

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

HEATHER A FREISINGER
Claimant

SMART RETRACT INC
Employer

APPEAL 19A-UI-06334-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/02/19
Claimant: Respondent (1)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer, Smart Retract Inc., filed an appeal to an initial decision dated June 21, 2019 (reference 01), which allowed benefits to the claimant. The parties were properly notified about the hearing. An in-person hearing was scheduled at the employer/appellant's request, and was held on September 11, 2019 at the Dubuque IWD office. Prior to the hearing, the employer/appellant requested to appear by telephone. The request was granted and the claimant was also granted permission to appear by phone. At the time of hearing, the employer participated by way of Marc Pichik, CEO via telephone. The claimant, Heather A. Freisinger, participated personally, via telephone.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Department Exhibits 1, 2, 3 and Employer Exhibits A, B, C, D, E, F, and G were admitted into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

NOTE TO EMPLOYER:

If you wish to edit the address of record, please access your account at:
<https://www.myiowaui.org/UITIPTaxWeb/>.

ISSUE:

Is the employer's appeal timely?

FINDINGS OF FACT:

The claimant established a claim for unemployment insurance benefits effective June 2, 2019. An initial unemployment insurance decision (Reference 01) allowing benefits to the claimant based upon her separation with this employer, was mailed to the employer's address of record on June 21, 2019 (Department Exhibit D-1). The initial decision provided a warning that stated

an appeal must be filed by July 1, 2019 (Department Exhibit D-1). The employer filed its appeal on August 9, 2019 by mail (Department Exhibit D-2).

The employer confirmed the address of record was a valid address at the time of mailing, and mail was checked by an employee each day, Monday through Friday. Mail is then opened by staff and distributed for handling. Mr. Pichik handles all mail related to IWD. He was out of the office June 4 - July 11, 2019 and stated neither he nor his staff received the initial decision within the appeal period.

However, Mr. Pichik stated after July 11, 2019, he received a letter from IWD that allowed benefits to the claimant (Department Exhibit D-2). He was unable to confirm if it was the initial decision mailed on June 21, 2019. Mr. Pichik began inquiring about the decision that allowed benefits to the claimant (in part, because the employer did not participate in the fact-finding interview) (Department Exhibit D-2). The matter was escalated to management and on July 23, 2019, Mr. Pichik was advised by unemployment insurance manager, Scott Perkins, to file an appeal (Department Exhibit D-2, Pichik testimony). Mr. Perkins also sent Mr. Pichik an email on July 23, 2019 with a link to appeal instructions (Employer Exhibit D, page 7). Mr. Pichik filed the appeal by mail on August 9, 2019 (Department Exhibit D-2). Mr. Pichik attributed the delay in filing the appeal to confusion and travel.

REASONING AND CONCLUSIONS OF LAW:

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

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

Filing – determination – appeal.

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.

Iowa Admin. Code r. 871-24.35(2) provides:

Date of submission and extension of time for payments and notices.

(2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The division shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service, the division shall issue an appealable decision to the interested party.

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 Iowa Admin. Code r. 871-26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. *Messina v. Iowa Dep't of Job Serv.*, 341 N.W.2d 52 (Iowa 1983). The employer's appeal was filed on August 9, 2019 by mail (Department Exhibit D-2).

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).

The initial decision was mailed to the employer's address of record on June 21, 2019 and the employer denied receipt notice of the initial decision. Mr. Pichik testified the employer was aware of the unfavorable decision by July 23, 2019, when he began contacting IWD. On July 23, 2019, he was advised to file an appeal and also provided instructions via email (Department Exhibit D-2, Pichik testimony). At the latest, the employer was put on notice of the unfavorable decision on July 23rd and prescribed ten-day period to appeal was calculated using that date, the employer's appeal was still beyond the tenth day.

No submission shall be considered timely if the delay in filing was unreasonable, based on the circumstances in the case. 871 IAC 24.35(2)(c). The employer filed its appeal eighteen days after learning about the unfavorable decision and being directed to file an appeal. Even though the employer initially may not have received the decision when sent on June 21, 2019, it waited eighteen days after knowledge of the unfavorable decision to file the appeal. The evidence does not support the eighteen-day delay in filing the appeal was attributed to agency error, postal service error or other reasonable circumstances. Based on the evidence presented, the administrative law judge concludes the employer's delay in filing its appeal was unreasonable.

The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6(2), and 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 21, 2019, (reference 01) unemployment insurance decision is affirmed. The employer's appeal in this case was not timely, and the decision of the representative remains in effect.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn