

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHEYENNE KLECKNER
Claimant

APPEAL 18A-UI-02736-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ASHLEY COLLECTIBLES
Employer

**OC: 01/28/18
Claimant: Respondent (1)**

Iowa Code § 96.6(2) – Timeliness of Protest
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer filed an appeal from the February 16, 2018, (reference 03) unemployment insurance decision that found the protest untimely and allowed benefits. After due notice was issued, a hearing was held by telephone conference call on March 16, 2018. Claimant did not answer when contacted at the number provided and she did not participate. Employer participated through owner Randy Ashley. Official notice was taken of the administrative record, with no objection.

ISSUE:

Is the appeal timely?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An unemployment insurance decision finding the employer's protest untimely and allowing benefits was mailed to the employer's last known address of record on February 16, 2018. The employer received the decision, but Mr. Ashley was not sure when it was received. Mr. Ashley testified it normally takes two or three days for the employer to receive mail at its address of record from Des Moines, Iowa. Mr. Ashley is not aware of any issues with the mail around February 16, 2018. Mr. Ashley testified that the employer does not always pick up its mail every day. After the employer received the decision, Mr. Ashley read the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by February 26, 2018. The appeal was not filed until February 28, 2018, which is after the date noticed on the unemployment insurance decision.

Around January 8, 2018, the employer had a flood in its store, which caused the employer to close its store to the public and rebuild. After January 8, 2018, the employer's store was not open to the public, but it used employees to tear down and rebuild the store from January 8, 2018 until March 9, 2018. The employer reopened its store on March 9, 2018.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the employer'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).

The record shows that the appellant did have a reasonable opportunity to file a timely appeal. Although the employer had to close its store to the public after its store flooded, the employer was still using employees to clean up the store from January 8, 2018 until it reopened to the public on March 9, 2018. During this clean up period, the employer received the unemployment insurance decision that was mailed on February 16, 2018. Mr. Ashley testified he was not sure when the employer received the decision, but he testified it normally takes only two or three days for the employer to get mail from Des Moines, Iowa. Therefore, the employer would have received the decision around February 19, 2018. The employer then faxed its appeal on February 28, 2018, which was after the deadline to file an 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 February 16, 2018, (reference 03) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs