

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JACOB D LILL

Claimant

APPEAL NO: 14A-UI-05519-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KESSEL CONSTRUCTION INC

Employer

OC: 12/08/13

Claimant: Respondent (1)

Section 96.5-3-a – Work Refusal
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Kessel Construction, Inc. (employer) appealed a representative's January 21, 2014 decision (reference 01) that concluded Jacob D. Lill (claimant) was qualified to receive unemployment insurance benefits in conjunction with an assertion that he had refused an offer of work with the employer. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 19, 2014. A review of the Appeals Section's conference call system indicates that the claimant failed to respond to the hearing notice and register a telephone number at which he could be reached for the hearing and did not participate in the hearing. Barbara Kessel appeared on the employer's behalf and presented testimony from one other witness, Brian Kessel. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the employer's appeal timely or are there legal grounds under which it can be treated as timely?

Is the claimant disqualified due to refusing an offer of suitable work without good cause?

FINDINGS OF FACT:

The representative's decision was mailed to the employer's last-known address of record on January 21, 2014. The employer received the decision. The decision stated that "You [the claimant] are eligible to receive unemployment insurance benefits as long as you meet all the other eligibility requirements. Explanation of Decision: Our records indicate on 07/24/13, you did not accept an offer of work with Kessel Construction Inc. At the time, you did not have a valid unemployment insurance claim for benefits." (Emphasis added.) The decision also contained a warning that an appeal must be postmarked or received by the Appeals Section by January 31, 2014. The employer took no action to appeal the decision until May 13, 2014 when it protested the first quarter 2014 statement of charges which included charges for benefits paid to the claimant. The employer did not appeal until after it received the quarterly statement of

charges because it had misread the representative's decision and thought that it was indicating that the claimant was not eligible because he had refused an offer of work.

The claimant started working for the employer on September 12, 2012. He worked as a laborer on an occasional, temporary basis as needed. His last day of work was February 26, 2013. At least from April 1, 2013 through July 23, 2013 the employer had no work available for the claimant. On July 24, 2013 the employer contacted the claimant about some available work, but was told that he was working another job elsewhere.

The claimant established an unemployment insurance benefit year effective December 8, 2013. He had no claim in effect during July 2013.

REASONING AND CONCLUSIONS OF LAW:

If a party fails to make a timely appeal of a representative's decision and there is no legal excuse under which the appeal can be deemed to have been made timely, the decision as to the merits has become final and is not subject to further review. Iowa Code § 96.6-2 provides that unless the affected party (here, the employer) 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 then 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).

A party does not have a reasonable opportunity to file a timely appeal if the delay is due to Agency error or misinformation or to delay or other action of the United States postal service. Rule 871 IAC 24.35(2). Failing to correctly read and follow the instructions for filing an appeal is not a reason outside the appellant's control that deprived the appellant from having a reasonable opportunity to file a timely appeal. The appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the prescribed time was not due to a legally excusable reason so that it can be treated as timely. The administrative law judge further concludes that because the appeal was not timely, the

administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal, regardless of whether the merits of the appeal would be valid. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

However, in the alternative, even if the appeal were to be deemed timely, the administrative law judge would affirm the representative's decision on the merits.

The claimant essentially worked for the employer on an as-needed temporary basis for spot jobs. As such, even though the employer considered the claimant "still employed" in between the spot jobs, under the law, upon completion of each job the claimant was technically laid off for lack of work. Rules 871 IAC 24.26(19); 871 IAC 24.1(113)a. Therefore, his most recent separation from this employment occurred February 26, 2013; the potential refusal on July 24, 2013 does not create a new separation. At best, it creates a question as to whether the claimant could be disqualified for refusing a suitable offer of work without good cause. Rule 871 IAC 24.26(19).

Iowa Code § 96.5-3-a provides in pertinent part:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. . . . To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph.

Rule 871 IAC 24.24(8) provides:

(8) Refusal disqualification jurisdiction. Both the offer of work or the order to apply for work and the claimant's accompanying refusal must occur within the individual's benefit year, as defined in subrule 24.1(21), before the Iowa code subsection 96.5(3) disqualification can be imposed. It is not necessary that the offer, the order, or the refusal occur in a week in which the claimant filed a weekly claim for benefits before the disqualification can be imposed.

Rule 871 IAC 24.24(7) provides:

(7) Gainfully employed outside of area where job is offered. Two reasons which generally would be good cause for not accepting an offer of work would be if the claimant were gainfully employed elsewhere or the claimant did not reside in the area where the job was offered.

Here, the claimant did not have an open claim at the time an offer of work was made in July 2013, so any refusal would not be effective to disqualify him from benefits. Further, his refusal because of being gainfully employed elsewhere is a non-disqualifying reason for him to have refused the offer of work, even if it had been made during a time he had an open claim for benefits. Benefits are allowed, if the claimant is otherwise eligible.

The final wages paid by the employer to the claimant are still within the claimant's base period of his current claim for unemployment insurance benefits. The employer's account therefore remains chargeable for benefits that have been paid to the claimant.

DECISION:

The representative's January 21, 2014 decision (reference 01) is affirmed. The appeal in this case was not timely, and the decision of the representative has become final and remains in full force and effect. Benefits are allowed, if the claimant is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs