

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FLOYD D MULKEY

Claimant

APPEAL NO. 08A-UI-08819-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MANPOWER INC OF CEDAR RAPIDS

Employer

**OC: 08/04/08 R: 03
Claimant: Appellant (1)**

Section 96.6-2 – Timeliness of Appeal

Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Floyd D. Mulkey (claimant) appealed a representative's August 4, 2008 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a January 8, 2008 separation from employment from Manpower Inc. of Cedar Rapids (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 17, 2008. This appeal was consolidated for hearing with one related appeal, 08A-UI-08820-DT. The claimant participated in the hearing. Barb Kotz 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 August 4, 2008. No evidence was provided to rebut the presumption that the claimant received the decision within a few days thereafter. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by August 14, 2008, a Thursday. The appeal was not filed until it was hand-delivered to a local Agency office on October 2, 2008, which is after the date noticed on the disqualification decision. The claimant filed his appeal at that time because an overpayment decision had been issued on September 29, 2008 (reference 04). The claimant had not understood that even though the August 4 decision had stated that he "was not eligible to receive unemployment insurance benefits" and that "if this decision denies benefits and is not reversed on appeal, it may result in an overpayment which you will be required to repay," he assumed the disqualification related only to the period immediately after his separation from the employer, and he was seeking unemployment insurance benefits after a temporary separation with a subsequent employer suffered in June 2008.

The claimant established an unemployment insurance benefit year effective June 15, 2008. His weekly benefit amount was calculated to be \$306.00. His requalification amount was therefore \$3,060.00. On October 8, 2008 an additional representative's decision was issued (reference 06), concluding that since January 8, 2008, the claimant has requalified by earning ten times his weekly benefit amount. The basis for the requalification was a pay stub from September 2008 indicating gross annual wages to that point in excess of \$3,060.00. Benefit eligibility was reinstated effective the week beginning September 21, 2008. However, Agency wage records show that as of June 30, 2008 the claimant had been paid only \$2,594.00 since his employment with the employer ended, insufficient to requalify the claimant.

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). The claimant did not realize that the disqualification from his January 8, 2008 separation could result in his being required to repay the benefits he had already received after opening a claim in June after a temporary separation from another employer. Failing to read and follow the instructions for filing an appeal is not a reason outside the appellant's control that deprived him from having a reasonable opportunity to file a timely appeal. The appellant did have a reasonable opportunity to file a timely appeal.

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 August 4, 2008 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 until the claimant requalified September 21, 2008.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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