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

STEPHEN M MULLINS
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CHARITON IA 50049

PETERSON CONTRACTORS INC
BOX A
REINBECK IA 50669-0155

Appeal Number: 04A-UI-02518-DT
OC: 12/22/02 R: 04
Claimant: Appellant (2)

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 96.5-1 – Voluntary Leaving - Layoff
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Stephen M. Mullins (claimant) appealed a representative's March 3, 2004 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Peterson Contractors, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 30, 2004 in conjunction with one related appeal, 04A-UI-02517-DT. The claimant participated in the hearing. The employer received the hearing notice and responded by calling the Appeals Section on March 24, 2004. The employer indicated that Jan Ehrig would be available at the scheduled time for the hearing at telephone number (319) 345-2713, extension 213. However, when the administrative law judge called that number at the scheduled time for the hearing, Ms. Ehrig was not available. Therefore, the employer did not participate in the hearing. During the hearing, Agency Exhibit One and Claimant's Exhibit A were entered into

evidence. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant's appeal timely? Was there a disqualifying separation from employment?

FINDINGS OF FACT:

A representative's decision was mailed to the claimant's last-known address of record on November 12, 2003. The claimant received the decision on or by November 17, 2003. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by November 22, 2003. The notice also provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was November 24, 2003. The appeal was not filed until it was delivered to the local Agency office on March 8, 2004. The reason for the delay was that when the claimant received the disqualification decision on or about November 17, within a few days thereafter but prior to November 24, he went to his local Agency office to inquire as to what he needed to do. He was advised that he needed to earn ten times his weekly benefit amount in order to requalify for benefits. He understood that this was his only option, and that there was nothing he could do to challenge the decision.

The November 12, 2003 (reference 04) decision had been issued under a claim year the claimant had established effective December 22, 2002, which was reopened with his additional claim effective October 5, 2003. That claim year expired December 21, 2003. The claimant, at that point, found some employment with which he was attempting to requalify. He did not establish a second claim year until February 15, 2004. A representative's decision was then issued on March 3, 2004 (reference 01) under the new claim year, concluding that the November 12, 2003 (reference 01) decision was binding on the new claim year. Upon receipt of the new decision, the claimant consulted further with other persons at the local Agency office, and learned that he could have challenged the November 12, 2003 decision by filing an appeal, which he then did.

The claimant started working for the employer on July 10, 2001. He worked full time as a truck driver in the employer's seasonal road construction business. He worked primarily on projects around the Marshalltown, Iowa area. His most recent day of work was October 3, 2003. At that time, his foreman informed the claimant and the other drivers that their work on the project was done for the season and that they were laid off until the spring. He made some reference to the possibility of there being a little more work on another project in another area, and the claimant told the foreman to let him know. Neither the foreman nor anyone else on behalf of the employer subsequently contacted the claimant to recall him to work on any other project through the rest of 2003.

On January 15, 2004, the employer mailed the claimant a notice to attend a pre-season employee meeting to be held on February 21, 2004. The claimant did attend. The employer announced that it was preparing to recall the employees, including the claimant, potentially by the end of March or early April 2004. As of the date of the hearing, the claimant had not yet been contacted and instructed to report for work on a specific date or project.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's November 12, 2003 decision and whether that decision is binding on the new claim year.

Iowa Code Section 96.6-2 provides in pertinent part:

> 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.

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 not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation. The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code Section 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979); Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979), and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

The substantive issue in this case is whether the claimant voluntarily quit.

Iowa Code Section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.1(113)a provides:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

The claimant was informed that his work on the project was complete for the season, and was not directed to return to work prior to February 21, 2004. Therefore, the October 3, 2003 separation was attributable to a lack of work by the employer. Benefits are allowed.

DECISION:

The representative's March 3, 2004 decision (reference 01) is reversed. The claimant was laid off due to a lack of work. Benefits are allowed, provided he is otherwise eligible.

ld/b