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

BARBARA A SMITH Claimant, and GIRL SCOUTS OF GREATER IOWA Employer.	:	HEARING NUMBER: 09B-UI-09598 EMPLOYMENT APPEAL BOARD DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. Two 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** as set forth below.

FINDINGS OF FACT: The decision of the claim representative was mailed to the Employer's last known address on June 22, 2009. (Ex. A-1). That decision stated that it became final unless an appeal was postmarked by July 2, 2009 (a Thursday). The Employer's appeal was received by the Appeals Section on July 6, 2009. (Ex. A-1). The Employer was shut down on July 3, 2009. (Tran at p. 2).

REASONING AND CONCLUSIONS OF LAW:

As an initial matter we note that the Administrative Law Judge failed to address the issue of timeliness of the appeal. Judge Wise did rule the appeal timely during the oral proceedings, and perhaps this is why. The decision also misidentified the Claims decision date as June 26 which would make a July 6 appeal timely. Perhaps this explains the failure to address timeliness in the written decision. It is clear that the Claims decision date was June 22 since not only is the date on the Claims decision in the file but

the Employer's own appeal states it is appealing a June 22 decision. We now independently make our own assessment of timeliness.

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); Bearslee 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 Employer 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."

The key question in this matter is when was the appeal "filed." The Administrative Law Judge took testimony from the Employer on when it asserts that the appeal was placed in a receptacle. But, to go by the rules, the rule refers not to the physical act of mailing but to the postmark:

> 26.4(2) An appeal from an initial decision concerning the allowance or denial of benefits shall be filed, by mail, facsimile or in person, not later than ten calendar days, **as determined by the postmark or the date stamp**, after the decision was mailed to the party at its last-known address... .

871 IAC 26.4(2). The rule makes clear that when the appeal is sent by mail the date of filing is the date of the postmark and not the date of physically placing the appeal in the mail. If we were to read this rule alone then the only choices for the date of appeal are the date of "postmark or the date stamp." Ordinarily we would read this to mean that with no postmark, as in this case, then we would go by the date shown on the date stamp. By this reading the appeal was filed on July 6 and is untimely. We have in the past been more generous and have read rule 26.4(2) in conjunction with the more general rule:

24.35(1) Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:

a. If transmitted via the United States postal service on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

871 IAC 24.35(1)"a". This rule provides additional guidance to determining the date of mailing. Under 24.35(1)"a" if the postmark is not legible, or not extant, then a postage meter mark is to be used. If there is no legible postage meter mark then the rule states the date of mailing is "the date entered on the document as the date of completion". The rule does not say that evidence should be taken to reconstruct the date of the postmark if it is not available.. "[I]n the absence of a postmark" the rule mandates the use of "the date entered on the document as the date of completion". 871 IAC 24.35(1)"a". Here the postage meter mark contains no date. We thus turn to the date entered on the appeal document. This approach is quite favorable to the Employer since whatever date it entered on its own appeal would then bind us. The only date on the appeal letter is in the line reading "Decision Date: 6/22/09." This is followed by the words "Girl Scouts of Greater Iowa appeals this decision..." Clearly the date of "6/22/09" identifies the date of the decision being appealed and is <u>not</u> "the date entered on the document as the date of completion". Thus the Employer unfortunately entered no date at all as the date of the completion of the appeal. We thus turn back to rule 26.4(2) and use the date of receipt as the date of filing.

Our reading may be technical but it is not without purpose. By using the document date as the fall back, the rule seeks to simplify the process of determining the mailing date. It is the same reason that the postmark rather than placement in the mailbox is used, namely, to avoid extended testimony about mailing. We have often seen contradictory and confusing *argument* submitted to us about just when an appeal was placed in a mail box. To avoid conundrums over detailed factual issues the rule provides for easily and objectively determined dates. Both the postmark and the document date provide a relatively easy means of determining mailing. A contrary approach would result in the use of resources to determine mailing dates rather than the basic issue to be decided in the case. The rule provides a reliable and quick means of determining filing date while maintaining fairness to the party who can protect itself by merely dating its appeal.

The Employer supplies no reason for its late appeal. Since the requirements of rule 24.35(2) are not satisfied the Board is **obliged** to apply the ten day period and to reverse the administrative law judge. Since the Employer asserts no reason at all for the late appeal we could not excuse it even under the more generous good cause standard. With no appeal we are forced – no matter what we might think of the merits of the case – to affirm the claims representative decision.

DECISION:

The administrative law judge's decision dated July 27, 2009 is **REVERSED**. The Employment Appeal Board concludes that the appeal to the Administrative Law Judge was untimely and that, as a result, there was no jurisdiction to entertain the Employer's appeal. The decision of the claims representative made on June 22, 2009 is therefore affirmed. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

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John A. Peno

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Elizabeth L. Seiser

RRA/ss