

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KRISTINA M MESSERLY
Claimant

APPEAL NO. 10A-UI-15638-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OZARK AUTOMOTIVE DISTRIBUTORS INC
Employer

OC: 09/13/09
Claimant: Respondent (1)

Section 96.5(2) - Discharge
Section 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

The employer filed an appeal from the October 14, 2009, reference 01, decision that allowed benefits to the claimant in connection with an August 25, 2009 separation. After due notice was issued, a hearing was held by telephone conference call on January 19, 2011. Claimant participated. Whitney Smith represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 10A-UI-15639-JTT. Department Exhibits D-1, D-2, and D-3 were received into evidence. The administrative law judge took official notice of the agency administrative records indicating no appeal was filed from the above decision until November 12, 2010. The administrative law judge took official notice of the Agency's administrative record of quarterly statements of charges mailed to the employer.

ISSUE:

Whether the employer's appeal from the October 14, 2009, reference 01, decision is timely.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On October 14, 2009, Workforce Development mailed a copy of the October 14, 2009, reference 01, decision to the employer's last known address of record. The decision allowed benefits to the claimant and indicated the employer's account could be charged. The employer received the decision in a timely manner, prior to the deadline for appeal. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by October 24, 2009.

The October 14, 2009, reference 01, decision was entered in connection with a claim year that started September 13, 2009. That particular claim year ended on September 11, 2010.

A new claim year was established for the claimant effective September 12, 2010. On November 4, 2010, a workforce development representative entered a reference 02 decision that again allowed benefits to the claimant and indicated the employer's account could be charged in connection with the August 25, 2009 separation. The decision indicated that a decision entered in connection with a prior claim concerning the same separation continued in effect.

On November 11, 2010, the employer faxed an appeal from the November 4, 2010, reference 02, decision to the Appeals Section. The Appeals Section received the appeal the same day. The Appeals Section treated the employer's appeal from the November 4, 2010, reference 02, decision as an appeal also from the October 14, 2009, reference 01, decision.

The Appeals Section did not docket employer appeal from the October 14, 2009, reference 01, decision until November 2010 because no appeal had been received prior to that time. Between entry of the October 14, 2009, reference 01, decision and the filing of the employer's appeal November 2010, Workforce Development mailed multiple quarterly statements of charges to the employer that contained assessments for benefits paid to the claimant.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. 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. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". 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. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

The appeal in this case was filed on November 11, 2010, when the Appeals Section received the employer's faxed appeal.

The evidence in the record establishes that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. Indeed, more than a year passed between the entry of the October 14, 2009, reference 01, decision and the employer's appeal on November 11, 2010. 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 have a reasonable opportunity to file a timely appeal.

No appeal shall be considered timely if the delay in filing was unreasonable, as determined by the division after considering the circumstances in the case. See 871 IAC 24.35(2)(c).

The administrative law judge concludes that the appellant's failure to file a timely appeal from the October 14, 2009, reference 01, decision within the time prescribed by the Iowa Employment Security Law was not due to any Workforce Development error or misinformation or delay or other action of the United States Postal Service. See 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code section 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The Agency representative's October 14, 2009, reference 01, decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw