IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRIANNA WINTERS
Claimant

SUNNYBROOK LIVING CARE CENTER LC
Employer

APPEAL NO: 14A-UI-05173-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/01/13
Claimant: Appellant (4)

Section 96.6-2 – Timeliness of Protest
Section 96.6-2 – Timeliness of Appeal
Section 96.4-3 – Able and Available
871 IAC 24.22(2)j – Leave of Absence

STATEMENT OF THE CASE:

Brianna Winters (claimant) appealed a representative's April 30, 2014 decision (reference 03) that concluded she was not qualified to receive unemployment insurance benefits because of a disqualifying separation from Sunnybrook Living Care Center, L.C. (employer) which was asserted to have occurred in November 2013. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 27, 2014. The claimant participated in the hearing and was represented by Jim Hamilton, paralegal. Michelle Hanson appeared on the employer's behalf. This appeal was consolidated for hearing with two related appeals, 14A-UI-05174-DT and 14A-UI-04853-DT. During the hearing, Exhibits A-1, A-2, and A-3 were 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 affirming 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?

Was the employer's protest 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 April 30, 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 10, 2014. 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 Monday, May 12. The appeal was not filed until it was postmarked on May 19, 2014, which is after the date noticed on the disqualification decision.

The claimant did not believe she needed to appeal the representative's decision until May 19 because only a couple days after receiving the reference 03 decision regarding the supposed separation from employment, she received another decision which had been issued on May 2, 2014 (reference 05), the subject of 14A-UI-04853-DT, which stated that the supposed November 2013 separation was not disqualifying. She believed the May 2 decision was an amendment to or modification of the April 30 decision, and concluded that she need not appeal. However, she then received a third decision issued on May 12, 2014 (reference 05), the subject of 14A-UI-05174-DT, which advised her that she was being held overpaid benefits because of the April 30 (reference 03) decision. She then made her appeal on April 19.

The claimant established a claim for unemployment insurance benefits effective December 1, 2013. A notice of claim was mailed to the employer's last-known address of record on December 9, 2013. The employer received the notice. The notice has an area for the employer to designate any "statement of protest" to assert that the named claimant could be "subject to disqualification because of the following selected item(s)." Options include a space to designate that the employer asserts that the claimant voluntarily quit, was discharged for misconduct, or refused suitable work or recall to work. Another area is to assert that the claimant is "still employed" with other options to be marked to further explain the status, such as being on leave of absence. The notice contained a warning that a protest must be postmarked or received by the Agency by December 19, 2013. The protest was not filed until it was faxed to the Claims Section on April 14, 2014 and marked as received by the section on April 15, 2014, which is after the date noticed on the notice of claim. No explanation was offered as to why there had been no protest made in December, or otherwise not until April 14. The information included by the employer on the protest was only to mark the box of "other" under the "still employed" option, into which the employer specified, "Non work-related restrictions."

Apparently prompted by the employer's protest received on April 15, the Claims Section issued a new notice of claim, mailed to the employer on April 17, 2014, with a deadline of April 28, 2014. The employer received this notice as well, and replied by submitting a responsive protest on April 24. The employer again only marked the box of "other" under the "still employed option, into which the employer specified, "We do not make accommodation to non-work related restrictions."

The claimant started working for the employer on August 7, 2013. She worked full time as a certified nursing aide (CNA). Her last day of work was the shift from the evening of November 20 into the morning of November 21. On November 21 she indicated to the employer she needed to have light duty work due to pregnancy. The employer declined to allow her to continue working with the non-work-related restrictions. On December 5 she brought another doctor's note to the employer indicating her restrictions were no pushing, pulling, or lifting over 25 pounds, and that this was to continue until her post-partum release from care. The employer again declined to allow the claimant to continue working with the non-work-related restrictions. The claimant did not request a leave of absence.

On April 14 the employer's acting administrator called the claimant and told her she was "terminated." On April 21 he called her again and said that she was "reinstated." While the employer may be willing to return the claimant to her employment when she is released without

any work restrictions, as of mid-April 2014 the claimant has been performing a search for other employment, including as a cashier or in a fast-food restaurant. The work for which she has been applying is within her work restrictions.

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. She reasonably concluded that the decision issued on April 30, 2014 (reference 03) regarding the purported November 2013 separation had been amended or modified by the May 2, 2014 (reference 04) regarding that same separation.

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 Rule 871 IAC 24.35(2), or other factor outside of the claimant's control. 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).

There is also a question as to whether the employer timely raised the question as to whether there had been a disqualifying separation from employment. The law provides that all interested parties shall be promptly notified about an individual filing a claim. The parties have ten days from the date of mailing the notice of claim to protest payment of benefits to the claimant. Iowa Code § 96.6-2. The portions of Iowa Code § 96.6-2 cited above dealing with

timeliness of an appeal from a representative's decision states an appeal must be filed within ten days after notification of that decision was mailed and that the Iowa court has held that this statute clearly limits the time to do so, and compliance with the appeal notice provision is mandatory and jurisdictional. *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979).

The administrative law judge considers the reasoning and holding of the *Beardslee* court controlling on the portion of Iowa Code § 96.6-2 which deals with the time limit to file a protest after the notice of claim has been mailed to the employer. Compliance with the protest provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), protests are considered filed when postmarked, if mailed. *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983). The question in this case thus becomes whether the employer was deprived of a reasonable opportunity to assert a protest 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 employer did have a reasonable opportunity to file a timely protest.

Rule 871 IAC 24.35(2) provides in pertinent part:

> 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 department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.

The employer has not shown that the delay for not complying with the jurisdictional time limit was due to department error or misinformation or delay or other action of the United States Postal Service. Since the employer filed the protest late without any legal excuse, the employer did not file a timely protest. The Agency's de facto determination in December 2013 therefore was that claimant's November 2013 separation was non-disqualifying, so that the claimant should be eligible for unemployment insurance benefits. This becomes the final determination regarding the at least temporary separation from employment. Since the administrative law judge concludes that the protest was not timely filed pursuant to Iowa Code § 96.6-2, Agency lacked jurisdiction to make a determination with respect to the nature of the protest and the reasons for the claimant's at least separation from employment, regardless of the merits of the employer's protest as to an at least temporary separation from employment. See, *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979); *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979) and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

The remaining issue is whether the claimant is and has been able and available for work. As this is a week-to-week determination, it can be raised by the employer at any time. Iowa Code § 96.4-3. The employer could have raised that issue immediately in December by so making a timely protest. For the reasons discussed above, the administrative law judge finds that the employer is foreclosed from raising that issue for the period of time from December 1, 2013 through the benefit week ending April 12, 2014. However, beginning April 13, 2014, the week in which the employer first raised the question, the issue can be considered.

For each week for which a claimant seeks unemployment insurance benefits, she must be able and available for work. In general, an employee who is only temporarily separated from her employment due to being on a leave of absence is not "able and available" for work during the period of the leave, as it is treated as a period of voluntary unemployment. Rules

871 IAC 24.22(2)j; 871 IAC 24.23(10). However, implicit in this conclusion is that the leave is "voluntary" with mutual consent, not a unilateral decision made by the employer. Rules 871 IAC 24.22(2)j; 871 IAC 24.23(10). Here the claimant did not request a leave of absence, she only sought accommodation. Her involuntary at least temporary period of separation is not due to the type of leave of absence which would render her unable or unavailable for work.

She would still need to be otherwise able and available for work. 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). The claimant has demonstrated that since the week of April 13, 2014 she has been and is able to work in some gainful employment. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The appeal in this case is treated as timely. The April 30, 2014 (reference 03) decision is modified in favor of the claimant. The employer's protest in this case was not timely as to any separation from employment or as to the claimant being able and available prior to April 13, 2014, and so there is no determination as to there being a potentially disqualifying separation from employment. The determination is only that the claimant has been able and available for work. Benefits are allowed, provided the claimant is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs