

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**KOLTON J EALY**  
Claimant

**CALVIN ROCKETT LLC**  
Employer

**APPEAL 17R-UI-03443-JCT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 12/11/16**  
**Claimant: Respondent (1)**

Iowa Code § 96.6(2) – Timeliness of Appeal  
Iowa Code § 96.6(2) – Timeliness of Protest

**STATEMENT OF THE CASE:**

The employer appealed an unemployment insurance decision dated January 10, 2017, (reference 03), that concluded it had failed to file a timely protest regarding the claimant's separation of employment and no disqualification from receiving unemployment insurance benefits could be imposed. A first hearing was scheduled but not conducted for February 22, 2017. The employer's appeal was dismissed for a failure to appear. The employer successfully filed a request for reopening to the Employment Appeal Board, who remanded the matter for a second hearing. The parties were properly notified about the hearing. A telephone hearing was held on April 19, 2017. The claimant did not respond to the hearing notice instructions and did not participate. The employer participated through Timothy Shore, owner. Witness, Allison Shore, was unavailable when called for the hearing.

Department Exhibits D-1, D-2 and D-3 were received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents and WAGE-A. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Is the appeal timely?  
Did the claimant file a timely protest to the notice of claim?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: An initial decision was mailed to the employer's address of record on January 10, 2017. The employer has three individuals who collect the mail daily or almost daily. The employer's address of record is the employer's physical location of business/restaurant. The employer was open and operating between January 10 and 20, 2017. The employer witnesses did not know who retrieved the mail containing the initial decision or when it was received by the employer. Customarily, since the mail is addressed in care of the employer's account, the mail is collected for the accountant, Diane Blue, and delivered to her once a week. She will then return any mail

back to the employer, such as unemployment mail, so the employer can respond. There was no evidence presented that the initial decision was not received by the employer within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by January 20, 2017. (Department Exhibit D-1). The employer filed its appeal via email (for two claimants) on January 31, 2017 (Department Exhibit D-2). No evidence was presented that the employer attempted to file an appeal before January 31, 2017.

## **REASONING AND CONCLUSIONS OF LAW:**

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

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.

In addressing an issue of timeliness of an appeal, the Iowa Supreme Court concluded that when a statute creates a right to appeal and limits the time for appealing, compliance with the time limit is mandatory and jurisdictional. *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979). 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. Iowa Dep't of Job Serv.*, 277 N.W.2d 877, 881 (Iowa 1979).

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 record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed.

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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). Based on the evidence presented, the record shows that the appellant did have a reasonable opportunity to file a timely appeal. The employer uses its physical business for location for mailing purposes. While the employer checks mail almost daily, it then uses a multi-step process to distribute mail for responses. The employer sends mail in care of its offsite accountant once a week, (which then includes mail from Iowa Workforce Development) who then sends mail back if the employer needs to respond. The employer could not discern who collected mail during this period of time, who opened the mail, when it was forwarded to Ms. Blue, or when Ms. Blue sent it back to the employer for Ms. Shore to appeal. Ms. Blue did not testify or offer any statement regarding her receipt of the notice of initial decision before returning it to the employer to file an appeal. The employer did not provide evidence regarding the receipt of the notice of the initial decision to support a delay due to postal service or agency error contributed to the late filing of the appeal on January 31, 2017.

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.* Assessing the credibility of the witness and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer's failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to Iowa Admin. Code r. 871-24.35(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. 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). Therefore, the claimant remains eligible for benefits and the employer's account is not relieved of potential liability associated with the claim.

**DECISION:**

The January 10, 2017, (reference 03) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

jlb/rvs