IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

LAVON MOORE
1027 LINCOLN WAY
AMES IA 50010

SHIVA INC
HOLIDAY INN EXPRESS MOTEL
2400 RIDGETOP CR
AMES IA 50010

IOWA CIVIL RIGHTS COMMISSION
GRIMES STATE OFFICE BUILDING
400 E 14TH ST
DES MOINES, IA 50319-1004

Appeal Number: 05A-UI-00874-DT
OC: 11/07/04 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Shiva, Inc. (employer) potentially appealed a representative's December 2, 2004 decision (reference 01) that concluded Lavon Moore (claimant) was qualified to receive unemployment insurance benefits. Hearing notices were mailed to the parties' last-known addresses of record for a telephone hearing to be held at 8:30 a.m. on February 10, 2005. The employer failed to respond to the hearing notice and provide a telephone number at which a representative could be reached for the hearing and did not participate in the hearing. The claimant responded to the hearing notice and indicated that she would participate in the hearing. When the administrative law judge contacted the claimant for the hearing, she requested that the administrative law judge make a determination based upon a review of the information in the administrative file. Based on a review of the information in the administrative file and the law,

the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the employer's apparent appeal timely?

FINDINGS OF FACT:

The representative's decision was mailed to the employer's last known address of record on December 2, 2004. No evidence was provided to rebut the presumption that the employer received the decision within a few days thereafter. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by December 12, 2004. The apparent appeal was not filed until it was postmarked on January 11, 2005, which is after the date noticed on the disqualification decision.

The materials sent by the employer were in an envelope addressed to: Grimes State Office Building, 400 E. 14th Street, Des Moines, IA 50309-1858. No agency was identified for delivery. The envelope was delivered to the Department of Education, which has offices in the Grimes Building. Noting that the first document in the envelope was a copy of the notice of the fact-finding interview for unemployment insurance, the Department of Education forwarded the documents to Workforce Development, where they were treated as an appeal of the December 2, 2004 decision. Given that several pages of the rest of the material in the envelope were apparent responses to a civil rights complaint, the administrative law judge finds it likely that the employer actually did not intend to appeal the December 2, 2004 decision at all, but rather was attempting to send its responses to the claimant's civil rights complaint to the Civil Rights Commission. The claimant acknowledged that there was a civil rights complaint pending and waived confidentiality for purposes of this decision.

REASONING AND CONCLUSIONS OF LAW:

The determinative issue in this case is whether the employer timely appealed the representative's decision.

Iowa Code section 96.6-2 provides in pertinent part:

> 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. . . . 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.

The ten calendar days for appeal begin 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 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.

871 IAC 24.35(2) provides in pertinent part:

> The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.

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 pursuant to 871 IAC 24.35(2) or other factors outside the appellant's control. The administrative law judge further concludes that because the appeal was not timely filed pursuant to Iowa Code section 96.6-2, 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 v. IDJS, 276 N.W.2d 373 (Iowa 1979); Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979), and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

The employer's "appeal" documentation shall be forwarded to the Civil Rights Commission as likely was the employer's original intent.

DECISION:

The December 2, 2004 (reference 01) decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect. Benefits are allowed.

ld/sc