

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEITH D JONES
Claimant

APPEAL NO. 11A-UI-05711-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

R K AUTOGRAPHICS INC
Employer

OC: 03/20/11
Claimant: Respondent (1)

Section 96.4-3 – Able and Available
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

R K Autographics, Inc. (employer) appealed a representative's April 15, 2011 decision (reference 01) that concluded Keith D. Jones (claimant) was qualified to receive unemployment insurance benefits because he was not working under his prior hours and wages. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 24, 2011. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Ronald Fletcher appeared on the employer's behalf. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the employer's appeal timely or are there legal grounds under which it can be treated as timely?

FINDINGS OF FACT:

The representative's decision was mailed to the employer's last known address of record on April 15, 2011. The employer received the decision on April 18. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by April 25, 2011, a Monday. The appeal was not filed until it was faxed on April 28, 2011, which is after the date noticed on the disqualification decision. The reason for the delay was because the employer believed it had 15 days to make an appeal, despite the instructions on the decision clarifying that the appeal deadline is ten days from the date of mailing. The employer indicated that on some unknown date a contact was made to some Agency office and that some Agency representative indicated the employer had 15 days to appeal; however, no specifics were available.

The employer employs the claimant on a part-time basis. The work typically might be seasonal, but because the claimant believed he could do some additional work on a different machine, the

employer obtained that machine so the claimant could perform that work. The claimant proved not to be as able to operate the machine as had been believed, and ultimately broke the machine. When the machine was broken, the employer did not have as many hours available for him as previously.

The claimant established an unemployment insurance benefit year effective March 20, 2011. He did not file any weekly claims until the week ending April 29, for which he reported \$47.00 in wages. As of the date of the hearing, he had also filed weekly claim for the weeks ending May 7, May 14, and May 21, for which he reported no wages.

REASONING AND CONCLUSIONS OF LAW:

If a party fails to make a timely appeal of a representative's decision and there is no legal excuse under which the appeal can be deemed to have been made timely, the decision as to the merits has become final and is not subject to further review. Iowa Code § 96.6-2 provides that unless the affected party (here, the employer) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by 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 evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976). Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983).

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 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. IDJS, 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. IDJS, 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 then becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. Hendren v. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC, 212 N.W.2d 471, 472 (Iowa 1973).

A party does not have a reasonable opportunity to file a timely appeal if the delay is due to Agency error or misinformation or to delay or other action of the United States postal service. 871 IAC 24.35(2). Failing to read and follow the instructions for filing an appeal is not a reason outside the appellant's control that deprived the appellant from having a reasonable opportunity to file a timely appeal. The employer did not establish that there was an Agency error or misinformation which caused the delay. The appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that the appellant's failure to file a timely appeal within the prescribed time was not due to a legally excusable reason so that it can be treated as timely. The administrative law judge further concludes that because the appeal was not timely, the administrative law judge lacks jurisdiction to make a determination with respect to the nature

of the appeal, regardless of whether the merits of the appeal would be valid. See Beardslee, supra; Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

However, in the alternative, even if the appeal were to be deemed timely, the administrative law judge would affirm the representative's decision on the merits. The unemployment insurance law provides that a claimant is deemed partially unemployed if he is not employed at his usual hours and wages and earns less than his weekly benefit amount plus \$15.00 in other employment. Iowa Code §96.19-38-b. As long as he remains available for his prior work, it is not pertinent to this determination that he may have been responsible for the damage to the machine which resulted in the lack of work for the claimant.

Beginning on or about March 20, 2011, the employer was not providing the claimant with substantially the same employment as it previously provided. Consequently, the claimant is qualified to receive partial unemployment insurance benefits, provided he remains otherwise eligible. To be eligible for benefits for any particular week, the claimant must file a weekly claim for that week reporting his gross wages (not net) from all employers earned (not paid) for that week; the amount of his eligibility will then be determined pursuant to the formula set out by the statute. 871 IAC 24.52(8); Iowa Code § 96.3-3.

DECISION:

The representative's April 15, 2011 decision (reference 01) is affirmed. The appeal in this case was not timely, and the decision of the representative has become final and remains in full force and effect. The claimant is eligible for at least partial unemployment insurance benefits beginning March 20, if he remains otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw