

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL R ESTEP
Claimant

APPEAL NO. 10A-UI-06498-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAREWAY STORES
Employer

OC: 01/24/10
Claimant: Respondent (1-R)

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

STATEMENT OF THE CASE:

The employer, Fareway, filed an appeal from a decision dated March 2, 2010, reference 03. The decision allowed benefits to the claimant, Michael Estep. After due notice was issued a hearing was held by telephone conference call on June 21, 2010. The claimant participated on his own behalf. The employer participated by Meat Department Manager Wade Schueler and was represented by Corporate Council Garrett Picklapp. Exhibit D-1 was admitted into the record.

ISSUE:

The issue is whether the appeal is timely.

FINDINGS OF FACT:

A disqualification decision was mailed to the employer's last-known address of record on March 2, 2010. The employer received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by March 12, 2010. The appeal was not filed until April 28, 2010, which is after the date noticed on the decision.

The employer filed the appeal in the mistaken belief it would be permitted to provide testimony about a period of the claimant's availability which occurred after the appeal date had passed.

REASONING AND CONCLUSIONS OF LAW:

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).

(1) The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

The employer's appeal was not timely in regards to the circumstances occurring before the appeal date passed. But new circumstances after the appeal date should be determined as to availability and that issue should be remanded.

DECISION:

The decision of the representative dated March 2, 2010, reference 03, is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect. The claimant is eligible for unemployment benefits.

The issue of whether the claimant was able and available for work for the period April 10 through 24, 2010, is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs