

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MONIQUE C EDWARDS

Claimant

APPEAL NO: 14A-UI-04918-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TEAM STAFFING SOLUTIONS INC

Employer

OC: 04/28/13

Claimant: Appellant (4)

Section 96.3-7 – Recovery of Overpayment of Benefits

871 IAC 24.10 – Employer Participation

Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Monique C. Edwards (claimant) appealed a representative's April 30, 2014 (reference 04) decision that concluded she had been overpaid unemployment insurance benefits. After a hearing notice was mailed to the claimant's last-known address of record, a telephone hearing was held on June 30, 2014. The claimant participated in the hearing. Sarah Fiedler participated on behalf of Team Staffing Solutions, Inc. (employer). 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 affirming the representative's decision that the claimant was overpaid unemployment insurance benefits.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it should be treated as timely?

Was the claimant overpaid unemployment insurance benefits of \$2,817.41?

Is that overpayment subject to recovery based upon whether the employer's participated in the fact-finding interview?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on April 30, 2014. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 10, 2014, 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, May 12, 2014. The appeal was not filed until it was faxed on May 13, 2014 which is

after the date noticed on the disqualification decision. The reason for the delay was that it had not been convenient for the claimant to attempt to make her appeal until May 12 and when she attempted to make her appeal by fax late on May 12, she encountered problems caused by a local thunderstorm.

The claimant established a claim for unemployment insurance benefits effective April 28, 2013. A fact-finding interview was held with a Claims Representative on November 22, 2013. The employer's representative, Fiedler, was in training that day and the employer's owner does not typically participate in fact-finding interviews, nor does the employer's business clients. As a result, the employer only submitted a written statement dated November 15, 2013 to be considered "in lieu of the company's participation by telephone." The statement only stated, "The claimant started an assignment for the client company Doran & Ward on 10/7/13 and worked until 10/10/13. On that date, the claimant called in to say that she would be late that day and was given a verbal warning for her attendance issues. She did work on 10/10/13, but told [the employer] that going forward, she would not have child care. She did not check in for additional work until 11/12/13 and is considered to have quit, as continued work was available but she was not due to childcare issues." No contact information was provided for any first hand witness to be contacted for rebuttal information.

After the fact-finding interview, the Claims Representative issued a decision dated November 25, 2013 (reference 02) that concluded the claimant was eligible to receive benefits after the separation from employment, finding that she had completed an assignment and had good cause for delaying in reporting for an additional assignment. The employer appealed the representative's decision. A hearing before an Appeals administrative law judge was conducted on January 10, 2014 under Appeal No. 13A-UI-13190-SWT. The employer, through Fiedler, participated in the hearing; the claimant did not. On January 13, 2014 that judge issued a decision which reversed the representative's decision and found the facts of the separation were disqualifying as to the claimant, concluding that there had been a voluntary quit without good cause attributable to the employer. The claimant did appeal that judge's decision to the Employment Appeal Board, asserting that she had not gotten the notice of the January 10 hearing. As a result, on February 12, 2014 the Board remanded the matter back to the Appeals Bureau for a new hearing.

Upon that remand, a new hearing was scheduled with another Appeals administrative law judge for March 12, 2014 under Appeal No. 14R-UI-01692-VST. The employer participated in that hearing, again through Fiedler, and again the claimant did not participate in that hearing. On March 24, 2014 that judge issued a decision which also concluded that the facts of the separation were disqualifying as to the claimant, concluding that there had been a voluntary quit without good cause attributable to the employer. The claimant did not make an appeal to the Board from that judge's March 24, 2014 decision.

The March 24, 2014 judge's decision remanded the question of a potential overpayment and the employer's participation back to the Agency for investigation and a determination. The overpayment decision was issued in this case as a result of that remand. The overpayment decision does not specifically address the question as to whether the employer satisfied the requirement for participation.

The claimant received unemployment insurance benefits after the separation from employment in the amount of \$2,817.41.

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 claimant) 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. Rule 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, the fact that the appeal was not timely is moot; even if the appeal were to be deemed timely, the administrative law judge would affirm the representative's decision on the merits. Further, the fact that the appeal was not timely does not preclude the administrative law judge from considering the question as to whether the employer had participated in the fact-finding

interview; the representative's decision issued on April 30, 2014 does not make any reference to the employer's participation, so as to put the claimant on notice that any determination had been made as to the employer's participation. The issue was properly included, however, on the notice of hearing for this case.

An underlying disqualification can result in an overpayment of unemployment insurance benefits. The claimant did appeal the initial administrative law judge's decision that reversed the representative's decision and found the separation to be disqualifying, but after the Board remand for a new hearing, the claimant did not appeal the subsequent administrative law judge's decision issued on March 24, 2014 in 14R-UI-01692-VST which also reversed the representative's decision and found the separation to be disqualifying. If the claimant had a dispute with whether or not she should have been disqualified as a result of the separation from the employer, she needed to have participated in that March 10, 2014 hearing or further appealed the March 24, 2014 decision to the Board. Iowa Code § 96.6-2; *Beardslee v. Iowa Department of Job Service*, 276 N.W.2d 373 (Iowa 1979). The decision causing the disqualification is not subject to review in this case regarding the overpayment.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. Iowa Code § 96.3-7. In this case, unless or until the administrative law judge's decision in 14R-UI-01692-VST would be reversed, the claimant has received benefits but was ineligible for those benefits.

However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b; Rule 871 IAC 24.10.

The employer did not provide a live person to participate directly in the fact-finding interview. Further, although the employer provided written documentation in lieu of personal participation, the employer did not comply with the requirement of the rule which specifies, "If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal." Rule 871 IAC 24.10. There has been no showing that the claimant received benefits due to fraud or willful misrepresentation; therefore, since the employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

DECISION:

The representative's April 30, 2014 (reference 04) decision is modified in favor of the claimant. The claimant was overpaid benefits of \$2,817.41. However, the overpayment is not subject to recovery so the claimant's effective overpayment balance is zero.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/can