

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

CHANGKOUTH KONG
Claimant

WALMART INC
Employer

APPEAL NO. 22A-UI-09391-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/29/20
Claimant: Appellant (1)

Iowa Code Section 96.6(2) – Timeliness of Appeal
Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

On April 14, 2022, Changkouth Kong (claimant) filed a late appeal from the June 1, 2020 (reference 01) decision that denied benefits effective March 29, 2020, based on the deputy's conclusion that the claimant was still employed with Walmart, Inc. in the same hours and wages as in the original contract of hire and was not partially unemployed within the meaning of the law. After due notice was issued, a hearing was held on June 2, 2022. Claimant participated. Ryan Locke represented the employer. There were four appeal numbers set for a consolidated hearing: 22A-UI-09391-JT-T, 22A-UI-09392-JT-T, 22A-UI-09393-JT-T and 22A-UI-09394-JT-T. Exhibit A, the online appeal, was received into evidence. The administrative law judge took official notice of the following Agency administrative records: the reference 01, 03, 04 and 05 decisions, NMRO, DBRO, KPYX, the April 8, 2021 Application for Overpayment Waiver, and the July 21, 2021 decision denying repayment waiver pertaining to FPUC benefits.

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:

Changkouth Kong (claimant) established an original claim for benefits that was effective March 29, 2020.

On June 1, 2022, Iowa Workforce Development mailed the June 1, 2022 (reference 01) decision to the claimant's Iowa City last-known address of record. The reference 01 decision denied benefits effective March 29, 2020, based on the deputy's conclusion that the claimant was still employed with Walmart, Inc. in the same hours and wages as in the original contract of hire and was not partially unemployed within the meaning of the law. The reference 01 decision stated the decision would become final unless an appeal was postmarked by June 11, 2020 or was received by the Appeals Section by that date. The decision stated that if the deadline for appeal fell on a Saturday, Sunday or legal holiday, the deadline would be extended to the next working

day. June 11, 2020 was a Saturday and the next working day was Monday, June 13, 2020. The claimant received the reference 01 decision in a timely manner, prior to the deadline for appeal. The claimant did not take steps to file an appeal from the decision by the appeal deadline or at any point prior to April 14, 2022.

On October 27, 2020, IWD mailed the October 27, 2020 (reference 03) decision to the claimant's Iowa City last-known address of record. The reference 03 decision held the claimant was overpaid \$1,650.00 in regular state benefits for six weeks between March 29, 2020 and May 9, 2020, due to the June 1, 2020 (reference 01) decision that disqualified the claimant for benefits. The reference 03 decision stated the decision would become final unless an appeal was postmarked by November 6, 2020 or was received by the Appeals Section by that date. The decision stated that if the deadline for appeal fell on a Saturday, Sunday or legal holiday, the deadline would be extended to the next working day. November 6, 2020 was a Sunday and the next working day was Monday, November 7, 2020. The claimant received the reference 03 decision in a timely manner, prior to the deadline for appeal. The claimant did not take steps to file an appeal from the decision by the appeal deadline or at any point prior to April 14, 2022.

On November 6, 2020, IWD mailed the November 6, 2020 (reference 04) decision to the claimant's Iowa City last-known address of record. The reference 04 decision held the claimant was overpaid \$3,600.00 in Federal Pandemic Unemployment Compensation (FPUC) for six weeks between March 29, 2020 and May 9, 2020, due to the October 27, 2020 (reference 03) overpayment decision that stated the claimant was not eligible for benefits during the affected period. The reference 04 decision contained standard appeal rights information, but omitted the deadline date by which the appeal had to be filed:

This decision becomes final unless an appeal is postmarked by [omitted date] or received by the Appeals Section by that date. If this date falls on a Saturday, Sunday or legal holiday, the appeal hearing is extended to the next working day.

The omitted date was November 16, 2020. The claimant received the reference 04 decision in a timely manner. The claimant did not take steps to file an appeal from the decision prior to April 14, 2022.

On April 18, 2021, the claimant filed an Application for Overpayment Waiver regarding the \$3,600.00 FPUC overpayment.

On July 21, 2021, IWD Unemployment Insurance Integrity Bureau Collections Unit mailed and decision letter to the claimant in which the Agency denied the claimant's waiver request. The claimant waiver denial decision stated the decision would become final unless an appeal was postmarked by July 31, 2021 or was received by the Appeal Section by that date. The decision stated that if the deadline for appeal fell on a Saturday, Sunday or legal holiday, the deadline would be extended to the next working day. July 31, 2021 was a Saturday and the next working day was Monday August 2, 2021. The claimant did not take steps to appeal the waiver denial decision by the appeal deadline or at any other point up to the present.

On April 7, 2022, Iowa Workforce Development mailed the April 7, 2022 (reference 05) decision to the claimant's Iowa City last-known address of record. The reference 05 decision notified the claimant that IWD was withholding the claimant's Iowa income tax refund so that it could be offset against the outstanding overpayment and a \$7.00 administrative transfer fee. The reference 05 decision notified the claimant that he could appeal the decision, but that "Your appeal is limited to the validity of this Agency's authority to withhold your Iowa Income Tax Refund." The reference 05 tax offset decision included an April 17, 2022 deadline for appeal.

On April 14, 2022, the claimant completed and transmitted an appeal from the reference 05 tax offset decision. The claimant wrote: "I am making regular payment that's going towards my overpayment. I need my Iowa Income Tax Refund to cover educational cost."

The Appeals Bureau received the claimant's appeal on April 14, 2022. Despite the notice set forth in the tax offset decision, that appeal would be limited to IWD's authority to withhold the claimant's Iowa income tax refund, the Appeals Bureau treated the claimant's appeal from the tax offset decision as also a late appeal from the reference 01, 03, and 04 decisions.

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, 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-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 Iowa Administrative Code rule

871-24.35(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 Iowa Administrative Code rule 871-24.35(1)(b).

The evidence in the record establishes 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. 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). One 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).

No submission shall be considered timely if the delay in filing was unreasonable, as determined by the division after considering the circumstances in the case. See Iowa Administrative Code rule 871-24.35(2)(c).

The wisdom of docketing appeals from the 2020 decisions in response to the 2022 appeal from the 2022 tax offset notice is questionable, especially in light of the appeal limitation information set forth in the tax offset decision. The appeal limitation comes from Iowa Administrative Code rule 871-25.16(4): "Any appeal by the individual is limited to the validity of the department's authority to recoup the overpayment through offset."

In any event, the evidence in the record establishes an untimely appeal from the June 1, 2020 (reference 01) decision. The claimant received the decision in a timely manner, had a reasonable opportunity to file an appeal by the appeal deadline. The appeal filed on April 14, 2022, as it relates to the June 1, 2020 (reference 01) decision, involves unreasonable delay. The late filing of the appeal was not attributable to the Iowa Workforce Development error or misinformation or delay or other action of the United States Postal Service. There is not good cause to treat the late appeal as a timely appeal. See Iowa Administrative Code rule 871-24.35(2). Because the appeal was untimely, administrative law judge lacks jurisdiction to disturb the decision from which the claimant appeals in the present matter. See *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The claimant's appeal from the June 1, 2020 (reference 01) decision was untimely. The decision that denied benefits effective March 29, 2020, based on the determination that the claimant was not partially unemployed, remains in effect.

A handwritten signature in black ink that reads "James E. Timberland". The signature is written in a cursive, flowing style.

James E. Timberland
Administrative Law Judge

August 10, 2022
Decision Dated and Mailed

jet/lj

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.