

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RANDALL C OWENS
Claimant

APPEAL NO: 13A-UI-04641-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AEROTEK INC
Employer

OC: 03/10/13

Claimant: Appellant (4)

Section 96.5-1 – Voluntary Leaving/Requalification
Section 96.4-3 – Able and Available
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Randall C. Owens (claimant) appealed a representative's April 5, 2013 decision (reference 03) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Aerotek, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 30, 2013. The claimant participated in the hearing. The employer failed to respond to the hearing notice and provide a telephone number at which a witness or representative could be reached for the hearing and did not participate in the hearing. During the hearing, Exhibit A-1 was 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 modifying the representative's decision and allowing the claimant benefits.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it should be treated as timely?

Is the claimant disqualified from receiving unemployment insurance benefits because of his separation with the employer?

Is the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on April 5, 2013. The claimant received the decision within a few days thereafter. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by April 15, 2013, a Monday. The appeal was not filed until it was faxed to the Appeals Section on April 18, 2013, which is after the date noticed on the disqualification decision. The reason for

the delay was that the claimant had not understood the significance of the decision and had not understood what he would need to do to appeal.

The representative's decision had concluded that the claimant's employment with the employer had ended on November 9, 2012 due to the claimant voluntarily quitting work due to a non-work-related illness or injury, and that the claimant was disqualified until he either recovered and sought to return to work with the employer, or requalified by earning ten times his weekly benefit amount.

The claimant did recover from an injury, but rather than returning to work with the employer, he started work with another employer on or about December 17, 2012. He continued in that employment until approximately the middle of February 2013. In that new employment he earned over \$4,490.00. When that newer employment ended, the claimant established a claim for unemployment insurance benefits effective March 10, 2013. His weekly benefit amount was calculated to be \$449.00.

REASONING AND CONCLUSIONS OF LAW:

If a party fails to make a timely appeal of a representative's decision and there is no legal excuse under which the appeal can be deemed to have been made timely, the decision as to the merits has become final and is not subject to further review. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) 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 then 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).

A party does not have a reasonable opportunity to file a timely appeal if the delay is due to Agency error or misinformation or to delay or other action of the United States postal service. 871 IAC 24.35(2). Failing to read and follow the instructions for filing an appeal is not a reason outside the appellant's control that deprived the appellant from having a reasonable opportunity to file a timely appeal. 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 prescribed time was not due to a legally excusable reason so that it can be treated as timely. The administrative law judge further concludes that because the appeal was not timely, the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal, regardless of whether the merits of the appeal would be valid. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

However, the administrative law judge further concludes that the claimant has requalified for benefits since the separation from this employer and before he established his claim for unemployment insurance benefits effective March 10, 2013. Further, while the claimant may not have been able and available for work for a period of time due to his injury, he has demonstrated that he subsequently recovered from that injury and was able to work. Iowa Code § 96.4-3. To be found able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). Since establishing his claim for benefits effective March 10, 2013, the claimant has been able and available for work. Accordingly, benefits are allowed and the account of the employer shall not be charged.

DECISION:

While the appeal was not timely, the representative's April 5, 2013 decision (reference 03) is modified in favor of the appellant. As determined by the decision which became final due to no timely appeal, the claimant voluntarily left his employment without good cause attributable to the employer; however, the claimant has requalified for benefits since the separation. The claimant is able and available for work. Effective March 10, 2013 benefits are allowed, provided the claimant is otherwise eligible. The account of the employer shall not be charged.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css