

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALAN N ZISKOVSKY
Claimant

APPEAL NO. 11A-UI-14486-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

OC: 10/25/09
Claimant: Appellant (1)

Section 96.4-3 – Able and Available
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated March 12, 2010, reference 02, which held claimant ineligible for unemployment insurance benefits as of February 28, 2010, due to back surgery. After due notice, a telephone conference hearing was scheduled for and held on December 5, 2011. Claimant participated. The record consists of the testimony of Alan Ziskovsky. Official notice is taken of agency records.

ISSUE:

Whether the claimant filed a timely appeal.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The claimant established an original claim for benefits with an original claim date of October 25, 2009. On March 12, 2010, a representative issued a decision that held that the claimant was ineligible for unemployment insurance benefits as of February 28, 2010, because he was not able and available for work. The decision also states that the decision would become final unless an appeal was postmarked by March 22, 2010, or received by the appeal section on that date. The claimant's appeal was filed on November 4, 2011, after he received a decision dated October 26, 2011, reference 05, where he was assessed an overpayment of \$427.00 based on the reference 02 decision.

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 have a reasonable opportunity to file an appeal postmarked as timely.

The administrative law judge concludes that failure to have the appeal timely postmarked within the time prescribed by the Iowa Employment Security Law was not due to error, misinformation, delay, or other action of the United States Postal Service pursuant to 871 IAC 24.35(2). The claimant testified that he did not appeal the reference 02 decision. The claimant had self-reported to the agency that he was unable to work as of February 28, 2010, due to back surgery. Since the claimant's appeal is not timely, the administrative law judge has no jurisdiction to rule on the merits of the claimant's claim for unemployment insurance benefits.

DECISION:

The claimant failed to file a timely appeal from the representative's decision dated March 12, 2010, reference 02. That decision, which concluded that the claimant was not eligible to receive unemployment insurance benefits, as of February 28, 2010, remains in full force and effect.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs