

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ELIZABETH RAYGOZA-AGUAYO
Claimant

APPEAL 17A-UI-11898-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

NOVAK AGENCY INC
Employer

OC: 03/13/16
Claimant: Respondent (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.6(2) – Timeliness of Protest

STATEMENT OF THE CASE:

Novak Agency, Inc. (employer) filed an appeal from the June 1, 2016, reference 01, unemployment insurance decision that found the protest untimely and allowed benefits. After due notice was issued, a telephone hearing began on December 8, 2017 and concluded on December 21, 2017. The claimant participated and was represented by non-attorney representative Max Rosenberg. The employer participated through President Larry G. Novak. Office Manager Sara Lisk and Max Rosenberg were sworn in as witnesses but did not provide any testimony. Department's Exhibits D1, D3, and D4 were received without objection. Department's Exhibit D2 was admitted into the record over the claimant's objection based on hearsay.

ISSUES:

Is the employer's appeal timely?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: The claimant filed her claim for benefits effective March 13, 2016. In April 2013, the employer moved from an address in Urbandale to an address in Des Moines. The employer did not update its address with Iowa Workforce Development (IWD) prior to March 2016. The notice of claim was mailed to the employer's last known address in Urbandale, Iowa.

On May 9, 2016, a Statement of Charges for the first quarter of 2016 was mailed to the employer's address in Des Moines. The employer objected to being charged for the claimant's benefits and mailed an appeal to the chargeback unit as directed. On May 27, 2016 at 4:28 p.m., an IWD representative from the chargeback unit sent an email to the employer stating she was finding the employer's protest to the claimant's receipt of benefits untimely. She explained she would issue an unemployment insurance decision that the employer would receive within three to five business days and it had ten days to file an appeal to that decision.

An unemployment insurance decision dated June 1, 2016, reference 01, was mailed to the employer's address in Des Moines stating its protest was untimely. The decision included a warning that an appeal needed to be filed by June 11, 2016. On November 9, 2016, a Statement of Charges for the third quarter of 2016 was mailed to the employer's address in Des Moines and showed that benefits for the claimant were still being charged to its account.

In May 2017, the claimant filed a wage and hour claim against the employer. An investigation ensued and the matter was settled in August 2017. The employer received mail from IWD during that investigation which was sent to the Des Moines address.

In November 2017, the employer received a 2017 summary related to its tax rate. This prompted the employer to contact IWD. The employer spoke with two IWD representatives, the second of which forwarded his email to the Appeals Bureau for an appeal to the June 1, 2016, reference 01, unemployment insurance decision. The employer does not know how unemployment works as it normally has a tax rate of zero because employees do not file unemployment claims against it.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that employer's appeal is untimely.

Iowa Code section 96.6(2) provides, in pertinent part:

The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with 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. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

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 Supreme 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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge does not find credible the employer's denial it had knowledge its protest was untimely. The employer denies receiving the email sent by the IWD representative stating its protest was untimely, even though the email was sent to the correct email address. The employer denies receiving the unemployment insurance decision dated June 1, 2016, reference 01, stating the protest was untimely and the November 9, 2016 Statement of Charges which put the employer on notice its account was still being charged for the claimant's benefits. However, both documents were mailed to the employer's correct address in Des Moines. Additionally, the employer received prior tax summaries mailed to the old address after the employer moved and it received subsequent documentation from IWD at the Des Moines address.

The record shows that the appellant did have a reasonable opportunity to file a timely appeal. The employer was aware that the claimant was receiving benefits and had notice that they were being charged to its account. It had notice of the decision that was made finding the protest untimely which was mailed in June 2016. The employer has also argued that it is unfamiliar with the unemployment insurance process, but it did not read the documents that were sent in their entirety or contact IWD about the issue regarding the claimant until November 2017. Ignorance of the unemployment insurance process does not render the notice received by the employer invalid. The employer's failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to Iowa Admin. Code r. 871-24.35(2). As the appeal was not timely filed pursuant to Iowa Code § 96.6(2), the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The June 1, 2016, reference 01, unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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