

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

KATHRYN C PILLER

Claimant,

and

SHELBY CO BOARD OF CATHOLIC
EDU.

Employer.

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HEARING NUMBER: 09B-UI-13098

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1

DECISION

The Claimant submitted new and additional evidence, which the Board accepted as it was both material and relevant to the issue to be determined, and it had in fact been faxed but not received. The Board allowed the employer an opportunity to respond and is now ready to issue a decision in consideration of the same.

FINDINGS OF FACT:

A claims representative decision was mailed to the Claimant at her last known address on August 17, 2009, and received by the Claimant before the due date. The decision contains a warning that any appeal must be postmarked or returned not later than ten days from the initial mailing date. Based on the credible evidence, the Claimant did fax a timely appeal on August 21, 2009.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code 96.6 provides:

2. *Initial determination.* ... 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 - but not conclusive - evidence of the date of mailing.

There is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and the Administrative Law Judge and this Board have no authority to change the decision of representative if a timely appeal is not filed. Franklin v. Iowa Dept. Job Service, 277 N.W.2d 877, 881 (Iowa 1979). The ten day period for appealing an initial determination concerning a claim for benefits has been described as jurisdictional. Messina v. Iowa Dept. of Job Service, 341 N.W.2d 52, 55 (Iowa 1983); Beardslee v. Iowa Dept. Job Service, 276 N.W.2d 373 (Iowa 1979). The only basis for changing the ten-day period would be where notice to the appealing party was constitutionally invalid. E.g. Beardslee v. Iowa Dept. Job Service, 276 N.W.2d 373, 377 (Iowa 1979). The question in such cases becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. Hendren v. Iowa Employment Sec. Commission, 217 N.W.2d 255 (Iowa 1974); Smith v. Iowa Employment Sec. Commission, 212 N.W.2d 471 (Iowa 1973). The question of whether the Claimant has been denied a reasonable opportunity to assert an appeal is also informed by rule 871-24.35(2) which states that "the submission of any ...appeal...not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service."

The question in this case is whether the appeal was actually ever faxed. If it was not then the date of filing is "never". If so then the date of filing is the date the document was faxed. 871—26.4(2). The Claimant claims that she did fax the appeal on time and offers first-hand testimony that she did, as well as documentary proof. This documentary proof was new and additional evidence which we have allowed. We allowed the new and additional evidence in this matter because the Claimant submits to us proof that the evidence of the 8/21 fax was submitted, again by FAX, to the Administrative Law Judge on September 29. We do think it odd that the Claimant argues she faxed documents on two separate occasions, from two separate locations, and twice the documents were mislaid. But the documentary proof appears genuine and is convincing. The FAX number shown is correct, and the dates are timely. Under the circumstances we find it credible that the Petitioner did timely fax the appeal and that it has been mislaid. Applying the rules to this state of facts we find that the appeal was filed on August 21 and that it was therefore timely.

John A. Peno

Elizabeth L. Seiser

RRA/fnv

Monique F. Kuester