

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KRISTINA M KERWIN
Claimant

APPEAL NO. 07A-UI-05388-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SIGNATURE PROP OF GOWRIE LLC
GOWRIE CARE CENTER
Employer

OC: 04/15/07 R: 01
Claimant: Respondent (1)

Iowa Code section 96.6(2) – Timeliness of Appeal
Iowa Code section 96.19(38)(b) – Partially Unemployed

STATEMENT OF THE CASE:

Signature Property of Gowrie/Gowrie Care Center filed an appeal from the May 14, 2007, reference 02, decision that allowed benefits under a theory of partial unemployment. After due notice was issued, a hearing was held by telephone conference call on June 27, 2007. Claimant Kristina Kerwin participated. Mary Ellen Carr, Administrator, represented the employer. The administrative law judge received Department Exhibits D-1 and D-2 into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and the wages reported by the claimant since the claim was established.

ISSUES:

Whether the employer's appeal was timely.

Whether good cause exists to deem the employer's appeal timely.

Whether, for the period of April 15, 2007 through June 24, 2007, the claimant was partially unemployed.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The May 14, 2007, reference 02, decision was mailed to the employer's last-known address of record on May 14, 2007. The employer received the decision on May 15. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 24, 2007. On May 24, 2007, Administrator Mary Ellen Carr drafted the employer's appeal and faxed it to the Unemployment Insurance Service Center in Des Moines, rather than to the Appeals Section. The fax number for the Appeals Section appeared on the May 14, 2007, reference 02 decision. The fax number for the Unemployment Insurance Service Center appeared on the Notice of Claim the employer had previously received. The employer's faxed appeal was received at the Unemployment Insurance Service Center on May 24, 2007. That bureau forwarded the appeal to the Appeals Section on May 25, 2007.

Kristina Kerwin commenced her employment with Gowrie Care Center in 2004 and was reclassified to full-time status effective September 28, 2006. Ms. Kerwin was a Certified Nursing Assistant and Certified Medication Assistant. In February 2007, the employer experienced a significant decrease in its resident census. At the beginning of April, the employer significantly reduced Ms. Kerwin's scheduled work hours. This prompted Ms. Kerwin to establish a claim for unemployment insurance benefits. Iowa Workforce Development calculated Ms. Kerwin's weekly benefit amount at \$302.00. While Ms. Kerwin continued an active claim for benefits, she continued to work her scheduled hours and pick up hours from other employees when possible. Ms. Kerwin continued to report her weekly wages to Iowa Workforce Development and the Agency considered these wages in awarding benefits. Ms. Kerwin received benefits for only three weeks, totaling \$302.00, and received no benefits for several additional weeks when her weekly wages exceeded her weekly benefit amount. Ms. Kerwin last received benefits during the week that ended May 19, 2007. After that, the employer began to schedule Ms. Kerwin for more hours.

REASONING AND CONCLUSIONS OF LAW:

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-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

Workforce Development rule 871 IAC 24.35(1) provides as follows:

Date of submission and extension of time for payments and notices.

24.35(1) Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:

a. If transmitted via the United States postal service 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 on the date it is received by the division.

Although appeals from claims representative decisions should be directed to the Appeals Section, the Appeals Section generally treats as timely and "filed with the division" an Appeal that is submitted to a local Workforce Development Center by the appeal deadline. The difference between submitting an appeal to a local office and submitting an appeal to the Unemployment Insurance Service Center appears insignificant. In both instances, the document has been "received by" the division. The question is whether the appeal has been properly "filed." In the present case, the employer made a good faith effort to submit a timely appeal, but used the wrong Agency fax number. The Appeals Section's receipt of the appeal was delayed by one day. Under the circumstances, a mechanical operation of the law to find an untimely appeal and deny the employer an opportunity to have the merits of the appeal addressed would not serve justice. The administrative law judge concludes that the appeal was timely and that the administrative law judge has authority to rule on the merits of the appeal.

An individual shall be deemed *partially unemployed* in any week in which, while employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars. Iowa Code section 96.19(38)(b).

The evidence in the record indicates that during the period of April 15, 2007 through May 19, 2007, Ms. Kerwin was intermittently scheduled to work less than her regular full-time hours. The evidence indicates that during three weeks of this time period, Ms. Kerwin's weekly wages were less than her weekly benefit amount plus \$15.00.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Kerwin was partially unemployed during the period of April 15 through May 19, 2007 and was eligible for unemployment insurance benefits, provided she was otherwise eligible. The employer's account may be charged for benefits paid to the claimant during the period of April 15 through May 19, 2007.

Both parties assert that there has been a very recent separation from the employment. The separation issues were not before the Administrative Law Judge. The administrative law judge has directed the employer to properly notify the Iowa Workforce Development Claims Division of the separation so that a notice of claim may issue and appropriate proceedings may follow from that.

DECISION:

The employer's appeal was timely. The Agency representative's May 14, 2007, reference 02, decision is affirmed. The claimant was partially unemployed during the period of April 15 through May 19, 2007. The claimant is eligible for benefits for that period, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant for the period of April 15 through May 19, 2007.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs