

IOWA DEPARTMENT OF INSPECTIONS & APPEALS
Division of Administrative Hearings
Lucas State Office Building
Des Moines, Iowa 50319

Appeal Number: 07-IWDUI-144
OC: 10/08/06
Claimant: Appellant (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

ALLAN W SOMMER
2472 50TH STREET
FAIRMONT MN 56031-5023

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

IOWA WORKFORCE DEVELOPMENT
INVESTIGATION AND RECOVERY
1000 EAST GRAND AVENUE
DES MOINES IA 50319-0209

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to the Department. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

DAN ANDERSON, IWD

(Administrative Law Judge)

October 26, 2007

(Dated and Mailed)

Iowa Code Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant appealed an Iowa Workforce Development decision dated September 24, 2007, reference 02, which held that he was overpaid benefits \$668 for the 2-weeks ending October 21, 2006, because he failed to report wages earned with Rohlin Construction.

A telephone hearing was scheduled and held on October 22, 2007, pursuant to due notice. The claimant participated. Jane Connor, Investigator, participated on behalf of the department. Departmental Exhibit One consisting of the claimant's faxed appeal statement was received into evidence for the record.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, finds that: A decision was mailed to the claimant's last known address of record on September 24, 2007. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Iowa Workforce Development Appeals Section by October 4, 2007. The claimant had previously received a department notice about his overpayment.

The claimant failed to take notice of the warning date to submit his appeal. The claimant faxed his appeal to the department on October 8, 2007. While the claimant may have communicated with a department representative about the overpayment and an appeal, the reverse side of the decision provides instructions on his responsibility to submit his own appeal.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the appeal has been filed in a timely manner.

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.

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.

Case law commentary on timeliness:

The ten calendar days for appeal begin 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).

In this case, the appealing party had a reasonable opportunity to file a timely appeal, and no good

cause has been established for the filing of any late appeal. The claimant's testimony that he thought a department representative was going to submit an appeal is not credible. Department representatives may help a party to file an appeal, but they do not file appeals on behalf of any party. The claimant failed to offer a good cause for filing his appeal four-days after the expiration date.

The administrative law judge concludes that 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 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code Section 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).

DECISION:

The decision of Iowa Workforce Development dated September 24, 2007, reference 02, is AFFIRMED. The appeal in this case was not timely, and the decision remains in force and effect. The claimant is overpaid benefits \$668 due to misrepresentation.

rls