

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER R KIRBY
Claimant

APPEAL NO: 14A-UI-05359-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 04/20/14

Claimant: Appellant (2)

Section 96.4-3 – Able and Available
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Jennifer R. Kirby (claimant) appealed a representative's May 13, 2014 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits by not being able and available for work. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 12, 2014. The claimant participated in the hearing. A review of the Appeals Section's conference call system indicates that the employer failed to respond to the hearing notice and register 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.

ISSUES:

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

Was 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 May 13, 2014. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 23, 2014, a Friday. The appeal was not treated as filed until a copy was faxed on May 24, 2014, which is after the date noticed on the disqualification decision. However, on May 16 the claimant had spoken to an Agency representative and had been given two fax numbers to use to submit an appeal. On May 23 she transmitted her appeal letter to both fax numbers; one fax went through with a successful transmission, but the other, to the Appeals Section's direct fax, was not successful, so she refaxed to that number on May 24.

The claimant started working for the employer on February 28, 2012. She worked full time as a production worker at the employer's Waterloo, Iowa facility. Her last actual day of work was February 11, 2014. She went on a medical leave of absence due to illness as of that time. Her doctor did not release her as able to return to work until April 18, 2014. However, on April 18 she received a letter of termination from the employer. In another decision issued on May 13, 2014 (reference 02), the representative determined that the separation was not disqualifying. The claimant established an unemployment insurance benefit year effective April 20, 2014.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. 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 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 or delay or other action pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking 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); Rule 871 IAC 24.22(1). A claimant is not able and available for work if she is ill and under a doctor's care. Rules 871 IAC 24.22(1), 871 IAC 24.23(1),(35).

The claimant has demonstrated that she has been released by her doctor as able to work as of April 18, 2014. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The appeal in this case was timely. The representative's May 13, 2014 decision (reference 02) is reversed. The claimant is able to work and available for work effective April 20, 2014. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs