

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DERRICK BELL
Claimant

ABM INDUSTRY GROUPS LLC
Employer

APPEAL 20A-UI-04437-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/29/20
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview
PL116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation (FPUC)
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer/appellant, ABM Industry Groups LLC., filed an appeal from the May 1, 2020 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 9, 2020. The claimant participated personally. The employer participated through Pixie Allan, hearing representative. Reina Gonzalez, appellate coordinator for Employer’s Edge, testified for Employer. Elizabeth Kinderman and Shonda Smith also participated for the employer.

The administrative law judge took official notice of the administrative records. Department Exhibit A (Appeal letter) was admitted. Employer Exhibits 1-8 were admitted. 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.

ISSUES:

Is the appeal timely?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An initial unemployment insurance decision (Reference 01) resulting in an allowance of benefits was mailed to the employer’s last known address of record on May 1, 2020. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by May 11, 2020.

The appeal was not filed until May 22, 2020, which is after the date noticed on the initial decision (Department Exhibit A). The employer stated in the appeal letter, that the filing of the appeal was late due to the surge of claims and decisions the employer agent has received as a

result of the COVID-19 pandemic (Department Exhibit A). The person who drafted the appeal letter, Sara Chavez, did not participate in the hearing.

At the hearing, witness, Reina Gonzales, stated the employer did not receive it in the mail until May 16, 2020, even though it was mailed on May 1, 2020. The employer address on record is PO BOX 351567 Westminster, Colorado 80035. This is a valid mailing address for the employer's designated agent, Employer's Edge LLC. She asserted it may have been delayed due to volume. Ms. Gonzales does not work in the mailroom.

The employer stated its mail process is to retrieve the mail from the PO Box six days a week. From there, mail goes to a mailroom for scanning. After a document is scanned or uploaded, a representative from Employer's Edge can access it for purposes of review and determining whether an initial decision should be appealed. No representative from the mailroom attended the hearing.

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).

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 Ct. 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.* Based on the evidence presented, the administrative law judge is not persuaded the employer's delay in filing its appeal was due to postal service or agency error. See Admin. Code r. 871-24.35(2).

The administrative law judge did not find the employer witness to be credible. She did not file the appeal and did not handle the mail containing the initial decision. Her testimony was inconsistent with information contained in the appeal letter, which was that the employer's representative was requesting leniency on the timeframe due to the surge of claims from COVID-19 (Department Exhibit 1).

Further, she failed to provide persuasive evidence in support of the Postal Service being at fault for the delay in receipt of the initial decision. If the employer was checking its mail six days a week, it is not reasonable that it would take sixteen days to arrive in Westminster, Colorado, from Des Moines, Iowa. Rather it is quite possible that it took sixteen days from mailing date for the document to arrive, be opened, scanned and accessed by staff, who are working to keep up with the unprecedented volume.

Based on the evidence presented, the administrative law judge concludes the employer/appellant did have a reasonable opportunity to file a timely appeal. The administrative law judge recognizes the tremendous volume of unemployment insurance claims and decisions that have been generated as a result of the COVID-19 pandemic. The administrative law judge is sympathetic to employees of third party vendors who have been designated to respond on behalf of employers, and may be understaffed to handle the influx of volume.

However, based upon the evidence presented, the administrative law judge concludes that employer's 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 Iowa Admin. Code r. 871-24.35(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. 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 May 1, 2020, (reference 01) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.



Jennifer L. Beckman
Administrative Law Judge
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June 26, 2020
Decision Dated and Mailed

jlb/sam