

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ELODIE V MCWILSON

Claimant

APPEAL NO. 09A-UI-00121-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DES STAFFING SERVICES INC

Employer

**OC: 09/28/08 R: 02
Claimant: Appellant (1)**

Iowa Code Section 96.5(3)(a) – Refusal of Suitable Work
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Elodie McWilson filed an appeal from the November 3, 2008, reference 01, decision that denied benefits and that concluded she had refused to accept suitable work with DES Staffing Services on October 5, 2008. After due notice was issued, a hearing was held by telephone conference call on January 20, 2009. Ms. McWilson participated. The employer participated through Amy MacGregor and John Dunkin. The hearing in this matter was consolidated with the hearing in Appeal Number 09A-UI-00122-JTT. Department Exhibits D-1, D-2 and D-3 were received into evidence.

ISSUE:

Whether the claimant's appeal from the November 3, 2008, reference 01, decision was timely.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On November 3, 2008, Iowa Workforce Development mailed a copy of the reference 01 decision to Elodie McWilson at her last-known address of record. The reference 01 decision denied benefits and concluded that Ms. McWilson had refused to accept suitable work with DES Staffing Services on October 5, 2008. The reference 01 decision contained a warning that an appeal must be postmarked or received by the Appeals Section by November 13, 2008. On November 4, 2008, Iowa Workforce Development mailed a reference 03 decision to Ms. McWilson at the same last-known address of record. The reference 03 decision also denied benefits and concluded that Ms. McWilson had refused to accept suitable work with DES Staffing Services on October 6, 2008. The reference 03 decision contained a warning that an appeal must be postmarked or received by the Appeals Section by November 14, 2008. Ms. McWilson received both decisions in a timely manner, prior to the applicable deadline for appeal.

Ms. McWilson did not take any steps to appeal the reference 01 or reference 03 decision until January 5, 2009, when she went to the Boone Workforce Development Center and completed an appeal form. Ms. McWilson delivered the appeal form to the Workforce Development Center

staff on January 5 and the Workforce Development Center staff faxed the appeal to the Appeals Section on the same day.

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). See also Pepsi-Cola Bottling Company of Cedar Rapids v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990). 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).

Ms. McWilson's appeal from the reference 01 and reference 03 decisions was filed on January 5, 2009, the day she delivered her completed appeal to the Boone Workforce Development Center staff.

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). 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 Ms. McWilson did have a reasonable opportunity to file a timely appeal from each decision.

No appeal shall be considered timely if the delay in filing was unreasonable, as determined by the division after considering the circumstances in the case. See 871 IAC 24.35(2)(c).

The weight of the evidence indicates that Ms. McWilson did not file her appeal of either decision until more than seven weeks after the deadline for 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 November 3, 2008, reference 01, decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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