

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEANINE M GANGESTAD
Claimant

APPEAL NO: 12A-UI-10516-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PRINTING SERVICES INC
Employer

OC: 06/24/12

Claimant: Respondent (1/R)

Section 96.4-3 – Able and Available
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Printing Services, Inc. (employer) appealed a representative's July 18, 2012 decision (reference 02) that concluded Jeanine M. Gangestad (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 26, 2012. The claimant participated in the hearing. Steve Bean appeared on the employer's behalf. 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 representative's decision was mailed to the employer's last-known address of record on July 18, 2012. The employer received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by July 28, 2012, a Saturday. The notice also provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was Monday, July 30. The appeal was not filed until it was postmarked on August 28, 2012, which is after the date noticed on the disqualification decision. The employer believed the reason for the delay was a change in the person who filled the employer's position of controller.

The claimant started working for the employer on October 7, 2010. She worked on call through January 2011. She was not called for work after that date and concluded her employment was over. She then sought and found full time employment with another employer. After that employment ended she established a claim for unemployment insurance benefits effective June 24, 2012. She subsequently applied for regular employment with this employer. At that time there was no regular employment position available with the employer, but she was offered

and accepted the opportunity to again work on an on-call basis, which she began September 4, 2012.

Because of medical complications from a surgery, the claimant has only been able to work about four hours a day, about two days per week. The employer might have more work available for her, but she has indicated that this is all she was physically able to work at this time.

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 employer) 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). 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 appellant did have a reasonable opportunity to file 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).

However, in the alternative, even if the appeal were to be deemed timely, the administrative law judge would affirm the representative's decision on the merits. In the period from the establishment of the claimant's claim June 24, 2012 through the week ending September 1, 2012, the employer was not providing the claimant the same employment as it had prior to February 2011.

With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3. To be found able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). However, a claimant must remain available for work on the same basis as when her base period wages were accrued. 871 IAC 24.22(2)f. An issue as to whether the claimant is adequately physically able and available for work arose during the hearing. While the representative's decision and the hearing notice touched upon the issue of the claimant being able and available for work, the review and determination was not in the context of the claimant's physical ability for work, but rather on her availability in relation to her employment relationship with this employer. The physical ability issue was addressed by the Claims representative, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The representative's July 18, 2012 decision (reference 02) 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 allowed, if the claimant is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the physical ability to work issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs