

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA J GRAY
Claimant

APPEAL NO: 07A-UI-10801-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARLOS O'KELLY'S INC
Employer

**OC: 10/21/07 R: 03
Claimant: Appellant (1)**

Section 96.6-2 - Timeliness of Appeal
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

Melissa J. Gray (claimant) appealed a representative's November 8, 2007 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Carlos O'Kelly's, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for 2:00 p.m. on December 10, 2007. The claimant received the hearing notice and responded by calling the Appeals Section on December 5, 2007. She indicated that she would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, the claimant did not participate in the hearing. The employer responded to the hearing notice and indicated that Aaron Breitbart would participate as the employer's representative. When the administrative law judge contacted Mr. Breitbart for the hearing, he agreed that the administrative law judge should make a determination based upon a review of the information in the administrative file. The administrative law judge considered the record closed at 2:11 p.m. At 2:46 p.m., the claimant called the Appeals Section and requested that the record be reopened. 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.

ISSUES:

Should the hearing record be reopened? Was the claimant's appeal timely or are there legal grounds under which it can be treated as timely?

FINDINGS OF FACT:

The claimant received the hearing notice prior to the December 10, 2007 hearing. The instructions inform the parties that they are to be available at the specified time for the hearing, and that if they cannot be reached at the time of the hearing at the number they provided, the judge may decide the case on the basis of other available evidence. The reason the claimant was not available at the number she had previously provided was that she was finishing a

college final which took a little more time than she had previously anticipated and then she stayed after for a period of time to speak with the professor.

The representative's decision was mailed to the claimant's last-known address of record on November 8, 2007. No evidence was provided to rebut the presumption that the claimant 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 November 18, 2007. The notice also provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was Monday, November 19, 2007. The appeal was not filed until it was postmarked on November 23, 2007, which is after the date noticed on the disqualification decision. No explanation for the delay in filing the appeal was provided; the only reference to the timing of the appeal on the claimant's appeal was the notation that she had "talked to Quitin (sic) (a local Agency representative) on 11/20 & he told me to go along with the appeal."

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The claimant was not available for the December 10, 2007 hearing at the scheduled time for the hearing, and did not recontact the Appeals Section until 46 minutes after scheduled time for the hearing and after the hearing record had been closed. Although the claimant intended to participate in the hearing, the claimant failed to read or follow the hearing notice instructions and be available at the time specified for the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The claimant knew in advance of her scheduled final and did not take reasonable care to avoid a conflict with the scheduled hearing, and did not seek to reschedule the hearing. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

As to the timing of the claimant's appeal, 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 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 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 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 fact that the claimant spoke to an Agency representative the day after the appeal deadline and that representative did not discourage the claimant from filing her appeal does not waive the jurisdictional timeliness issue and does not result in a conclusion that the delay in filing the appeal was due to some Agency action. The Agency representative had no power or authority

regarding how the appeal might be treated as timely; he acted appropriately in advising the claimant to proceed with her appeal, as only through the appeal process could the claimant have the opportunity to present evidence to the administrative law judge as to circumstances under which the appeal could legally be treated as timely. The claimant has presented no evidence under which the appeal can be legally treated as timely. 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 § 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, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

DECISION:

The representative's November 8, 2007 decision (reference 01) is affirmed. The appeal in this case was not timely, and the decision of the representative has become final and remains in full force and effect. Benefits are denied.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs