

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SHEILA A LONG
Claimant

APPEAL 17A-UI-02732-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

**OC: 12/11/16
Claimant: Appellant (1)**

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(3) – Earnest and Active Search for Work

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 24, 2017, (reference 06) unemployment insurance decision that denied benefits based upon her failure to make an adequate work search after having earlier been warned. The claimant was properly notified of the hearing. The hearing was originally scheduled for April 4, 2017, but the claimant requested it be rescheduled to an earlier date and waived the notice requirement. A telephone hearing was held on March 29, 2017. The claimant participated and testified. Department's Exhibit D-1 was received and official notice was taken of the administrative record.

ISSUES:

Is the claimant's appeal is timely?
Is the claimant able to and available for work?
Did the claimant make an active work search?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to claimant's last known address of record on February 24, 2017. Claimant initially testified she received the decision later that week. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by March 6, 2017. The appeal was not filed until March 10, 2017, which is after the date noticed on the disqualification decision. The first sentence of the decision states, "If this decision denies benefits and is not reversed on appeal, it may result in an overpayment which you will be required to repay." At first claimant testified she did not file her appeal prior to March 10 because she is very busy. Claimant later testified she did not receive the decision until March 7, before finally testifying she did not receive the decision at all and that her failure to receive the decision is why she did not appeal sooner.

Claimant then testified the only fact-finding decision she had ever received was a March 6, 2017 (reference 08) decision regarding her overpayment. Claimant was not aware of any disruptions to her mail service during the months of January, February, or March 2017. Later in her testimony claimant stated she had received a letter claiming she had been previously warned about failure to make an adequate work search and she disagreed with this letter. The hearing officer read the language from the February 24, 2017, (reference 06) unemployment insurance decision at issue and claimant confirmed this sounded like the letter she was referring to, but she was not certain, as she did not have the letter in front of her. Claimant explained when she got this letter she did not believe she had received prior warnings and called Iowa Workforce Development to tell them she disagreed with the decision. This call was not made to the appeals bureau. Claimant initially testified she could not remember if she read the appeal rights on the back of the decision or not, but then testified she must have in order to have gotten the information on how to file her appeal.

Claimant testified she did not do a work search for the week of January 15, 2017. She did not complete a work search that week because she had found a part-time job. Claimant testified she was never told there was an Unemployment Insurance Handbook or that she should read it. Claimant later testified she did not know if she had received a handbook or not and that she might have read some portions of the handbook, but not the portions about weekly work searches.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant'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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 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. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

The decision in this case rests, at least in part, on the credibility of the claimant. 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 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.*

After assessing the credibility of the claimant, reviewing the exhibits and administrative record, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events surrounding her receipt of the fact-finding decision and filing of her subsequent appeal, not to be credible. Claimant initially testified she received the decision within a few days of its mailing on February 24, then testified it was not received until March 7, then testified she never received the decision, and finally testified that she disputed the information in the decision and previously called Iowa Workforce Development after receiving the decision to tell them she disputed the information. Because of the repeated inconsistencies in claimant's testimony and in light of the information in the administrative record, she is not credible.

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). The record shows that the appellant did 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 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 February 24, 2017, (reference 06) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

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