

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TERRY L CARVER**  
Claimant

**APPEAL NO. 10A-UI-11979-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CENTRAL IOWA KFC INC**  
Employer

**OC: 05/09/10**  
**Claimant: Respondent (1)**

Iowa Code § 96.5(1)d – Voluntary Leaving/Illness or Injury  
Iowa Code § 96.4(3) – Ability to and Availability for Work  
Iowa Code § 96.6(2) – Timeliness of Appeal

**STATEMENT OF THE CASE:**

The employer filed an appeal from the June 8, 2010 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on October 28, 2010. Claimant participated. Employer participated through Julie Mangold. Department's Exhibit D-1 was received. The parties waived fact-finding and notice on the issue of claimant's ability to work and availability for work effective May 9, 2010. Claimant's Exhibit A was admitted to the record.

**ISSUE:**

The issue is whether employer's appeal is timely with respect to the May 9, 2010 separation and whether claimant is able to and available for work effective May 9, 2010.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to employer's last known address of record on October 28, 2010. The employer received the decision on June 9 and decided not to appeal the separation but wanted to challenge claimant's availability for work. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by June 18, 2010. The appeal was not filed until August 23, 2010, which is after the date noticed on the disqualification decision.

Claimant was treated for non-work-related right wrist pain and was released to work with restrictions on May 10, 2010. She was separated from employment on May 9, 2010 while still on medical leave. On June 20 a manager told her she could have her job back and was put on the schedule beginning June 27, but she was hospitalized from June 25 through July 2, 2010 and reported the issue to Mangold. She did not claim benefits while in the hospital. She was released to return to work with restrictions on July 8, 2010 and called Mangold, who said she was not going to put her on the schedule until she was fully released without restriction. In the

meantime, she obtained another job and moved out of the area on September 11, 2010 and was released without restrictions on September 13, 2010.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes employer'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).

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. 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).

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work effective May 9, 2010.

Iowa Code § 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

871 IAC 24.23(35) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

While employer is not obligated to accommodate a non-work-related medical condition, employer terminated the employment relationship while she was under a physician's care and could not perform her regular job duties. Since the employment ended, claimant was no longer obligated to return to employer upon her medical release to offer her services. Employer offered to hire her back but still refused to put her on the schedule until she obtained a full release. Thus, the offer to hire her back was not effective until she had a full release on September 13, and by that time she had moved and found another job. Thus claimant is considered as able to work as of May 9, 2010.

**DECISION:**

The June 8, 2010 (reference 01) decision is affirmed. The appeal regarding the separation of May 9, 2010 was not timely, and the decision of the representative remains in effect. Claimant was able to and available for work effective May 9, 2010 during benefit weeks claimed.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw