

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROSS D TOMMINGO

Claimant

APPEAL NO. 09A-UI-15406-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STIVERS MIDTOWN LINCOLN & MERC INC

Employer

Original Claim: 06/14/09

Claimant: Appellant (2)

Section 96.5-3-a – Work Refusal
Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Ross D. Tommingo (claimant) appealed a representative's July 23, 2009 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits in conjunction with an asserted offer of work with Stivers Midtown Lincoln & Mercury, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 16, 2009. The claimant participated in the hearing. The employer failed to respond to the hearing notice and provide a telephone number at which a witness or representative could be reached for the hearing and did not participate in the hearing. This appeal was consolidated for hearing with one related appeal, 09A-UI-15407-DT. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it can be treated as timely?

Is the claimant disqualified due to refusing an offer of suitable work?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last known address of record on July 23, 2009. The claimant did not receive the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by August 2, 2009. The appeal was not filed until the claimant appealed the resulting overpayment decision on October 14, 2009, which is after the date noticed on the disqualification decision.

The claimant started working for the employer on January 11, 2008. He worked full-time as a body technician in the employer's car dealership. His last day of work was June 10, 2009, when he was laid off for lack of work.

The claimant traveled out of Iowa to seek work in Missouri. On or about June 24, he called the employer to inquire about a paycheck for accrued vacation pay. While speaking to the employer's representative, the representative asked him if he would like to come back to work "if things picked up in the future," to which the claimant responded, "I don't know," as he believed he was about to secure employment in Missouri, which he ultimately did. As a result, he ceased making weekly claims beginning July 5, 2009. The employer did not make any further contact to the claimant to indicate that, in fact, work had picked up enough that it did want the claimant to come back to work.

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.

The administrative law judge concludes that the 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 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).

The substantive issue in this case is whether the claimant refused a suitable offer of work. Iowa Code § 96.5-3 provides that a claimant will be disqualified for benefits if he has failed without good cause to accept suitable work when offered. However, applying this statute, 871 IAC 24.24(1)a provides that in order for there to be a disqualification for a refusal of work,

there must have been a bona fide offer of work to the claimant by personal contact and a definite refusal was made by the claimant.

In this case, there was no definite bona fide offer of work and no definite refusal of work. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The appeal is treated as timely. The representative's July 23, 2009 decision (reference 01) is reversed. The claimant did not refuse a suitable offer of work. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw