

**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**

**NATHAN L SMITH
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PO BOX 33
GOLDFIELD IA 50525-0033**

**ADVANCED DRAINAGE SYSTEMS INC
c/o ADP UCM SERVICES INC
PO BOX 66744
ST LOUIS MO 63166-6744**

**Appeal Number: 05A-UI-05957-RT
OC: 08-08-04 R: 01
Claimant: Appellant (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)

Section 96.6-2 – Initial Determination (Timeliness of Appeal)

STATEMENT OF THE CASE:

The claimant, Nathan L. Smith, filed an appeal from an unemployment insurance decision dated May 19, 2005, reference 04, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on June 21, 2005, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where he or any of his witnesses could be reached for the hearing, as instructed in the notice of appeal. Mitch Kirkland, Plant Manager, participated in the hearing for the employer, Advanced Drainage Systems, Inc. Department Exhibit One was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, including Department Exhibit One, the administrative law judge finds: An authorized representative of Iowa Workforce Development issued a decision in this matter on May 19, 2005, reference 04, determining that the claimant was not eligible to receive unemployment insurance benefits because he was discharged from work on April 15, 2005 for excessive unexcused absenteeism after being warned. This decision was sent to the claimant on May 19, 2005 at the same address as shown on the claimant's attempted appeal. This decision was received by the claimant on May 21, 2005 as shown on the claimant's attempted appeal. This decision indicated that an appeal had to be postmarked or otherwise received by the Appeals Section by May 31, 2005 (the decision actually said May 29, 2005 but since that was a Sunday and the following Monday, May 30, 2005 was Memorial Day, the appeal would be due the next business or working day). However, as shown at Department Exhibit One the claimant's appeal was dated and left at the local Iowa Workforce Development office on June 2, 2005 making the appeal two days late. The appeal was also postmarked to the Appeals Section on June 2, 2005. In his appeal letter the claimant says something about going to the local Workforce Development office in Clarion but they were short-handed on May 26, 2005 and the office did not work or was not opened on May 31, 2005. The office was actually closed on May 30, 2005, which was Memorial Day. The claimant did not participate in the hearing to properly lay foundation or testify to the reasons for the delay in the appeal. An appellant does not have to go to the local Workforce Development office to appeal a decision. Further, the claimant had at least six days to go to the local Workforce Development office if he felt it necessary to do so to appeal the decision.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant filed a timely appeal or, if not, whether the claimant demonstrated good cause for such failure. The administrative law judge concludes that the claimant's appeal was not timely and the claimant has not demonstrated good cause for the delay in the filing of his appeal and, as a consequence, the appeal should not be accepted and the administrative law judge has no jurisdiction to reach the remaining issue.
2. Whether the claimant's separation from employment was a disqualifying event. The administrative law judge does not have jurisdiction to reach this issue.

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 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).

(1) The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

871 IAC 24.35(2) provides:

(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 department 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 division 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 or its successor, the division shall issue an appealable decision to the interested party.

The administrative law judge concludes that the claimant has the burden to prove that his appeal was timely or that he had good cause for the delay in the filing of his appeal. The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence either that his appeal was timely or that he had good cause for the delay in the filing of his appeal. As shown on Department Exhibit One and as set out in the findings of fact, the claimant's appeal was two days late. The claimant did not participate in the hearing and provide reasons why his appeal was late. The claimant's appeal itself states that the claimant received the decision from which he seeks to appeal on May 21, 2005. This gave the claimant six business or working days to file his appeal. The claimant did not do so. In his appeal the claimant states that he went to his local Workforce Development office in Clarion, Iowa on May 26, 2005 and that they were short-handed. The claimant did not participate in the hearing to testify as to this fact. Whether the Workforce Development office was short-handed or not, the claimant had other days to file his appeal both before and after May 26, 2005. The claimant said that the office did not work on the 31st but this is inaccurate; the office was closed on May 30, 2005, which was Memorial Day, but the claimant still had May 31, 2005 to file his appeal and it would have been timely. The claimant does not have to go to a local office to file his appeal; all he had to do was do a letter of appeal. The administrative law judge concludes there is not a preponderance of the evidence that the delay in the submission of the claimant's appeal was due to Iowa Workforce Development department error or misinformation or to a delay or other action by the U.S. Postal Service. Accordingly, the administrative law judge concludes that the claimant's appeal is not timely and the claimant has not demonstrated good cause for the delay in the filing of his appeal and, as a consequence, the appeal should not be accepted and the administrative law judge lacks jurisdiction to make a determination with respect to the other issue presented, the separation from employment. The administrative law judge further concludes that the representative's decision of May 19, 2005, reference 04, should remain in full force and effect.

DECISION:

The representative's decision of May 19, 2005, reference 04, is to remain in full force and effect. The claimant, Nathan L. Smith, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. The claimant's attempted appeal is not timely and he has not demonstrated good cause for the delay in the filing of his appeal.

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