

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ADRIAN V FELIX
Claimant

APPEAL NO: 13A-UI-02118-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 08/26/12

Claimant: Appellant (5)

Section 96.4-3 – Able and Available
871 IAC 24.22(2)j – Leave of Absence
Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Adrian V. Felix (claimant) appealed a representative's September 24, 2012 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits in connection with his employment with Tyson Fresh Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 19, 2013. The claimant participated in the hearing. Dzemal Grcic appeared on the employer's behalf. Ike Rocha served as interpreter. 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.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it should be treated as timely? Was the claimant eligible for unemployment insurance benefits by being able and available for work? Was there period of voluntary unemployment through a leave of absence?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on September 24, 2012. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by October 4, 2012. The appeal was not filed until it was hand-delivered to a local Agency office on February 20, 2013 and was forwarded to the Appeals Section. The claimant indicated that the reason for the delay was that he did not read or understand English. The administrative law judge notes that for a period of time after the issuance of the decision the claimant ceased filing weekly continued claims, suggesting he understood that he was denied benefits. The claimant knew there was something he needed to do to pursue the issue, but he did not have an explanation as to why he did not seek assistance to learn what it was that he needed to do until February 2013, five months after the issuance of the decision.

The claimant started working for the employer on April 26, 2010. He worked full time as a production worker at the employer's Waterloo, Iowa pork plant. His last day of work was August 17, 2012.

The claimant had suffered a work-related injury to his shoulder in August 2010. He had undergone two surgeries to the shoulder in 2011. He continued to have pain and other problems from the injury, including some related issues to his right hand. On or about August 21 the claimant's doctor provided the claimant with a number of work restrictions, including no lifting more than 15 pounds below shoulder height, and no lifting of any weight over shoulder height.

When the employer received those restrictions, it determined that it had no work available for the claimant which would meet those restrictions. Therefore, the employer placed the claimant on a leave of absence status for up to a year, during which the claimant could put in bids for any jobs he believed he could perform with his restrictions. The claimant's doctor added additional restrictions to the claimant for no work with his right hand in conjunction with surgeries to the hand in October 2012 and January 2013.

The claimant has not found any jobs available with the employer that would be possible with his work restrictions. As of the date of the hearing he could also not identify any positions with any other employer which he believed he could perform with his current restrictions.

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. 871 IAC 24.35(2). Even though the claimant might not have been able to personally read and follow the instructions on the representative's decision for filing an appeal, he did have a reasonable opportunity to seek assistance to learn what he needed to do well prior to when he did so in February 2013. The appellant did have a reasonable opportunity to file an appeal that would have been treated as timely.

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 prior to when the claimant finally did make his 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 of the nature of able and available disqualifications being from week to week, the administrative law judge is able to consider the claimant's status as of the benefit week ending February 25, 2013, the week in which the claimant made his appeal.

For each week for which a claimant seeks unemployment insurance benefits, he must be able and available for work. Iowa Code § 96.4-3. In general, an employee who is only temporarily separated from his employment due to being on a leave of absence is not "able and available" for work during the period of the leave, as it is treated as a period of voluntary unemployment. 871 IAC 24.22(2); 871 IAC 24.23(10). However, those provisions assume that the leave of absence was agreed to on a mutual basis. In this case, it was not the claimant's choice to go onto a leave of absence; rather, it was the employer's unilateral decision to place the claimant on a leave of absence because it could not accommodate the claimant's restrictions due to his work-related injuries. As of the benefit week ending February 25, 2013, the claimant would be eligible to receive unemployment insurance benefits if he was otherwise eligible.

To be found able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). The claimant has not yet demonstrated that he is able to work in some gainful employment. This is something that can change on a week-to-week basis, so if the claimant subsequently determines that there is some job that he can identify as being something he could do within his work restrictions, he can provide that information to a representative at his local Agency office; the administrative law judge suggests that the claimant might want to also provide a copy of this decision along with the job information to the local Agency representative so that the representative will understand why the claimant is providing that job information to the local office. Benefits are denied until the claimant can establish that he is able and available for work by being able to identify some job, with the employer or with some other employer, which he is capable of performing with his physical restrictions.

DECISION:

The claimant's appeal was not timely, and is final as to the claimant's status prior to the week ending February 25, 2013. The representative's September 24, 2012 decision (reference 01) is modified with no effect on the parties. The claimant is not able and available for work effective the week ending February 25, 2013, but not because of being on a leave of absence, but rather,

because he has not demonstrated that there is some job that he can perform with his physical restrictions. The claimant is not qualified to receive unemployment insurance benefits until he can demonstrate that there is some job that he is able to perform within his work restrictions.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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