

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

EVA J KELLY

Claimant,

and

FIVE STAR QUALITY CARE INC

Employer.

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HEARING NUMBER: 12B-UI-11212

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1, 96.6-2

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

On July 2, 2012 a representative's decision was mailed to Eva Kelly (Claimant). The decision was mailed to the Claimant's last known address as supplied to Iowa Workforce. The Claimant never received the decision. She received a subsequent decision which referred to that one and she appealed that decision in a timely basis.

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REASONING AND CONCLUSIONS OF LAW:

Iowa Code 96.6 provides:

2. *Initial determination.* ... 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.

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 - but not conclusive - evidence of the date of mailing.

There is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and the Administrative Law Judge and this Board have no authority to change the decision of representative if a timely appeal is not filed. *Franklin v. Iowa Dept. Job Service*, 277 N.W.2d 877, 881 (Iowa 1979). The ten day period for appealing an initial determination concerning a claim for benefits has been described as jurisdictional. *Messina v. Iowa Dept. of Job Service*, 341 N.W.2d 52, 55 (Iowa 1983); *Bearslee v. Iowa Dept. Job Service*, 276 N.W.2d 373 (Iowa 1979). The only basis for changing the ten-day period would be where notice to the appealing party was constitutionally invalid. *E.g. Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373, 377 (Iowa 1979). The question in such cases becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Employment Sec. Commission*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Employment Sec. Commission*, 212 N.W.2d 471 (Iowa 1973). The question of whether the Claimant has been denied a reasonable opportunity to assert an appeal is also informed by rule 871-24.35(2) which states that "the submission of any ... appeal...not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service."

The delay here was caused either by Workforce and or by the United States Postal Service, or even both. Since the Claimant appealed right away he was not responsible for the delay. Since he did not get the decision until the due date the delay is excused both under the *Smith v. IESC*, 212 N.W.2d 471 (Iowa 1973) line of cases and 871-24.35(2). We find the Claimant's appeal timely.

DECISION:

The administrative law judge's decision dated October 15, 2012 is **REVERSED AND REMANDED**.

The decision of the administrative law judge is not vacated at this time, and remains in force unless and until the Department makes a differing determination pursuant to this remand. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section. The administrative law judge shall issue a decision on the merits of this case. The Administrative Law Judge

may in the Administrative Law Judge's discretion conduct an additional hearing if the judge deems it necessary to develop issues that were not adequately addressed in the first hearing because of the disposition of the issue of timeliness. After the hearing, if any, the administrative law judge shall issue a decision that provides the parties appeal rights.

John A. Peno

Monique F. Kuester

Cloyd (Robby) Robinson

RRA/fnv