

BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319

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LATISHA S DAVIS

Claimant,

and

A+ HOME HEALTH CARE

Employer.

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HEARING NUMBER: 09B-UI-01674

EMPLOYMENT APPEAL BOARD  
DECISION

**NOTICE**

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION: 96.6-2**

**DECISION**

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The claimant The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

On January 16, 2009 a representative's decision was mailed to Latisha Davis (Claimant). The decision was mailed to the Claimant's last known address as supplied to Iowa Workforce. The Claimant had moved but left a forwarding address with the post office. On January 23 the Post Office forwarded the decision to the Claimant's North Carolina address. The Claimant received the decision on about January 27, which is after the due date for its appeal. The Claimant delayed her appeal until February 2, 2009.

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code 96.6 provides:

2. *Initial determination.* ... 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.

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 - but not conclusive - evidence of the date of mailing.

There is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and the Administrative Law Judge and this Board have no authority to change the decision of representative if a timely appeal is not filed. Franklin v. Iowa Dept. Job Service, 277 N.W.2d 877, 881 (Iowa 1979). The ten day period for appealing an initial determination concerning a claim for benefits has been described as jurisdictional. Messina v. Iowa Dept. of Job Service, 341 N.W.2d 52, 55 (Iowa 1983); Beardslee v. Iowa Dept. Job Service, 276 N.W.2d 373 (Iowa 1979). The only basis for changing the ten-day period would be where notice to the appealing party was constitutionally invalid. E.g. Beardslee v. Iowa Dept. Job Service, 276 N.W.2d 373, 377 (Iowa 1979). The question in such cases becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. Hendren v. Iowa Employment Sec. Commission, 217 N.W.2d 255 (Iowa 1974); Smith v. Iowa Employment Sec. Commission, 212 N.W.2d 471 (Iowa 1973). The question of whether the Claimant has been denied a reasonable opportunity to assert an appeal is also informed by rule 871-24.35(2) which states that "the submission of any ... appeal... not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service."

Since the Claimant did not update Workforce on her new address we consider the decision as being mailed to the 'last known address.' Yet the Claimant did leave a forwarding address with the Post Office, and the decision was not even forwarded until about January 23. The decision is then not received until after the due date had run. Even with a forwarding address eleven days is an unexpectedly long time for delivery of the decision. Because of the mailing problem the Claimant should be relieved of the requirement of sending the appeal in by the 26<sup>th</sup> since the decision was not received until after this deadline.

The question, then, is how long the Claimant should be given to effect her appeal. There are several possibilities. Perhaps the Claimant should be given no longer than reasonably necessary to make a bare-bones appeal. Perhaps the Claimant should be given an additional seven days on the theory that mail usually gets where it is going in three days. Perhaps the Claimant should be given as many days as its receipt is late. Perhaps the Claimant should be required to file on the very date of receipt. All are defensible yet all of these share one problem: how is the Claimant supposed to know when the deadline

is? The decision gives a date certain. If that date is in the past the Claimant is given no clue as to what

alternative date to use. Yet *some* deadline must apply – the Claimant cannot wait an eternity to appeal. To our mind the *easiest* and most workable rule, as well as the fairest to the parties, is to use ten days from receipt as the new deadline where Workforce or Post Office delay has caused the original deadline to run without notice to the Claimant. This new deadline is adequately short as to promote prompt action while also giving the Claimant plenty of notice. A claimant who tried to claim more time than this could be fairly answered by saying that the mailing error should not put the claimant in a *better* position than she would have been without error. An employer who tried to argue for less time could be fairly answered by saying the mailing error should not put the claimant in a *worse* position than she would have been without error. Here the Claimant's appeal was within ten days of the late receipt, and we find the Claimant's appeal timely.

#### DECISION:

The administrative law judge's decision dated February 24, 2009 is **REVERSED AND REMANDED**. The decision of the administrative law judge is not vacated at this time. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section. The administrative law judge shall issue a decision on the merits of this case. The Administrative Law Judge may in the Administrative Law Judge's discretion conduct an additional hearing if the judge deems it necessary to develop issues that were not adequately addressed in the first hearing because of the disposition of the issue of timeliness. After the hearing, if any, the administrative law judge shall issue a decision that provides the parties appeal rights

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

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