

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHAD L PERKINS

Claimant

APPEAL NO. 17A-UI-02931-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WILKEN AND SONS INC

Employer

OC: 09/25/16

Claimant: Appellant (1)

Section 96.5-5 – Disqualification Due to Other Compensation
871 IAC 24.13(3)d – Fully Deductible Payments from Benefits
Section 96.23 – Base Period Exclusion
Section 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

Chad Perkins (claimant) appealed a representative's January 10, 2017, decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits. Wilken and Sons (employer) account will not be charged. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for April 25, 2017. The claimant was represented by Roger Sutton, Attorney at Law, and participated personally. The employer provided a telephone number but could not be reached at the time of the hearing. The administrative law judge left a message for the employer. Exhibit D-1 was received into evidence. The claimant offered and Exhibits A and B were received into evidence.

ISSUE:

The issue is whether the appeal was filed in a timely manner and, if so, whether the claimant qualifies to substitute workers' compensation benefits as wage credits on his claim.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant performed work for the employer from April 2014, to August 11, 2014, as a full-time labor. He suffered a work-related injury on August 11, 2014, and received disability payments until January 28, 2016. The claimant received temporary total disability workers' compensation benefits from the third quarter of 2014, through the third quarter of 2015.

On September 25, 2016, the claimant filed for unemployment insurance benefits. His base period of employment was from the second quarter of 2015, through the first quarter of 2016. The claimant had no wage credits during his base period of employment. During his base period of employment he received temporary total disability for workers' compensation benefits during two of the four quarters, the second and third quarters of 2015.

A disqualification decision was mailed to the claimant's last-known address of record on January 10, 2017. He did receive the decision within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by January 20, 2017. A workforce employee notified him of the decision in early January 2017, and told him he should file an appeal. On February 9, 2017, the claimant spoke with a workforce employee on the telephone. The employee advised the claimant to file an appeal to correct issues. On March 1, 2017, the claimant spoke to a workforce employee at the Mason City office. She told the claimant he should appeal. The claimant looked at the Iowa Workforce Development website but did not appeal he met with his attorney. The appeal was not filed until March 14, 2017, which is after the date noticed on the disqualification decision.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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).

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 not receive the decision within ten days of the mailing date. After he found out about the decision he took approximately two months to file his appeal.

The administrative law judge concludes that his failure to file a timely appeal after receiving notice of the decision was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 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).

Even if the appeal were filed in a timely manner, the administrative law judge concludes the claimant could not use workers' compensation benefits as wage credits on this unemployment claim.

Iowa Code § 96.5(5) provides:

An individual shall be disqualified for benefits:

5. Other compensation.

a. For any week with respect to which the individual is receiving or has received payment in the form of any of the following:

- (1) Wages in lieu of notice, separation allowance, severance pay, or dismissal pay.
- (2) Compensation for temporary disability under the workers' compensation law of any state or under a similar law of the United States.
- (3) A governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment made under a plan maintained or contributed to by a base period or chargeable employer where, except for benefits under the federal Social Security Act or the federal Railroad Retirement Act of 1974 or the corresponding provisions of prior law, the plan's eligibility requirements or benefit payments are affected by the base period employment or the remuneration for the base period employment. However, if an individual's benefits are reduced due to the receipt of a payment under this subparagraph, the reduction shall be decreased by the same percentage as the percentage contribution of the individual to the plan under which the payment is made.

b. Provided, that if the remuneration is less than the benefits which would otherwise be due under this chapter, the individual is entitled to receive for the week, if otherwise eligible, benefits reduced by the amount of the remuneration. Provided further, if benefits were paid for any week under this chapter for a period when benefits, remuneration or compensation under paragraph "a", subparagraph (1), (2), or (3), were paid on a retroactive basis for the same period, or any part thereof, the department shall

recover the excess amount of benefits paid by the department for the period, and no employer's account shall be charged with benefits so paid. However, compensation for service-connected disabilities or compensation for accrued leave based on military service by the beneficiary with the armed forces of the United States, irrespective of the amount of the benefit, does not disqualify any individual otherwise qualified from any of the benefits contemplated herein. A deduction shall not be made from the amount of benefits payable for a week for individuals receiving federal social security pensions to take into account the individuals' contributions to the pension program.

Iowa Admin. Code r. 871-24.13(3)d provides:

(3) Fully deductible payments from benefits. The following payments are considered as wages; however, such payments are fully deductible from benefits on a dollar-for-dollar basis:

d. Workers' compensation, temporary disability only. The payment shall be fully deductible with respect to the week in which the individual is entitled to the workers' compensation for temporary disability, and not to the week in which such payment is paid.

Iowa Code § 96.23(1), (2) provides:

1. The department shall exclude three or more calendar quarters from an individual's base period, as defined in section 96.19, subsection 3, if the individual received workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17 or indemnity insurance benefits during those three or more calendar quarters, if one of the following conditions applies to the individual's base period:

- a. The individual did not receive wages from insured work for three calendar quarters.
- b. The individual did not receive wages from insured work for two calendar quarters and did not receive wages from insured work for another calendar quarter equal to or greater than the amount required for a calendar quarter, other than the calendar quarter in which the individual's wages were highest, under section 96.4, subsection 4, paragraph a.

2. The department shall substitute, in lieu of the three or more calendar quarters excluded from the base period, those three or more consecutive calendar quarters, immediately preceding the base period, in which the individual did not receive such workers' compensation benefits or indemnity insurance benefits.

When a claimant receives workers' compensation during three or more calendar quarters of the base period of his claim, the claimant can substitute wages during calendar quarters before the claimant's base period. The claimant did not receive workers' compensation for total temporary disability during three or more calendar quarters in the claimant's current base period. He received such compensation in two quarters. As such, the claimant lacks the documentation to support his request to have his claim redetermined by substituting calendar quarters before his base period.

DECISION:

The January 10, 2017, representative's decision (reference 01) is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect. The claimant's request to have his claim redetermined by using workers' compensation benefits as wage credits on this unemployment claim is denied.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs