

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BARBARA M BROWN**  
Claimant

**APPEAL NO: 14A-UI-13360-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**JENNIE EDMUNDSON MEMORIAL HOSP**  
Employer

**OC: 11/16/14**

**Claimant: Appellant (4)**

Section 96.4-3 – Able and Available  
Section 96.19-38-b – Employed Under Same Hours and Wages  
Section 96.6-2 – Timeliness of Appeal

**STATEMENT OF THE CASE:**

Barbara M. Brown (claimant) appealed a representative's December 12, 2014 (reference 01) decision that concluded she was not qualified to receive unemployment insurance benefits in connection with her employment with Jennie Edmundson Memorial Hospital (employer) because she was still employed in her same hours and wages. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was begun on January 23, 2015; that hearing was recessed and then reconvened and concluded on February 17, 2015. This appeal was consolidated for hearing with related Appeal No. 15A-UI-00956-DT and Appeal No. 14A-UI-13361-DT. The claimant participated in the hearing. Donna Wellwood appeared on the employer's behalf. On February 17 the employer presented testimony from one additional witness, Roberta Opperman. During the hearing, Claimant's Exhibit A and Exhibit A-1 were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant'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 claimant's last-known address of record on December 12, 2014. The claimant received the decision at least by December 20, 2014. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by December 22, 2014, a Monday. The appeal was not filed until it was faxed to and received by the Appeals Section on December 26, 2014; which is after the date noticed on the disqualification decision. The only explanation for the delay was that the claimant was that it was during the holidays and she was not sure what she needed to do to appeal.

## 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 claimant) 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. Rule 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 appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that 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, because a determination as to whether a claimant is able and available for work or still employed in her same hours and wages is subject to week to week determination, the conclusion that the claimant was not able and available for work and was still employed under her same hours and wages is only final and binding until the claimant then made her appeal. Iowa Code § 96.4-3; Rule 871 IAC 24.22(2), (3). As a result, the question as to her availability can be further reviewed and determined as of the benefit week ending December 27, 2014.

As determined in the concurrently issued decision in appeal 15A-UI-00956-DT, the employment ended as of August 25, 2014. With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, be available for work, and be earnestly and actively seeking work. Iowa Code § 96.4-3. She is not employed under her same hours and wages with the employer, and so is available for other employment, which she has been seeking. Benefits are allowed as of the week beginning December 21, 2014.

**DECISION:**

The representative's December 12, 2014 (reference 01) decision is modified in favor of the claimant. The appeal in this case was not timely. The decision of the representative has become final and remains in full force and effect until the week the claimant made her appeal. Benefits are denied through December 20, 2014. The claimant is not employed under her same hours and wages and is able and available for work effective December 21, 2014. The claimant is qualified to receive unemployment insurance benefits as of that date, if she is otherwise

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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