IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DAVID C BARBER
Claimant

ACTION MOVING INC
Employer

APPEAL NO. 13A-UI-09405-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/16/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Action Moving, Inc., filed an appeal from the June 5, 2013, reference 07, decision that allowed benefits to the claimant, provided he was otherwise eligible, and that found the employer's protest untimely. After due notice was issued, a hearing was held on August 29, 2013. Claimant David Barber did not respond to the hearing notice instruction to provide a telephone number for the hearing and did not participate. Don Claeys represented the employer. Exhibit One and Department Exhibits D-1, D-2 and D-3 were received into evidence.

ISSUE:

Whether the appeal was timely. Whether there is good cause to treat the appeal as timely.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On June 5, 2013, Workforce Development mailed a copy of the June 5, 2013, reference 07, decision to the employer's last-known address of record. The address of record was and is Action Moving, Inc., C/O AEG Processing Center #58, Inc., P.O. Box 3636, Omaha, NE 68103. AEG Processing Center #58, Inc., is the employer's payroll processor. The employer's business is located in Sioux City, Iowa. The June 5, 2013, reference 07, decision allowed benefits to the claimant, provided he was otherwise eligible, and found the employer's protest untimely. The June 5, 2013, reference 07, decision carried a warning that an appeal from that decision must be postmarked by June 15, 2013 or received by the Appeals Section by that date. The decision also indicated that if the appeal deadline fell on a Saturday, Sunday, or legal holiday, the deadline would be extended to the next working day. June 15, 2013 was a Saturday and the next working day was Monday, June 17, 2013. The weight of the evidence indicates that the June 5, 2013, reference 07, decision was received at the Omaha address of record in a timely manner, prior to the deadline for appeal.

The Workforce Development Tax Bureau had also provided a copy of the June 5, 2013, reference 07, decision to the employer *by e-mail* on June 5, 2013. On June 3, 2013, Don Claeys, President and owner of Action Moving, Inc., had contacted the Tax Bureau by email to

contest a quarterly statement of charges that contained a charge for benefits paid to claimant David Barber. In her June 5, 2013, e-mail response to Mr. Claeys, Tax Bureau representative Jan Thomas had included a copy of the notice of claim form and a copy of the front page of June 5, 2013, reference 07, decision. In the e-mail message, the Tax Bureau representative directed the employer to follow the instructions for appeal that would be included on the back of the June 5, 2013, reference 07, decision that would go out in the mail to the employer that day.

On August 15, 2013, the Appeals Section received an appeal from the employer via fax. The Appeals Section's fax log indicates that the fax came through at 3:30 p.m. The Appeals Section did not receive an appeal from the employer prior to August 15, 2013 and the Appeals Section fax log bears no indication of a fax being received from the employer's number at any point between June 3, 2013 and the June 17, 2013 extended appeal deadline.

REASONING AND CONCLUSIONS OF LAW:

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, subsection 10, 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-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

An appeal submitted by mail is deemed filed 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 was 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. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

When an appeal is received by the Appeals Section, the law requires that the Appeals Section docket the appeal, mail notice of an appeal hearing to the parties, conduct an appeal hearing, and then entered a decision in response to the appeal. See Iowa Code section 96.6 and Iowa Admin. Code rule 871 IAC 26. Regular processing by the Appeals Section would have involved each of these steps. None of this occurred before the August 15, 2013 appeal from the employer. Had an appeal been received prior to August 15 the regular process should have been triggered, but it was not. "The proceedings of all officers and courts of limited and inferior jurisdiction within the state shall be presumed regular". Iowa Code section 622.56; *accord City Of Janesville v. McCartney*, 426 N.W.2d 785 (Iowa 1982). Thus there is a presumption, from the fact of the Appeals Section having no record of an appeal prior to August 15, 2013, that none was received by the Appeals Section. This is not an absolute presumption, but rather it is one that may be overcome with sufficiently probative evidence.

The employer did not supply evidence sufficient to overcome the presumption. The employer testified that an appeal was faxed on June 5, 2013. The employer provided no fax transmission report, no phone record, no fax cover sheet to support that assertion. The employer is not helped by the employer did nothing to follow up on the purported June 5 appeal for almost two and a half months. The weight of the evidence indicates that the appeal was not docketed until August 15, 2013 because no appeal of the June 5, 2013, reference 07, decision had been transmitted to the Appeals Section or received by the Appeals Section before that date. The employer provides even less evidence to support the assertion that AEG Processing did not receive a copy of the decision in June. The employer provided no testimony from any AEG Processing employee on that point.

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. 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 thus 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). The record shows that 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 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. See 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code section 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. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The Agency representative's June 5, 2013, reference 07, decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect. That decision was that the claimant is eligible for benefits, provided he is otherwise eligible, and that the employer's protest cannot be considered because was not timely.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/css