IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MISTY J RADIL
2806 JANAN DR
BELLEVUE NE 68005-2823

IOWA WORKFORCE
DEVELOPMENT DEPARTMENT

Appeal Number: 06A-UI-06744-DT
OC: 05/21/06 R: 01
Claimant: Appellant (4)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-5 – Severance Pay
Section 96.5-7 – Vacation Pay
Section 96.3-7 – Recovery of Overpayment of Benefits
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Misty J. Radil (claimant) appealed a representative's June 15, 2006 decision (reference 02) that concluded she was overpaid unemployment insurance benefits for the two weeks ending June 10, 2006 due to the receipt of severance pay from Criterion Claim Solutions, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 27, 2006. The claimant participated in the hearing. Julie McCord appeared on the employer's behalf. During the hearing, Exhibits A-1 and A-2 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.

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last known address of record on June 15, 2006. The claimant received the decision on or about June 18, 2006. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by June 25, 2006. 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, June 26, 2006. The only appeal received by the Appeal Section is the claimant's letter of appeal of a different representative's decision issued on June 22, 2006 (reference 03), which was dated June 26 but postmarked on June 27, 2006. While that letter was addressed to the 1000 E. Grand address of the Appeals Section on the letter itself, the envelope was addressed to "PO Box 10332" which is the Claims Section at a different address. The claimant testified that shortly after receiving the initial decision on or about June 18 she had called her local Agency office at the number provided for asking questions or obtaining further information, and that the person to whom she spoke advised her to make copies of the three checks she had received upon separation and mail them with an appeal to the above post office box address, rather than to the Appeal Section address provided on the back of the representative's decision. The claimant asserted that she had done so even before the June 22 decision was issued. The Agency has no record of the receipt of this prior communication from the claimant.

The claimant started working for the employer on August 12, 2002. She worked full time as a recovery representative on a Monday through Friday work schedule. She was paid an annual salary of $28,922.40, with a gross amount of $1,205.10 paid bimonthly on the 15th and 30th of each month. Her last day of work was May 15, 2006. She received her regular pay on the morning of May 15 representing compensation for her work completed through that date. At the end of the workday on May 15, the claimant was laid off. She was given an envelope containing three checks, one for a gross amount of $1,205.10, representing two weeks severance pay, another for $547.75 for another week of severance pay, and the third in the gross amount of $342.25 for 25 hours of vacation time, using an hourly annualized rate of $13.69. The claimant cashed each of these checks.

The claimant established an unemployment insurance benefit year effective May 21, 2006. Her weekly benefit amount was calculated to be $337.00. The employer submitted a timely response to the May 23, 2006 notice of claim and reported payment of 342.50 in vacation pay with an undesignated time, and the payment of severance pay from "5-16-06" through "6-7-06" of $1,375.77. This may have been a net amount rather than a gross amount, as the gross amount of severance pay was in fact $1,752.85 ($1,205.10 + 547.75). In a separately issued decision on June 22, 2006 (reference 03) (concurrently reviewed in 06A-UI-06745-DT), the claimant was also found ineligible to receive unemployment insurance benefits until after June 17, 2006 due to the receipt of vacation pay.

The claimant filed weekly claims for the weeks ending May 27, June 3, June 10, and June 17, 2006. She reported wage, vacation, or severance payments the week ending May 27 in excess of her benefit amount, so no benefits were paid for that week. No wage, vacation, or severance payments were reported for the weeks ending June 3 and June 10, 2006, so benefit payments were made for those weeks on June 5 and June 12, respectively. As a result of representative's decision in this case on June 15, those weeks benefits were concluded to have been overpaid by another decision issued on June 15, 2006 (reference 02) (concurrently reviewed in 06A-UI-06744-DT). As a result, an offset for one of the weeks' benefits was made on June 19

against the claimant's then-believed eligibility for the week ending June 17, 2006; however, as noted above, the subsequent June 22 decision concluded that the claimant was also not eligible for benefits for the week ending June 17, and that she was therefore overpaid (actually overcredited) for benefits for that week, for which she had not reported any wage, vacation, or severance payment.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's June 15, 2006 decision.

Iowa Code § 96.6-2 provides in pertinent part:

> 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.

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 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. 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 of the United States Postal Service pursuant to 871 IAC 24.35(2), or other factor outside of the claimant's control. The administrative law judge further concludes that the later appeal of the June 22, 2006 decision should also be treated as a timely appeal of the June 15, 2006 decision 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 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 underlying substantive issue in this case is whether the claimant's severance pay was deducted for the correct period. By necessity, the question of whether the vacation pay was properly allocated must also be addressed.

Iowa Code § 96.5-5 provides:

> An individual shall be disqualified for benefits:
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> 5. Other compensation. For any week with respect to which the individual is receiving or has received payment in the form of any of the following:
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> a. Wages in lieu of notice, separation allowance, severance pay, or dismissal pay.
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> b. Compensation for temporary disability under the workers' compensation law of any state or under a similar law of the United States.
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> c. A governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment made under a plan maintained or contributed to by a base period or chargeable employer where, except for benefits under the federal Social Security Act or the federal Railroad Retirement Act of 1974 or the corresponding provisions of prior law, the plan's eligibility requirements or benefit payments are affected by the base period employment or the remuneration for the base period employment. However, if an individual's benefits are reduced due to the receipt of a payment under this paragraph, the reduction shall be decreased by the same percentage as the percentage contribution of the individual to the plan under which the payment is made.
>
> Provided, that if the remuneration is less than the benefits which would otherwise be due under this chapter, the individual is entitled to receive for the week, if otherwise eligible, benefits reduced by the amount of the remuneration. Provided further, if benefits were paid for any week under this chapter for a period when benefits, remuneration or compensation under paragraphs "a", "b", or "c", were paid on a retroactive basis for the same period, or any part thereof, the department shall recover the excess amount of benefits paid by the department for the period, and no employer's account shall be charged with benefits so paid. However, compensation for service-connected disabilities or compensation for accrued leave based on military service, by the beneficiary, with the armed forces of the United States, irrespective of the amount of the benefit, does not disqualify any individual, otherwise qualified, from any of the benefits contemplated herein.

Iowa Code § 96.5-7 provides:

> An individual shall be disqualified for benefits: …
>
> 7. Vacation pay.
>
> a. When an employer makes a payment or becomes obligated to make a payment to an individual for vacation pay, or for vacation pay allowance, or as pay in lieu of vacation,

such payment or amount shall be deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" hereof.

b. When, in connection with a separation or layoff of an individual, the individual's employer makes a payment or payments to the individual, or becomes obligated to make a payment to the individual as, or in the nature of, vacation pay, or vacation pay allowance, or as pay in lieu of vacation, and within ten calendar days after notification of the filing of the individual's claim, designates by notice in writing to the department the period to which the payment shall be allocated; provided, that if such designated period is extended by the employer, the individual may again similarly designate an extended period, by giving notice in writing to the department not later than the beginning of the extension of the period, with the same effect as if the period of extension were included in the original designation. The amount of a payment or obligation to make payment, is deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" of this subsection 7.

c. Of the wages described in paragraph "a" (whether or not the employer has designated the period therein described), or of the wages described in paragraph "b", if the period therein described has been designated by the employer as therein provided, a sum equal to the wages of such individual for a normal workday shall be attributed to, or deemed to be payable to the individual with respect to, the first and each subsequent workday in such period until such amount so paid or owing is exhausted. Any individual receiving or entitled to receive wages as provided herein shall be ineligible for benefits for any week in which the sums, so designated or attributed to such normal workdays, equal or exceed the individual's weekly benefit amount. If the amount so designated or attributed as wages is less than the weekly benefit amount of such individual, the individual's benefits shall be reduced by such amount.

d. Notwithstanding contrary provisions in paragraphs "a", "b", and "c", if an individual is separated from employment and is scheduled to receive vacation payments during the period of unemployment attributable to the employer and if the employer does not designate the vacation period pursuant to paragraph "b", then payments made by the employer to the individual or an obligation to make a payment by the employer to the individual for vacation pay, vacation pay allowance or pay in lieu of vacation shall not be deemed wages as defined in section 96.19, subsection 41, for any period in excess of one week and such payments or the value of such obligations shall not be deducted for any period in excess of one week from the unemployment benefits the individual is otherwise entitled to receive under this chapter. However, if the employer designates more than one week as the vacation period pursuant to paragraph "b", the vacation pay, vacation pay allowance, or pay in lieu of vacation shall be considered wages and shall be deducted from benefits.

e. If an employer pays or is obligated to pay a bonus to an individual at the same time the employer pays or is obligated to pay vacation pay, a vacation pay allowance, or pay in lieu of vacation, the bonus shall not be deemed wages for purposes of determining benefit eligibility and amount, and the bonus shall not be deducted from unemployment benefits the individual is otherwise entitled to receive under this chapter.

871 IAC 24.16(3) provides:

(3) If the employer fails to properly notify the department within ten days after the notification of the filing of the claim that an amount of vacation pay, either paid or owed,

is to be applied to a specific vacation period, the entire amount of the vacation pay shall be applied to the one-week period starting on the first workday following the last day worked as defined in subrule 24.16(4). However, if the individual does not claim benefits after layoff for the normal employer workweek immediately following the last day worked, then the entire amount of the vacation pay shall not be deducted from any week of benefits.

871 IAC 24.13(1) provides:
Procedures for deducting payments from benefits. Any payment defined under subrules 24.13(2) and 24.13(3) made to an individual claiming benefits shall be deducted from benefits in accordance with the following procedures until the amount is exhausted; however, vacation pay which is deductible in the manner prescribed in rule 24.16(96) shall be deducted first when paid in conjunction with other deductible payments described in this rule unless otherwise designated by the employer: The individual claiming benefits is required to designate the last day paid which may indicate payments made under this rule. The employer is required to designate on the Form 65–5317, Notice of Claim, the amount of the payment and the period to which the amount applies. If the individual or the employer does not designate the period to which the amount of the payment applies, and the unemployment insurance representative cannot otherwise determine the period, the unemployment insurance representative shall determine the week or weeks following the effective date of the claim to which the amount of the payment applies by dividing the amount of the payment by the individual's average weekly wage during the highest earnings quarter of the individual's base period. The amount of any payment under subrule 24.13(2) shall be deducted from the individual's weekly benefit amount on the basis of the formula used to compute an individual's weekly benefit payment as provided in rule 24.18(96). The amount of any payment under subrule 24.13(3) shall be fully deducted from the individual's weekly benefit amount on a dollar–for–dollar basis.

The claimant's 25 hours of paid vacation should have been allocated to eight hours each on May 16, May 17, and May 18, with the additional hour carried over to May 19, 2006. The two weeks of additional severance pay and one week of regular severance pay should have begun at that time. Applying the annualized hourly rate of $13.69, the severance payments covered 128.04 hours. Seven hours should have been applied to May 19, 2006; 40 should have been applied to the workweek ending May 26, 2006; 40 should have been applied to the workweek ending June 2, 2006, 40 should have been applied to the workweek ending June 9, 2006, and the remaining 1.04 hours should have been applied to June 12, 2006.

Therefore, the 25 hours of vacation pay and seven hours of the severance pay had been applied before the effective date of the claimant's claim for benefits. For the first week of her claim, ending May 27, 2006, 40 hours of severance applied, totaling $547.60, and she had no remaining eligibility for that week. For the claim week ending June 3, 2006, 40 hours of severance applied, totaling $547.60, and she had no remaining eligibility for that week. For the claim week ending June 10, 2006, 40 hours of severance applied, totaling $547.60, and she had no remaining eligibility for that week. For the claim week beginning June 11 and ending June 17, 2006, 1.04 hours of severance applied, totaling $14.24 (rounded down to $14.00), and she had remaining eligibility of $323.00 for that week. As of June 11, 2006, after deduction of the remaining $14.00 of severance, benefits are allowed if the claimant is otherwise eligible.

The remaining issue in this case is whether the claimant is overpaid or overcredited unemployment insurance benefits as a result of the payments or offset credits made for the weeks ending June 3, June 10 or June 17, 2006.

Iowa Code § 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
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> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Due to the above analysis, the claimant was not eligible for the benefits she had received for the weeks ending June 3 and June 10, 2006. She was overpaid $674.00 for those two weeks. She had initially been credited with the entire $337.00 for the week ending June 17, but subsequently her entire eligibility for that week had been disallowed; however, pursuant to the above analysis, her benefits for that week should have only been reduced by $14.00, and she would have been entitled to the credit of the remaining $323.00. Her total overpayment with the $14.00 overcredit would have increased from $674.00 to $684.00, but then reduced by a proper offset credit of $323.00 to $361.00. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's June 15, 2006 decision (reference 02) is modified in favor of the claimant. The appeal in this case is treated as timely. The claimant was not eligible for unemployment insurance benefits for the period ending June 10, 2006 due to the receipt of a combination of vacation and severance pay. The claimant was overpaid benefits for those two weeks in the amount of $674.00.

ld/pjs