

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

TERRY D ASKINS

Claimant

and

CRST VAN EXPEDITED INC

Employer

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HEARING NUMBER: 16B-UI-10752

**EMPLOYMENT APPEAL BOARD
DECISION**

SECTION: 96.4-3, 96.6-2

DECISION

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

FINDINGS OF FACT:

On November 22, 2016 a representative's decision was mailed to Terry D. Askins (Claimant). The decision was mailed to the Claimant's last known address as supplied to Iowa Workforce, but the Claimant never received the decision. He contacted the agency to inquire about his decision, but he was told he couldn't collect unemployment while he was receiving workers compensation. Once he exhausted his workers compensation in early October, he filed his appeal on October 4, 2016.

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.*"

Here the evidence establishes that the Claimant never received the claims deputy decision. Although it is true that he can't collect unemployment benefits while on workers compensation, he could have nonetheless filed an appeal. He provided credible testimony that his inquiry into the matter yielded misinformation upon which he relied to later file to his appeal. For this reason, we shall find the Claimant's appeal timely.

DECISION:

The administrative law judge's decision dated October 24, 2016 is **REVERSED & 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.

The Employment Appeal Board would also send this matter to the Iowa Workforce Development, Claims Bureau, for a determination as to whether the Claimant is eligible to have a substitution of quarters pursuant to the following statute.

Iowa Code section 96.23 provides:

Base period exclusion. The department shall exclude three or more calendar quarters from an individual's base period, as defined in section 96.19, subsection 3, if the individual received weekly workers compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17 or weekly indemnity insurance benefits during those three or more calendar quarters, if one of the following conditions applies to the individual's base period:

1. The individual did not receive wages from insured work for three calendar quarters.
2. The individual did not receive wages from insured work for two calendar quarters and did not receive wages from insured work for another calendar quarter equal to or greater than the amount required for a calendar quarter, other than the calendar quarter in which the individual's wages were highest, under section 96.4, subsection 4.

The Department shall substitute, in lieu of the three or more calendar quarters excluded from the base period, those three or more consecutive calendar quarters, immediately preceding the base period, in which the individual did not receive such weekly workers' compensation benefits or weekly indemnity insurance benefits.

871 IAC 24.7(3) provides:

The department shall make an initial determination of eligibility for unemployment insurance benefits. If the individual has no wage records or lacks qualifying wage requirements, the department shall substitute three or more calendar quarters of the base period with those three or more consecutive calendar quarters immediately preceding the base period in which the individual did not receive worker's compensation benefits or indemnity insurance benefits. The qualifying criteria for substituting quarters in the base period are that the individual:

- a. Must have received workers' compensation benefits under Iowa Code chapter 85 or indemnity insurance benefits for which an employer is responsible during the excluded quarters, and
- b. Did not work in and receive wages from insured work for:
 - (1) Three or more calendar quarters in the base period, or
 - (2) Two calendar quarters and lacked qualifying wages from insured work during another quarter of the base period.

Kim D. Schmett

Ashley R. Koopmans

James M. Strohman