

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRIAN A KUHN**  
Claimant

**APPEAL NO: 08A-UI-09490-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 08/17/08 R: 02**  
**Claimant: Appellant (1)**

Section 96.5-2-a – Discharge  
Section 96.6-2 - Timeliness of Appeal

**STATEMENT OF THE CASE:**

Brian A. Kuhn (claimant) appealed a representative's September 15, 2008 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Hy-Vee, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 30, 2008. The claimant participated in the hearing. Tim Speir appeared on the employer's behalf and presented testimony from one witness, Ryan Barton. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

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

**FINDINGS OF FACT:**

The claimant had participated in the fact-finding interview in this case and had been advised by the Claims representative that the losing party would only have a specific period of time to file an appeal. The representative's decision was mailed to the claimant's last-known address of record on September 15, 2008. The claimant received the decision on or by September 19. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by September 25, 2008, a Monday. The appeal was not filed until it was hand-delivered to a local Agency office on October 17, 2008, which is after the date noticed on the disqualification decision. The reason for the delay was that the claimant did not initially read the decision, he was occupied in caring for a new baby, had only partial access to a vehicle, and could not afford a stamp to mail an appeal.

## 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 claimant) 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. 871 IAC 24.35(2). The appellant did have a reasonable opportunity to file a timely appeal. Failing to 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 care of a new baby, while important, cannot conceivably occupy all of the claimant's waking hours so as to preclude addressing important legal matters, where he had been advised even at the time of the fact-finding interview that if he was disqualified by the representative's decision that he would only have a certain amount of time to make an appeal. The cost of a first-class postage stamp to file an appeal is not so cost-prohibitive to excuse the filing of a timely appeal. None of the reasons presented are so outside of the claimant's control so as to preclude his having had a reasonable opportunity to make 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).

**DECISION:**

The representative's September 15, 2008 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 denied.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs