

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Department's Exhibit 1, the administrative law judge finds: An authorized representative of Iowa Workforce Development issued a decision in this matter on September 16, 2005, reference 01, determining that the claimant was not eligible to receive unemployment insurance benefits because records indicate she was discharged from work on August 30, 2005 for conduct not in the best interest of her employer. This decision was sent to the claimant on the same day. The decision was sent to the same address as shown on the claimant's appeal. This decision indicated that an appeal had to be postmarked or otherwise received by the appeals section by September 26, 2005. However, as shown at Department Exhibit 1, the claimant's appeal was delivered to the appeals section on October 18, 2005 making the appeal 22 days late. The appeal was dated October 18, 2005. The reason that the appeal was late was that the claimant was out of town on a family emergency from September 17, 2005 until she returned on October 10, 2005. When the claimant returned on October 10, 2005, the claimant received the appeal along with the rest of her mail. The claimant then testified that she could not appeal the decision because she was sick requiring bed rest with issues concerning her pregnancy. The claimant testified that no one was there to help her with the appeal. However, the claimant was able to prepare her meals and see to her other care. The claimant opened the appeal, but did not read it thoroughly and did not see the appeal deadline.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant filed a timely appeal or, if not, whether the claimant demonstrated good cause for such failure. The administrative law judge concludes that the claimant's appeal was not timely and that the claimant did not demonstrate good cause for the delay in the filing of her appeal and, as a consequence, the claimant's appeal should not be accepted and the administrative law judge has no jurisdiction to reach the remaining issue.
2. Whether the claimant's separation from employment was a disqualifying event. The administrative law judge does not have jurisdiction to reach that issue.

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

871 IAC 24.35(1) provides:

(1) Except as otherwise provided by statute or by department rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the department shall be considered received by and filed with the department:

a. If transmitted via the United States postal service or its successor, 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 is 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.

b. If transmitted by any means other than the United States postal service or its successor, on the date it is received by the department.

871 IAC 24.35(2) provides:

- (2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.
  - a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
  - b. The department shall designate personnel who are to decide whether an extension of time shall be granted.
  - c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.
  - d. If submission is not considered timely, although the interested party contends that the delay was due to department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

The administrative law judge concludes that the claimant has the burden to prove that her appeal was timely or that she had good cause for the delay in the filing of her appeal. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence, either that her appeal was timely, or that she had good cause for the delay in the filing of her appeal. On its face as shown at Department Exhibit 1, the claimant's appeal is 22 days late. The claimant received a copy of the decision dated September 16, 2005, reference 01, from which she seeks to appeal, in the mail properly and timely. However, the claimant was out of town until October 10, 2005 and did not open the appeal until she returned on October 10, 2005. At that time, the claimant found the appeal with her other mail. The claimant opened the appeal but did not read it thoroughly and did not see the deadline. The claimant then did not appeal for another eight days. The claimant testified that she was sick in bed requiring bed rest because of an issue with her pregnancy. The claimant testified that there was no one to help her prepare the appeal. However, the claimant's testimony is not credible. The claimant was able to prepare her meals and tend to her other care. The fact that the claimant was out of town until October 10, 2005, belies the claimant's testimony that she was thereafter restricted to bed rest. Nevertheless, there is no evidence that the claimant's delay in filing her appeal was due to any Workforce Development Department error or misinformation or to delay or other action by the United States Postal Service. Accordingly, the administrative law judge concludes that the claimant's attempted appeal of the decision dated September 16, 2005, reference 01, is not timely and the claimant has not demonstrated good cause for the delay in the filing of her appeal. Therefore, the administrative law judge concludes that the claimant's appeal should not be accepted and that he lacks jurisdiction to make a determination with respect to the nature of the claimant's separation from employment. The administrative law judge finally concludes that the representative's decision of September 16, 2005, reference 01, should remain in full force and effect.

DECISION:

The representative's decision of September 16, 2005, reference 01, is to remain in full force and effect. The claimant, Jamie A. Lyon is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. The claimant's attempted appeal is not timely and the claimant has not demonstrated good cause for its delay.

dj/kjw