

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BETTY S SIMON

Claimant

APPEAL NO. 08A-UI-10025-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HILLCREST FAMILY SERVICES

Employer

**OC: 07/27/08 R: 04
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct

Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 8, 2008, reference 01, decision that denied benefits. The telephone hearing began on November 13, 2008 pursuant to due notice and concluded on November 19, 2008, by agreement of the parties. Claimant participated. Employer participated through Julie Heiderscheit and Melissa Anderson.

ISSUE:

The issue is whether claimant's appeal was timely and if she was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant noted that she had received a direct deposit for benefit payment on October 2, called the Dubuque office after the money was received and talked to a representative, Paul to ask if a fact-finding decision had been made. He told her to wait until after she received the decision. From October 7 through October 24 claimant was staying at The Hope Lodge in Iowa City and her sister brought her mail to her. She has not filed weekly claims since September 27, 2008 because of being medically unable to work but anticipates being medically released November 14, 2008. The representative's decision was mailed to claimant's address of record on October 8 and received on October 11. Her sister brought the decision to her on October 12 and she opened it on that day and read the paragraph that states "IF THIS DECISION DENIES BENEFITS AND IS NOT REVERSED ON APPEAL, IT MAY RESULT IN AN OVERPAYMENT WHICH WILL YOU BE REQUIRED TO REPAY" and the paragraph "TO APPEAL THIS DECISION: THIS DECISION BECOMES FINAL UNLESS AN APPEAL IS POSTMARKED BY 10/18/08, OR RECEIVED BY IOWA WORKFORCE DEVELOPMENT APPEAL SECTION BY THAT DATE. IF THIS DATE FALLS ON A SATURDAY, SUNDAY OR LEGAL HOLIDAY, THE APPEAL PERIOD IS EXTENDED TO THE NEXT WORKING DAY" but she did not act on it. October 18 was a Saturday, so the appeal deadline automatically extended to Monday, October 20, 2008. The overpayment decision was mailed on October 15, 2008 and the deadline date was October 25, a Saturday, making the due

date for appeal of the overpayment decision Monday, October 27, the date on which she filed her appeal for both decisions.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. 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. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". 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. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

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 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. 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 thus 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).

The record shows that the appellant did have a reasonable opportunity to file a timely appeal since she acknowledged receiving the decision on October 12 and reading the paragraph notifying her that the decision, if not appealed, could result in having to repay benefits and the paragraph telling her that the appeal deadline was effective October 20, 2008. Her recollection of when she spoke to the local office and the representative's statements to her were hazy and her allegation that the local office representative told her to wait for the overpayment decision to act is simply not credible. This is not to say that she was misrepresenting the communication, but merely that she did not accurately recall the conversation or the circumstances. The administrative law judge concludes that failure to follow the clear written instructions 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 871 IAC 24.35(2). 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. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The October 8, 2008, reference 01, decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs