

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

NICHOLAS L FITCH
Claimant

APPEAL NO: 18A-UI-00017-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

OC: 02/26/17
Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

An appeal was filed from an unemployment insurance decision dated April 7, 2017, (reference 03) that denied benefits because the claimant was not able and available for work for the week ending March 25, 2017. Notice of the hearing was mailed to the claimant's last known address of record for a telephone hearing to be held at 2:00 p.m. on January 26, 2018. The claimant participated personally. Department Exhibit D-1 was admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents and claim records. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Is the appeal timely?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant established an unemployment insurance claim with an effective date of February 26, 2017. At the time he established his claim for benefits, he agreed to read a copy of the Unemployment Insurance Handbook for Claimants. The Unemployment Insurance Handbook included instructions for properly filing claims and that failure to follow the instructions in the handbook may lead to an improper payment of benefits that must be paid back.

The claimant filed a weekly continued claim for benefits for the week ending March 25, 2017. He indicated while completing his claim that he was not able and available for work, in error. He was then paid \$548.00 in benefits for the week ending March 25, 2017.

An initial unemployment insurance decision (reference 03) resulting in disqualification of benefits was mailed to the claimant's last known address of record on April 7, 2017. This is a valid mailing address for the claimant, and he checks his mail once or twice a week. The

decision contained a warning that an appeal must be postmarked or received by the Appeals Section by April 17, 2017.

The claimant attended his yearly National Guard training out of town between April 1 and 15, 2017, and did not check his mail. He checked his mail on April 17 or 18, 2017. The claimant would have received the reference 03, 04, and 06 initial decisions, and a missed fact-finding interview in the mail, which was sent during the period of his training. The claimant does not recall if he received any or all of the letters, or whether he read them. He acknowledged he does not read all of his mail from Iowa Workforce Development. A first letter indicating an overpayment was also mailed to the claimant on April 18, 2017. The claimant stated it was very possible he received the letters but did not remember.

A second letter of overpayment was mailed to the claimant around May 16, 2017. At that time, he read the notice and stated he repeatedly called IWD. The claimant could not provide any details, or specifics, or how many times he attempted to call IWD. He reported that each time he called IWD though, that he was told it was "taken care of" by the representatives. The claimant continued to receive additional notices, as well as the reference 07, 08, 09, and 10 decisions.

The claimant indicated he figured the mail had not caught up with his phone calls and did not contact IWD to inquire. He also then became frustrated and admitted he began ignoring mail from IWD until November 7, 2017, when he received another overpayment notice, dated October 19, 2017. He stated he called IWD and was not advised to appeal until he called again on December 28, 2017, and at that time was advised he could appeal the decisions. He then filed a consolidated appeal for the reference 03, 04 and 06 decisions on December 29, 2017, approximately eight months after the decisions were rendered (Department Exhibit D-1).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant's appeal is untimely.

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, subsections 10 and 11, 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 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. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

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 unemployment insurance 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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the claimant and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the claimant has failed to establish a good cause reason for an eight month delay in filing of his appeal.

When the claim was filed, the claimant was given the option of reading the Unemployment Insurance Handbook online or having it mailed to him. The Unemployment Insurance Handbook included instructions for properly filing claims. The handbook contains specific language regarding how to file an appeal if a claimant does not agree with a decision but the claimant did not read the handbook. In addition, the Unemployment Insurance Decision provides directions on how to file an appeal. However, the claimant did not read his decisions, and acknowledged he did not open and ignored mail from IWD.

The administrative law judge recognizes the claimant may not have received the decision until he returned from National Guard training on April 15, 2017, which coincided with the end of the appeal period. However, the claimant also stated he may have received the decision but does not remember. In addition to the reference 03 decision at hand, the claimant in this case was also mailed reference 04, 05, 06, 07, 08, 09, and 10 decisions and multiple notices of overpayment, that would have put him on reasonable notice that there were outstanding issues, including an unfavorable decision related to his claim.

The claimant asserted he repeatedly called IWD and each time was told the matter was taken care of. However, the administrative law judge did not find this testimony to be credible, inasmuch as the claimant's testimony was vague and not found to be credible, as the claimant could not provide any dates, nor could he provide any specific information about any of the individuals he spoke to at IWD, when he called, or even phone records as proof of calling. The administrative law judge is not persuaded the claimant would repeatedly, over a several month period, be given incorrect instructions about an unfavorable decision from multiple representatives.

Based on the multiple decisions and overpayment notices, and the fact the claimant acknowledged he did not receive his decisions and purposefully ignored mail from IWD out of frustration, the administrative law judge concludes the appellant did have a reasonable opportunity to file a timely appeal. The notice of initial decision was mailed April 7, 2017 and the claimant did not file his appeal until December 29, 2017 (Department Exhibit D-1). The administrative law judge concludes that failure to follow the clear written instructions 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 Iowa Admin. Code r. 871-24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 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. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The April 7, 2017, (reference 03) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn