

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

EMILY R GIPE
Claimant

APPEAL NO: 19A-UI-03529-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

YWCA CLINTON
Employer

OC: 12/16/18
Claimant: Respondent (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(7) – Receipt of Vacation Pay/PTO

STATEMENT OF THE CASE:

The employer filed an appeal from the January 11, 2019, (reference 03) unemployment insurance decision that denied benefits to the claimant for the two week period ending December 29, 2018 due to vacation pay. Due notice was issued and a hearing was held on May 16, 2019. Claimant participated. Employer participated through witness Shannon Sander-Welzien. Jim Bull also testified. Department Exhibit 1 was admitted into evidence. The administrative law judge took official notice of the claimant's unemployment insurance benefits records. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Is the appeal timely?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant established a claim with an effective date of December 16, 2018 in response to her permanent separation with this employer. A notice of claim was mailed to the employer to protest. The employer responded to the claim by checking the box that it was not protesting the claim and provided requested wage and vacation information (See administrative file/claim protest). (The employer's submitted a copy of its protest, as part of its appeal. This copy appeared altered from the copy sent to IWD on December, as the "do not protest" box was crossed out). Because the employer elected not to protest the claim, no fact-finding interview was conducted between the parties. The claimant was allowed to collect benefits.

Thereafter, the initial decision (reference 03) was mailed to the employer on January 11, 2019. The decision stated the claimant was not eligible to receive benefits for a two week period due to the receipt of vacation pay. The employer's evidence regarding the receipt of the initial decision was conflicting. Ms. Sander-Welzien stated mail is collected daily, she reviews it and delegates mail to Mr. Bull for handling, when appropriate. Mr. Bull denied knowledge or receipt of the initial decision dated January 11, 2019.

Ms. Sander-Welzien acknowledged seeing a decision that denied benefits to the claimant but may not have read it thoroughly to see the disqualification was temporary. The initial decision also contained a warning that any further appeal must be filed by January 21, 2019. No other decision was sent to the employer which would reference the claimant being denied benefits, temporarily or until she requalified (See administrative record.) No appeal was filed until the employer received its statement of charges, which was mailed on April 15, 2019. The employer didn't know when it received the statement of charges but filed its appeal on April 29, 2019 (Department Exhibit 1).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal is untimely.

Iowa Code section 96.6(2) provides, in pertinent part:

Filing – determination – appeal.

The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . 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.

Iowa Admin. Code r. 871-24.35(2) provides:

Date of submission and extension of time for payments and notices.

(2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document 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.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The division shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service, the division shall issue an appealable decision to the interested party.

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).

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 Supreme 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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* The administrative law judge took into consideration the conflicting testimony of employer witnesses, as well as the altered copy of employer protest submitted which conflicted with the copy in the administrative file. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer / appellant did have a reasonable opportunity to file a timely appeal.

Based on the evidence presented, the administrative law judge concludes the employer, by way of Ms. Sander-Welzien, did receive a copy of the initial decision within the appeal timeline, but may have failed to read through the entire decision, which did state the claimant was denied benefits, but only for two weeks. The administrative law judge concludes that the employer's failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law *was not due to any Agency error or misinformation or delay or other action of the United States Postal Service* pursuant to Iowa Admin. Code r. 871-24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The January 11, 2019, (reference 03) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn