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

MARVIN D CARTER
Claimant

PLATINUM HOLDINGS LLC
GRAND HARBOR RESORT & WATERPARK
Employer

APPEAL NO. 12A-UI-10661-LT

ADMINISTRATIVE LAW JUDGE
DECISION

OC: 11/28/10
Claimant: APPELLANT (1)

Iowa Code § 96.5(2)a – Misconduct/Disciplinary Suspension
Iowa Code § 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 8, 2011 (reference 03) decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on October 3, 2012. Claimant participated. Employer participated through Alicia Fricke. Department's Exhibit D-1 was received.

ISSUE:

Is the claimant's appeal was timely?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to claimant's last known address of record on March 8, 2011. He received the decision within the appeal period. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by March 18, 2011. The appeal was not filed until August 30, 2012, which is after the date noticed on the disqualification decision.

REASONING AND CONCLUSIONS OF LAW:

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

Ref. 22

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 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. 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). Pursuant to Iowa Admin. Code rules 871-26.2(96)(1) and 871-24.35(96)(1), appeals are considered filed when postmarked, if mailed. *Messina v. Iowa Dep't of Job Serv.*, 341 N.W.2d 52 (Iowa 1983).

The record shows that the appellant did have a reasonable opportunity to file a timely appeal. 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 March 8, 2011 (reference 03) decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

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