

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PIXIE E COLE
Claimant

AUNT NECEE'S PIZZA & MORE
Employer

APPEAL NO. 12A-UI-04977-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/20/11
Claimant: Respondent (2R)

Section 96.4-3 – Able and Available
Section 96.6-2 – Timely Appeal

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated December 23, 2011, reference 01, which held that the claimant was eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 22, 2012. Claimant participated. The employer participated by Denise Wersinger, owner. The record consists of the testimony of Denise Wersinger and the testimony of Pixie Cole. Official notice is taken of agency records.

ISSUES:

Whether the employer's appeal is timely; and
Whether the claimant was able and available for work for the week ending November 26, 2011.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant established a claim for benefits with an original claim date of November 20, 2011. On December 23, 2011, the representative issued a decision that held that the claimant was eligible for unemployment insurance benefits and that the employer's account would be charged. The employer never received a copy of this decision.

On February 9, 2012, the unemployment insurance division sent the employer a statement of charges, which included a charge of \$296.00 for the claimant. Benefits were paid to the claimant for the week ending November 26, 2011. The employer contacted the division and was told by two separate individuals that the problem would be corrected and she should call back in a couple of weeks. When the claimant called back, she was told that the problem could not be fixed and she was then referred to several other individuals, none of whom could help her. She finally reached the right person and was told that she needed to appeal the representative's decision of December 23, 2011. The employer then filed the appeal.

The employer is a restaurant and the claimant is still employed there. She did not work the week ending November 26, 2011, which included Thanksgiving, because she had asked for vacation time to spend with her family.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the employer timely appealed the representative's decision. Iowa Code section 96.6-2 provides that unless the affected party (here, the employer) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by 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 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).

In this case the evidence shows that the employer was deprived of a reasonable opportunity to assert an appeal in a timely fashion. The employer never received the representative's decision of December 23, 2011. When she received the statement of charges, she received incorrect advice from the division and was not referred to the correct individual in a timely manner. Under these circumstances, the employer's appeal will be treated as timely.

The next issue is whether the claimant was able and available for work for the week ending November 26, 2011. The evidence established that the claimant had requested time off from work during that week because she had family in town for the holidays. In order to qualify for benefits, the claimant has to be available to work the hours for which suitable work is available. 871 IAC 24.23(16). The claimant was not available for work because she had requested time off for personal reasons. The claimant is not eligible for benefits for the week ending November 26, 2011.

DECISION:

The decision of the representative dated December 23, 2011, reference 01, is reversed. The claimant was not able and available for work for the week ending November 26, 2011.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs