IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DIANNE M MOUNT
Claimant

FAREWAY STORES
Employer

APPEAL NO: 09A-UI-06636-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/08/09
Claimant: Respondent (1)

Section 96.5-3-a – Work Refusal
Section 96.4-3 – Able and Available
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Fareway Stores, Inc. (employer)) appealed a representative's March 17, 2009 decision (reference 03) that concluded Dianne M. Mount (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 May 27, 2009. This appeal was consolidated for hearing with one related appeal, 09A-UI-06637-DT. The claimant participated in the hearing. Garrett Piklap appeared on the employer's behalf and presented testimony from one other witness, Reynolds Cramer. During the hearing, Exhibit A-1 was entered into evidence. The administrative law judge takes official notice of the Agency wage records. 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.

ISSUES:

Was the employer's appeal timely or are there legal grounds under which it should be treated as timely? Is the claimant disqualified due to refusing an offer of suitable work without good cause? Was the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The representative's decision was mailed to the employer's last-known address of record on March 17, 2009. The employer received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by March 27, 2009. The appeal was not acknowledged as filed until April 27, 2009, which is after the date noticed on the disqualification decision. On March 25 the employer had prepared and mailed an appeal letter to the Appeals Section identifying the claimant and the representative's decision it was appealing; however, the letter incorrectly used the social security number of a different employee who had a pending appeal, so the Appeals Section staff included the employer's appeal letter for the claimant into the file of the pending appeal of the other employee, rather than recognizing and treating the appeal as a new appeal related to the claimant. When the

employer did not receive confirmation that an appeal had been set up concerning the claimant, it researched what had happened and resubmitted an appeal on April 27.

The claimant started working for the employer on February 19, 2007. She worked part time (approximately 25 hours per week, ranging between 18 and 32 hours per week) as a cashier at the employer's Sioux City, Pierce Street store. Her last day of work was February 6, 2009. The employer had determined not to renew its lease at that the older (1982) Pierce Street location after construction of about three new stores in the general metropolitan area in 2001 and 2002. On December 30, 2008 the employer informed the employees, including the claimant, of its decision to close its Pierce Street store, and gave the employees an opportunity to list preferences as to store locations to which they could be transferred.

The claimant initially indicated some preferences as to which stores she might prefer, but in discussions on January 29 and January 30 expressed concern about the number of hours she might be given, as she did not have personal transportation and would have an expense for transportation to and from another store. The two stores the claimant had preferred were both about 3.5 miles from the Pierce Street store; the claimant lived within about a block of the Pierce Street store. On January 30, when the employer could not make an assurance that the claimant would immediately remain at her usual 25 hour average, the claimant indicated she would choose not to accept a transfer, which would result in the ending of her employment with the employer as of the last day of store operation at the Pierce Street location. There was no further discussion between the claimant and the employer thereafter regarding the claimant returning to work at any of the employer's locations. The claimant then worked through February 6, the last day the store was open for business.

The claimant established an unemployment insurance benefit year effective February 8, 2009. Her weekly benefit amount was calculated to be $144.00, based on an average weekly wage in the high quarter of her base period of $255.07. At her hourly wage of $9.50, this equates to an average of about 26.85 hours.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. 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 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). The record shows that the appellant did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2), or other factor outside of the employer's control. The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, Beardslee, supra; Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

The substantive issue in this case is whether the claimant refused a suitable offer of work that would disqualify her from receiving unemployment insurance benefits.

Iowa Code § 96.5-3-a provides:

> An individual shall be disqualified for benefits:
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> 3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.
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> a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:
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> (1) One hundred percent, if the work is offered during the first five weeks of unemployment.

(2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.

(3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.

(4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

871 IAC 24.24(8) provides:

(8) Refusal disqualification jurisdiction. Both the offer of work or the order to apply for work and the claimant's accompanying refusal must occur within the individual's benefit year, as defined in subrule 24.1(21), before the Iowa code subsection 96.5(3) disqualification can be imposed. It is not necessary that the offer, the order, or the refusal occur in a week in which the claimant filed a weekly claim for benefits before the disqualification can be imposed.

Here, the claimant did not have an open claim at the time an offer of work was made, so any refusal would not be effective to disqualify her from benefits. Further, given the fact that at the most recent time the offer was made, January 30, 2009, the claimant was not yet even unemployed, the distance for the claimant to go to another location as compared to the Pierce Street location, and the lack of assurance that she would receive as many hours as she had been receiving at the Pierce Street location (so she would be receiving 100 percent of her average weekly wage), the claimant's refusal at that time would not be disqualifying. 871 IAC 871 IAC 24.24(15). Benefits are allowed, if the claimant is otherwise eligible.

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. As to the question of whether the claimant's lack of personal transportation has rendered her unable and unavailable for work, the claimant does have access to transportation she is willing to use, so long as the pay would be sufficient to cover the increased cost of that transportation. 871 IAC 24.23(4). The claimant did not lose her means of transportation; the employer's ending of the employment opportunity at the Pierce Street location changed the means by which the claimant would have to use for transportation. The claimant is sufficiently able and available for work in the community.

DECISION:

The representative's March 17, 2009 decision (reference 03) is affirmed. The appeal is treated as timely. The claimant did not refuse a suitable offer of work that would disqualify her from unemployment insurance benefit eligibility, and she is sufficiently able and available for work.

The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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