

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

VAN L LIAN
Claimant

HDS LTD
Employer

APPEAL 21A-UI-24776-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/15/20
Claimant: Appellant (1)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

On November 3, 2021, the claimant/appellant filed an appeal from the January 29, 2021, (reference 02) unemployment insurance decision that denied benefits based on claimant not willing to work the number of hours required in his occupation. This is limiting his availability to work. The parties were properly notified about the hearing. A telephone hearing was held on January 5, 2022. Claimant participated through CTS Language Link Interpreter, Lian (identification number 21924). Claimant called as a witness his friend, Lal Mueni. Also present was claimant's legal advocate Benita Ezeigbo. Employer participated through Michael Chamberlain. Administrative notice was taken of claimant's unemployment insurance benefits records.

ISSUES:

Is claimant's appeal timely?

Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An unemployment insurance decision was mailed to the claimant's last known address of record on January 29, 2021. Claimant received the decision within the appeal period. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by February 8, 2021. The appeal was not filed until November 3, 2021, which is after the date noticed on the unemployment insurance decision because claimant cannot speak or read English. Claimant received the overpayment decision at the end of October 2021 and took the paperwork to his friend Lal Mueni and had her translate the documents for him. Ms. Mueni is a friend of claimant through his church. Ms. Mueni helped claimant filed for benefits when he filed for benefits for the week beginning November 15, 2020. Claimant then filed the appeal when he realized he had been disqualified and had an overpayment balance.

Claimant began working for employer on July 20, 2020. Claimant was a Delivery Associate for the Employer. Claimant's work schedule requires him to work Wednesdays through Saturdays. Claimant was separated from employment on April 9, 2021. The issue of claimant's separation is not before the Administrative Law Judge in this appeal.

Claimant did not go to work on Saturday, November 14, 2020 because he was not feeling well. Claimant had the chills, felt dizzy, and lost his sense of smell. On November 17, 2020, claimant tested positive for COVID. On Wednesday, November 18, 2020, claimant notified the employer he had tested positive for COVID and informed the employer that his doctor restricted him from working for 14 days. Claimant was released to return to work on December 1, 2020. Claimant's next scheduled work day was Wednesday, December 2, 2020.

Employer had a policy that if an employee tested positive for COVID then the had to mandatorily quarantined until the employee was symptom free. The employer also had a policy that if an employee tested positive if they brought their positive test results to Employer then the Employer would pay them for the time they missed due to being sick with COVID. Claimant was not aware of this policy and did not provide a positive test to Employer.

Claimant returned to work on December 2, 2020.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 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). Pursuant to rules Iowa Admin. Code r. 871- 26.2(96)(1) and 871 IAC 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 postage meter mark on the last day for filing does not perfect a timely appeal if the postmark affixed by the United States Postal Service is beyond the filing date. *Pepsi-Cola Bottling Company of Cedar Rapids v. Emp't Appeal Bd.*, 465 N.W.2d 674 (Iowa Ct. App. 1990).

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). The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

Claimant received the decision and did not attempt to translate the letter until October 2021. Claimant chose to ignore the paperwork and did not try to follow up to determine the information in the letter until he received the overpayment letter. Claimant did not contact IWD to inform them he needed assistance translating the document. It appears he had access to a friend that could help him translate the decision, but he did not ask her for assistance. Ms. Mueni originally assisted claimant with filing for benefits and then helped translate the paperwork for claimant in October 2021. The administrative law judge concludes that failure 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 January 29, 2021, (reference 02) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.



Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

January 31, 2022
Decision Dated and Mailed

cs/scn

NOTE TO CLAIMANT: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits but who were unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>. If this decision becomes final or if you are not eligible for PUA, you may have an overpayment of benefits.

ATTENTION: On May 11, 2021, Governor Reynolds announced that Iowa will end its participation in federal pandemic-related unemployment benefit programs effective June 12, 2021. The last payable week for PUA in Iowa is the week ending June 12, 2021. You may be eligible for benefits incurred prior to June 12, 2021. Additional information can be found in the press release at <https://www.iowaworkforcedevelopment.gov/iowa-end-participation-federal-unemployment-benefit-programs-citing-strong-labor-market-and>.