

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALICIA A SEIDEL
Claimant

APPEAL NO: 09A-UI-02260-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 12/07/08

Claimant: Appellant (1)

Section 96.5-2-a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Alicia A. Seidel (claimant) appealed a representative's January 7, 2009 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Casey's Marketing Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 5, 2009. The claimant participated in the hearing up to the point where she was disconnected from the call; when the administrative law judge recontacted the claimant to determine if the disconnection had been inadvertent, the claimant immediately again disconnected. Michelle Dunn appeared on the employer's behalf. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

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

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on January 7, 2009. The claimant received the decision on or about January 9, 2009. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by January 17, 2009, a Saturday. 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 Tuesday, January 20, 2009. An appeal was not received as filed until the claimant went to her local Agency office on February 13, 2009 and had an appeal completed that day faxed to the Appeals Section.

The claimant asserted that on January 16, 2009 her mother had faxed an appeal for the claimant from a fax machine at the mother's work. The claimant was not present at the time. She did not obtain a confirmation report from the fax machine that the transmission was

successful. Further, the number to which the claimant indicated the appeal had been faxed was not the fax number for the Appeals Section as stated in the instructions on the back side of the representative's decision.

The claimant asserted that on January 23, 2009 she had called her local Agency office to inquire on the status of her appeal, and had been informed that there was no record of her appeal being received. The claimant did not seek to obtain a fax machine report from the machine her mother had ostensibly used in order to attempt to substantiate that an appeal had in fact been timely sent by fax. Further, when the administrative law judge inquired of the claimant as to why she had apparently waited until February 13 to take remedial action to file an appeal directly in the local Agency office, if she had learned on January 23 that her appeal had not been received, the claimant made no answer but disconnected from the hearing.

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 claimant has not demonstrated that she did properly file an appeal within the timeframe for appeal; even assuming an excusable explanation as to why that attempt was unsuccessful, she

has not demonstrated that she acted promptly to ensure an appeal was properly on file upon learning that her initial attempt had been unsuccessful.

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).

DECISION:

The representative's January 7, 2009 decision (reference 01) is affirmed. The appeal in this case was not timely, and the decision of the representative has become final and remains in full force and effect. Benefits are denied.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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