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).

The administrative law judge notes that after Judge Timberland reversed the overpayment decisions which had been issued based upon the able and available disqualification, no new overpayment decision was issued based upon the separation disqualification. While the dollar amount might be the same, a new overpayment decision or decisions should be issued based upon the April 20, 2011 (reference 01) decision regarding the October 21, 2010 separation decision. Further, there should be a consideration as to the claimant is eligible for waiver of any portion of the overpayment which might have been received as EUC benefits. 871 IAC 24.50(7); Public Law 110-252 § 4005(b). The case will be remanded to the Claims Section for a review on these issues. 871 IAC 26.14(5).

DECISION:

The representative's April 20, 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 as of October 21, 2010. The matter is remanded to the Claims Section for investigation and determination of the overpayment and potential EUC waiver issues.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs