

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**SHAWN L CAMP
1537 OSBORN ST
BURLINGTON IA 52601-4546**

**BIG SHOT GRILLE
300 JEFFERSON ST
BURLINGTON IA 52601**

**Appeal Number: 06A-UI-07696-JTT
OC: 06/11/06 R: 04
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Iowa Code section 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

Big Shot Grille filed an appeal from the July 21, 2006, reference 03, decision that allowed benefits and concluded the employer's account could be charged for benefits paid to the claimant. After due notice was issued, a hearing was held by telephone conference call on August 16, 2006. Owner Geno DelPreore represented the employer. Anna DelPreore and Mary Jo Sherman were also present on behalf of the employer. Claimant Shawn Camp participated. The administrative law judge took official notice of the Agency's administrative file and received Department Exhibit D-1 into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The July 21, 2006, reference 03, decision was mailed to the employer's last-known address of record on July 21, 2006. The employer received the decision in a timely manner and before the deadline for appeal. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by July 31, 2006. When the reference 03 decision was received at the employer's business, someone erroneously filed the document away in a drawer containing other unopened mail. Owner Geno DelPreore discovered the reference 03 decision on July 31. Mr. DelPreore attempted to fax an appeal from the restaurant but the fax was not successful. Mr. DelPreore noted that he did not receive the fax transmission receipt he would normally receive in connection with a successful fax transmission. Mr. DelPreore considered whether he should resubmit the fax and ultimately decided to fax the document from a different fax machine located at his home. However, Mr. DelPreore waited until the next day, August 1, to fax the document from his home. The employer's faxed appeal was received by the Appeals Section on August 1, 2006, after the deadline for appeal has passed.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

The evidence in the record establishes 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 employer/appellant did have a reasonable opportunity to file a timely appeal. This period of opportunity included the length of time the reference 03 decision was erroneously filed away in a mail drawer. This period also included the balance of July 31 remaining, up to midnight, after the employer had reason to believe the initial attempt to fax the appeal was unsuccessful.

The administrative law judge concludes that 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. See 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code section 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).

As noted during the hearing, the employer is not a "base period" employer and, therefore, is not currently being assessed for benefits paid to the claimant. The employer's account could only be charged for benefits paid to the claimant during the next benefit year that begins June 11, 2007. The employer could only then be charged if the claimant was otherwise eligible for benefits, and could only be charged an amount commensurate with the wage credits the claimant earned through the brief employment with Big Shot Grille.

DECISION:

The Agency representative's July 21, 2006, reference 03, decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

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