

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

DEBRA A RICHARDS
Claimant

BROWNS CREW CAR OF WYOMING INC
Employer

APPEAL 16A-UI-02220-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/10/16
Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 2, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. Telephone hearings were held on March 16 and 17, 2016. The claimant participated personally. The employer participated through Carla Fisch. Amy Armstrong also testified for the employer. Department Exhibits D-1 and D-2 were admitted into evidence.

ISSUE:

Is the appeal timely?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An unemployment insurance decision which disqualified the claimant from benefits based on separation was mailed to the claimant's last-known address of record on February 2, 2016 (Department Exhibit D-1). The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 12, 2016 (Department Exhibit D-1). The appeal was not filed until February 19, 2016, which is after the date noticed on the unemployment insurance decision (Department Exhibit D-2).

The claimant received the decision on February 16, 2016. At the hearing, the claimant indicated the address of record is not for her personal residence, but for her sister. The claimant offered multiple reasons for why she did receive the initial decision. The claimant asserted she expected to receive a decision by way of phone call from the deputy after the fact-finding interview and did not check the mail at her sister's home. The claimant also said her sister was on vacation from February 9 to 16, 2016, and refused to give her a key with access to the mailbox. Further, the claimant indicated she did not receive the decision sooner because she travels for work and was traveling during the period of time that the decision was sent.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant's appeal is untimely.

Iowa Code Section 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 Iowa Supreme Court has ruled that appeals from unemployment insurance decisions must be filed within the time limit set by statute and the administrative law judge has no authority to review a decision if a timely appeal is not filed. *Franklin v. IDJS*, 277 N.W.2d 877, 881 (Iowa 1979); *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). In this case, the claimant's appeal was filed after the deadline for appealing expired. 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. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

The next question is whether the claimant had a reasonable opportunity to file 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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witness who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant had a reasonable opportunity to file a timely appeal. .

The claimant offered several reasons she did not receive the initial decision (Department Exhibit D-1) before the appeal was due, including traveling for work and failure to make arrangements to access her sister's mailbox while she went on vacation. In addition, the administrative law judge was not persuaded by the claimant's assertion that she expected a decision by way of a phone call from the fact-finder, and that is why she did not check her mail sooner. Even if the

claimant did not receive the February 2, 2016 decision until she checked her mail on February 16, 2016, the claimant waited another three days before filing the appeal, even though the last day to appeal had already lapsed. Based on the evidence presented, the claimant's failure to file a timely appeal was not due to any Agency error or misinformation or delay or other action of the United States Postal Service, which under 871 IAC 24.35(2) would excuse the delay in filing an appeal. Since the appeal was not filed timely, there is no jurisdiction to make a decision on the merits of the appeal. See, *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The February 2, 2016, (reference 01) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/pjs