

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THOMAS W NEER
Claimant

APPEAL NO. 11A-EUCU-00221-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

**OC: 06/14/09
Claimant: Appellant (1)**

Section 96.3(7) - Overpayment
Section 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

Thomas Neer filed an appeal from the February 11, 2011, reference 02, decision that he was overpaid \$1,544.00 in benefits for four weeks between June 21, 2009 and July 18, 2009, due to receipt of vacation pay that was deductible from benefits.. After due notice was issued, a hearing was held by telephone conference call on March 21, 2011. The hearing in this matter was consolidated with the hearing in Appeal Number 11A-EUCU-00220-JTT. Department Exhibits D-1 and D-2 were received into evidence.

ISSUE:

Whether there is good cause to treat Mr. Neer's late appeal from the February 11, 2011, reference 02, overpayment decision as a timely appeal.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On February 11, 2011, Iowa Workforce Development mailed a copy of two decisions to Thomas Neer at his last known address of record. The February 11, 2011, reference 01, decision denied benefits for the five-week period ending July 18, 2009, based on a conclusion that Mr. Neer had received vacation pay that was deductible from his unemployment insurance benefits. The February 11, 2011, reference 02, decision indicated that Mr. Neer had been overpaid \$1,544.00 for four weeks between June 21, 2009 and July 18, 2009, based on the vacation pay issue. Both decisions contained a warning that an appeal must be postmarked or received by the Appeals Section by February 21, 2011. Both decisions were received at Mr. Neer's home in a timely manner, prior to the deadline for appeal. Mr. Neer was out of the country at the time the decisions arrived and did not return home until February 13, 2011. Mr. Neer had to go out of town for his work and did not review the decisions until several days later. On February 22, 2011, Mr. Neer telephoned a Workforce Development representative for guidance. That same day, the Workforce Development representative left a return message that directed Mr. Neer to follow the directions on the back of the decisions to file an appeal and to contact his local Workforce Development if he had further questions. On February 25, 2011, Mr. Neer drafted an appeal and mailed the appeal. The appeal bears a February 2011 postmark with a date that is

not entirely legible. The postmark is either a 25 or a 26. The first digit is legible, but the second digit—the 5 or 6—is not legible. Mr. Neer dated his appeal letter February 25, 2011.

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). 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).

Mr. Neer's mailed appeal was filed on February 25, 2011, the completion date that appears on the appeal letter.

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 the appellant did have a reasonable opportunity to file a timely appeal. The weight of the evidence indicates that both decisions were received at Mr. Neer's address of record in a timely manner, well before the deadline for appeal, but that Mr. Neer, for personal reasons, did not take steps toward filing an appeal until February 22, 2011.

The administrative law judge concludes that the appellant's 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 February 11, 2011, reference 02, decision is affirmed. The appeal in this case was not timely. The decision that the claimant was overpaid \$1,544.00 in benefits for four weeks between June 21, 2009 and July 18, 2009 remains in effect.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw