

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

ANDREW D BURGIN JR  
740 THOMAS RD  
POTEET TX 78065

IOWA MOLD TOOLING COMPANY INC  
500 HWY 18 W  
PO BOX 189  
GARNER IA 50438-0189

Appeal Number: 06A-UI-00232-RT  
OC: 07-03-05 R: 02  
Claimant: Appellant (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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.6-2 – Initial Determination (Timeliness of Appeal)  
Section 96.6-2-3 – Initial Determination (Previous Adjudication)

STATEMENT OF THE CASE:

The claimant, Andrew D. Burgin, Junior, filed an appeal from an unemployment insurance decision dated July 13, 2005, reference 01, denying unemployment insurance benefits to him because a decision on his separation from employment on January 27, 2005 was made on a prior claim and that decision remained in effect. After due notice was issued, a telephone hearing was held on January 24, 2006, with the claimant participating. During the hearing, Dawn Habhab, acted as both a witness and an advocate for the claimant. Rhonda Krause, Human Resources Manager, participated in the hearing for the employer, Iowa Mold Tooling Company, Inc. Department Exhibit One was admitted into evidence. The administrative law

judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

When the administrative law judge finally reached the claimant for the appeal's hearing, the claimant informed the administrative law judge that Dawn Habhab was going to be a witness and was not an attorney or representative. The administrative law judge suggested that Ms. Habhab be called when her testimony was necessary. The claimant agreed. The administrative law judge began the hearing. The claimant is hearing impaired; however, the claimant was able to hear the administrative law judge if he spoke loudly and slowly, which the administrative law judge did. The administrative law judge informed the claimant that if he did not hear something, to immediately say so, and the administrative law judge would repeat it. The claimant was able to hear and understand the proceedings. At approximately 11:36 a.m. the claimant requested that the administrative law judge call Dawn Habhab to act as his advocate and witness. The administrative law judge did so and Ms. Habhab thereafter participated in the hearing both as the claimant's advocate or representative and as a witness. If the administrative law judge had known that Ms. Habhab was going to be the claimant's advocate and representative, he would have called her at the beginning of the hearing. At 11:28 a.m. on January 13, 2006, the administrative law judge spoke to the employer's witness. She was concerned about the timeliness of appeal issue. The administrative law judge informed Ms. Krause that she could raise that issue at the hearing but also conceded that it was a jurisdictional issue that might have to be dealt with preliminarily at the hearing. The administrative law judge informed her that, according to the Notice of Appeal, the main issue was going to be whether the separation issue had been previously adjudicated. When the hearing began, the administrative law judge explained to the parties that there was a timeliness of appeal issue which was jurisdictional but that it was not set out on the Notice of Appeal. Since it was not set out on the Notice of Appeal, the administrative law judge informed the parties that he really did not have jurisdiction to decide that issue but that it was a preliminary issue that needed to be decided. The parties permitted the administrative law judge to take evidence on and decide the issue as to whether the claimant's appeal was timely and the parties waived further notice of that issue.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Department Exhibit One, the administrative law judge finds: An authorized representative of Iowa Workforce Development issued a decision in this matter on July 13, 2005, reference 01, determining that the claimant was not eligible to receive unemployment insurance benefits because a decision on his separation from employment on January 27, 2005, was made on a prior claim and that decision remained in effect. The decision dated July 13, 2005, was sent to the claimant on that date and received by the claimant in late July. That decision indicated that an appeal had to be postmarked or otherwise received by the Appeal's Section by July 25, 2005 (the decision actually said July 23, 2005, but since that was a Saturday, the appeal would be due the next business or working day). However, the claimant did not appeal the decision until he mailed his appeal in an envelope postmarked January 3, 2006, making the appeal over five months late. The only reason given by the claimant for the delay was that the evidence was scattered and he had to accumulate it. Although the claimant testified that he received the decision in late July of 2005, his advocate and witness, Dawn Habhab testified that the claimant did not receive the decision in order to timely file an appeal by July 25, 2005, because he was moving back and forth from Texas. However, the claimant testified that he did not finally move to Texas until September 7, 2005, long after the decision had been sent to him. Ms. Habhab did state that she had been out of the country for

one month and may have contributed to the delay in the filing of the appeal. She testified that she would have told the claimant to appeal the decision promptly but she was out of the country. She stated at one point that she was to help the claimant "decide boundaries." Ms. Habhab also testified that she told the claimant to "hold on" implying that she wanted the claimant to wait on the appeal. Ms. Habhab did concede that part of the responsibility lay with the Department of Human Rights, for whom she works, for the delay in the filing of the appeal. Apparently there were other issues raised with other agencies unrelated to the claimant's unemployment insurance claim involving both the claimant and Ms. Habhab.

The claimant reopened his claim for unemployment insurance benefits effective January 23, 2005 in a prior benefit year from July 4, 2004 to July 3, 2005. At that time and in that benefit year an authorized representative of Iowa Workforce Development issued a decision determining that the claimant's separation from the employer on January 27, 2005 was disqualifying and denied unemployment insurance benefits to the claimant. The claimant appealed this decision to the Appeal's Section and an administrative law judge affirmed the decision and denied the claimant benefits by a decision dated April 7, 2005. The claimant did not at that point appeal the decision to the Employment Appeal Board. The claimant went to work for another employer, Golden Oval Eggs LLC and earned \$5,837.77 in the second quarter of 2005 and \$638.87 in the third quarter of 2005. Since this amount was well in excess of ten times the claimant's weekly benefit amount of \$337.00 or \$3,370.00, the claimant requalified to receive unemployment insurance benefits following the disqualifying separation from the employer herein. The claimant then separated from Golden Oval Eggs LLC on or about June 30, 2005 and the claimant then filed a claim for a new benefit year from July 3, 2005 to July 2, 2006. The claimant's separation from Golden Oval Eggs LLC was eventually determined not to be disqualifying by an appeal to the Employment Appeal Board and the claimant was allowed benefits. The claimant has received unemployment insurance benefits in the new benefit year in the amount of \$3,707.00 as follows: \$337.00 per week for four weeks from benefit week ending July 9, 2005 to benefit week ending July 30, 2005 and \$337.00 per week for seven weeks from benefit week ending December 10, 2005 to benefit week ending January 21, 2006. The claimant appears to still be getting benefits.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant filed a timely appeal, or, if not, whether the claimant demonstrated good cause for such failure. The administrative law judge concludes that the claimant's appeal was not timely and the claimant has not demonstrated good cause for a delay in the filing of his appeal and, as a consequence, the claimant's appeal should not be accepted and the administrative law judge has no jurisdiction to reach the remaining issue.
2. Whether the claimant's separation from employment on January 27, 2005 was previously adjudicated and determined on a prior claim and that decision remains in effect. The administrative law judge does not have jurisdiction to decide that issue but notes that according to Iowa Workforce Development records, a decision on the claimant's separation on January 27, 2005 had been previously adjudicated and the claimant was denied benefits by a decision by an authorized representative of Iowa Workforce Development dated February 28, 2005 and affirmed by an administrative law judge by a decision dated April 7, 2005 as shown at reference 02 for a prior benefit year effective July 4, 2004.

3. Whether the claimant's separation from employment was a disqualifying event. The administrative law judge does not have jurisdiction to decide this issue because the claimant's appeal of the prior adjudication decision is not timely and further because the issue has already been previously adjudicated.

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 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 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(1) provides:

(1) Except as otherwise provided by statute or by department rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the department shall be considered received by and filed with the department:

a. If transmitted via the United States postal service or its successor, 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 is 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.

b. If transmitted by any means other than the United States postal service or its successor, on the date it is received by the department.

871 IAC 24.35(2) provides:

(2) 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.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The department shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

The administrative law judge concludes that the claimant has the burden to prove that his appeal was timely or that he had good cause for a delay in the filing of his appeal. The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence either that his appeal was timely or that he had good cause for a delay in the filing of his appeal. As shown at Department Exhibit One and as set out in the Findings of Fact, the claimant's appeal was over five months late. The claimant testified that he received the decision in late July but did not appeal because his

evidence was scattered. The administrative law judge does not understand exactly why this would be the reason for a delay in the filing of his appeal. The decision is clear that an appeal had to be postmarked or otherwise received by the Appeal's Section by July 23, 2005 which would be extended to July 25, 2005 because July 23 was a Saturday and the appeal would not be due until the next business or working day. The claimant's witness, Dawn Habhab testified that the claimant was moving to Texas and did not receive the decision in a timely fashion. The claimant testified that he did not officially move to Texas finally until September 7, 2005 almost two months after the decision had been sent. Even assuming that the claimant was moving back and forth from Texas and received the decision late, he received the decision in late July and had five months still to appeal the decision but did not do so. Ms. Habhab testified that part of the reason for the delay was that she was out of the country in July and if she had been present she would have told the claimant to appeal. She further testified that she was helping the claimant "decide boundaries." She seemed to testify that she had told the claimant to "hold on" and wait to file an appeal. Later Ms. Habhab testified that part of the responsibility was on the Department of Human Rights where she was employed. Apparently there were other issues being raised in other agencies which were totally unrelated to the claim for unemployment insurance benefits. Those issues should in no way have caused the claimant to delay any of his actions for unemployment insurance benefits. There is no evidence here that the claimant's delay was due to any error or misinformation on the part of Iowa Workforce Development or to any delay or other action of the U.S. Postal Service at least not for over five months. Accordingly, the administrative law judge is constrained to conclude that the claimant's attempted appeal of the decision dated July 13, 2005, reference 01, is not timely and the claimant has not demonstrated good cause for a delay in the filing of his appeal. Therefore, the administrative law judge concludes that the claimant's appeal should not be accepted and that he lacks jurisdiction to make a determination with respect to the other issues presented. The administrative law judge further concludes that the representative's decision of July 13, 2005, reference 01, should remain in full force and effect.

Although the administrative law judge does not technically have jurisdiction to reach the other issues including the issue as to whether there was a previous adjudication of the claimant's separation from the employer herein on January 27, 2005, the administrative law judge feels constrained to note that in a prior benefit year from July 4, 2004 to July 3, 2005, the claimant reopened his claim for unemployment insurance benefits effective January 23, 2005, following his separation from the employer herein on January 27, 2005. The administrative law judge further notes that an authorized representative of Iowa Workforce Development issued a decision dated February 28, 2005, determining that the claimant's separation was disqualifying and denying benefits. The administrative law judge further notes that the claimant appealed this decision to the Appeal's Section and an administrative law judge by decision dated April 7, 2005, affirmed the decision by the authorized representative and again denied benefits to the claimant. The claimant did not then appeal this decision to the Employment Appeal Board. If the claimant remains dissatisfied with that decision his remedy is to appeal that decision to the Employment Appeal Board. Clearly, the issue as to the claimant's separation on January 27, 2005 has been previously adjudicated and the administrative law judge would not now have jurisdiction to decide that issue because of its previous adjudication, quite apart from whether this appeal is timely. In addition, the administrative law judge notes that the claimant has requalified to receive unemployment insurance benefits following his disqualifying separation from the employer herein on January 27, 2005 and has received unemployment insurance benefits in the amount of \$3,707.00 and is still receiving unemployment insurance benefits.

DECISION:

The representative's decision of July 13, 2005, reference 01, is to remain in full force and effect. The claimant, Andrew D. Burgin, Junior, is not entitled to receive unemployment insurance benefits as a result of his separation from the employer herein, Iowa Mold Tooling Company, Inc., on January 27, 2005, because a decision on that separation was made on a prior claim and that decision remains in effect. However, the claimant is entitled to receive unemployment insurance benefits because he has requalified to receive unemployment insurance benefits since separating from the employer herein on or about January 27, 2005 pursuant to earnings from a subsequent employer and his separation from the subsequent employer was not disqualifying. Any unemployment insurance benefits that the claimant receives should not be charged to the account of the employer herein. The claimant's attempted appeal of the decision at issue here, dated July 13, 2005, reference 01, is not timely and the claimant has not demonstrated good cause for its delay.

kkf/kjw