

IOWA DEPARTMENT OF INSPECTIONS AND
APPEALS
DIVISION OF ADMINISTRATIVE HEARINGS
Wallace State Office Building
DES MOINES IOWA 50319

Appeal Number: 12IWD011

Respondent (6)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

This Decision Shall Become Final, as of the date of mailing stated below unless:

**SEMIR SALIHOVIC
D/B/A SMART ROOFING**

1. Either party files a WRITTEN application for a rehearing WITHIN TWENTY (20) DAYS AFTER the date below. The written application must state the specific reasons for the rehearing and the relief sought. If the request for a rehearing is denied or if the rehearing decision is not satisfactory, either party may petition the District Court WITHIN THIRTY (30) DAYS of either action;
OR

**IOWA WORKFORCE DEVELOPMENT
STEVEN HEINLE, FIELD AUDITOR
1000 EAST GRAND AVENUE
DES MOINES, IA 50319**

2. Either party may petition the District Court WITHIN THIRTY (30) DAYS after the date below.

YOU DO HAVE THE RIGHT TO HIRE A LAWYER at your own expense to represent you in these proceedings.

JOSEPH WALSH, IWD
JOSEPH BERVID, IWD
NICHOLAS OLIVENCIA, IWD
ROSS GIBSON, ATTY

(Administrative Law Judge)

June 13, 2012

(Decision Dated & Mailed)

STATEMENT OF THE CASE

Semir Salihovic d/b/a Smart Roofing has filed an appeal of two decisions issued by Iowa Workforce Development (the Department). In the first decision, dated October 3, 2011, the Department determined that an employer-employee relationship existed between the Appellant and his workers during the years 2009 and 2010. In the second decision, dated October 4, 2011, the Department determined that the Appellant was liable for unemployment insurance contributions effective April 1, 2009.

The case was transmitted from Workforce Development to the Department of Inspections and Appeals on March 16, 2012 to schedule a contested case hearing. The parties originally convened for hearing on April 23, 2012. At that time, attorney Bruce Cook represented the Appellant. The issue under appeal is whether the Appellant filed a timely appeal of a Department decision determining that an employer-employee relationship existed between the Appellant business and individuals performing services for the business during 2009 and 2010. During the course of the hearing on April 23, Cook represented that he personally had testimony that was relevant to the appeal issue. Cook requested a continuance in order for the Appellant to engage substitute counsel to

facilitate Cook's testimony in the matter. The request was granted.

The parties reconvened for hearing on April 24, 2012. Attorney Ross Gibson represented the Appellant; Bruce Cook formally withdrew as the Appellant's counsel. The Appellant was present and testified. Bruce Cook testified for the Appellant. Field auditor Steven Heinle represented the Department and presented testimony. The Department submitted Exhibit A, pages 3 through 22, which was admitted as evidence in the case. The Appellant submitted Exhibit C, which was admitted.

ISSUE

Whether Semir Salihovic d/b/a Smart Roofing filed a timely appeal.

FINDINGS OF FACT

Semir Salihovic completed and submitted to the Department a Report to Determine Liability in February, 2011. On that document, Salihovic reported that his primary business activity in Iowa is residential roofing. Salihovic listed his primary business address as . Salihovic submitted the document as part of his application for contractor registration with the Department. (Exh. A, pp. 17-20).

At some point, the Department's misclassification unit initiated an investigation into whether Salihovic was liable as an employer for unemployment insurance contributions. On September 20, 2011, the Department issued a decision finding Salihovic liable for unemployment insurance contributions effective April 1, 2009. The decision establishes a contribution rate of 9% for the years 2010 and 2011 and 8% for 2009. The decision indicates that any appeal must be filed within 30 days of September 20, 2011. Specifically, the decision provides, "This decision will be final if you do not file an appeal in thirty days from the date on this notice. Your appeal must be in writing and mailed directly to the Unemployment Insurance Services Tax Bureau." (Exh. A, pp. 11-12).

On October 4, 2011, the Department issued another decision finding Salihovic liable as an employer for unemployment insurance contributions. Apart from the decision date, this decision appears identical to the September 20, 2011 decision. The decision indicates that any appeal must be filed within 30 days of October 4, 2011 and includes the same language cited above with respect to the consequences of failure to file an appeal. (Exh. A, pp. 13-14).

The Department mailed a Notice of Employer Status and Liability to Salihovic on October 4, 2011, which informed him that the Department had determined that an employer-employee relationship existed between his business and the individuals performing services for the business during 2009 and 2010. The decision states that the compensation for the years 2009 and 2010 is being reported for unemployment insurance purposes. The date on this document is October 3, 2011, but the Department's representative, field auditor Steven Heinle, testified at hearing that he personally put both the October 4, 2011 decision referenced above and the Notice of Employer Status and Liability in the mail together on October 4, 2011. The Notice of

Employer Status and Liability indicates that any appeal must be filed within 30 days of October 3, 2011. (Exh. A, pp. 15-16; Heinle testimony).

By letter dated November 7, 2011, attorney Bruce Cook submitted an appeal on behalf of Salihovic. In the appeal letter, Cook wrote:

I realize that this request for an appeal does not appear to be timely and therefore request a waiver of the time limit required to request an appeal because Mr. Salikovic [sic] is of Bosnian descent, has some trouble with the English language and did not realize that the 30-day time limit to appeal was triggered with the decision of September 20, 2011.

(Exh. A, p. 8). The Department received the appeal letter via U.S. mail on November 8, 2012. The Department did not submit the envelope that the appeal came in with postmark as evidence, nor was its representative aware of the postmark date at hearing. (Heinle testimony).

At hearing, Salihovic testified that the first time he became aware that he was liable for unemployment insurance contributions was November 2, 2011. Salihovic stated that he received a phone call from someone on that date informing him of this fact. Salihovic met with Heinle on November 2, 2011. Heinle provided Salihovic with a copy of the September 20, 2011 decision at that meeting. (Salihovic testimony).

Salihovic contacted Cook regarding this matter on November 3, 2011. The two met that morning and Salihovic provided Cook a copy of the September 20, 2011 decision. Cook indicated to Salihovic that it would be problematic to file a timely appeal given the decision date because more than 30 days had already elapsed from the decision. Cook testified that it was obvious from their discussion that Salihovic did not understand his appeal rights and did not understand what the notice was saying with respect to his appeal rights. (Cook testimony).

Cook contacted the Department on either November 3 or 4, 2011 to request a copy of the decision applicable to Salihovic. As a result of that contact, a representative from the Department sent Cook the September 20, 2011 decision. Cook was not aware of the October 4, 2011 decision or the Notice of Employer Status and Liability dated October 3, 2011 until he received a copy of the exhibits from the Department after the appeal was filed. Had Cook realized that there were later dated decisions, he testified that he would have hand-delivered the appeal or filed it on November 4. Since he already believed the appeal was untimely, he filed instead on November 7. (Cook testimony).

Salihovic testified at hearing that he never received the September 20, October 3, or October 4, 2011 decisions by mail. He confirmed that the address to which they were mailed is his home address and he does receive mail there. (Salihovic testimony).

REASONING AND CONCLUSIONS OF LAW

Once the Department makes a determination regarding employer liability, the affected employing unit or employer has a right to appeal from this determination. Iowa law provides that “[a]n appeal shall not be entertained for any reason by the department unless the appeal is filed with the department within thirty days from the date on which the initial determination is mailed. If an appeal is not so filed, the initial determination shall with the expiration of the appeal period become final and conclusive in all respects and for all purposes.”¹

The October 3 and October 4 decisions were both mailed by the Department on October 4, 2011. Heinle testified that he personally deposited both of those decisions in the mail on October 4, 2011. I found his testimony in this regard credible. The thirtieth day following October 4 would have been November 3, 2011, which was a Thursday. Salihovic’s appeal was filed on November 7, 2011, the following Monday.

The Appellant argues that Iowa Rule of Civil Procedure 1.443(2) requires that an additional three days be added to the appeal time since the Department’s decision was sent by mail. That rule, which provides that an additional three days to respond is added when service or notice is made by mail, is not applicable here as it applies only to occasions when the length of time for response is prescribed by the Rules of Civil Procedure. In this case, it is the statute that prescribes an appeal time period of 30 days, not the Rules of Civil Procedure.

I did not find Salihovic’s testimony regarding his failure to receive the decisions by mail credible. The decisions were sent in two batches – one on September 20, 2011 and one on October 4, 2011 – and they were mailed to Salihovic’s home address, the address which he provided to the Department in the Report to Determine Liability. Salihovic confirmed at hearing that the address is correct and that he customarily receives mail there. Salihovic did not indicate that he had previously encountered any problems with mail delivery at his residence. There was no testimony regarding how many people live at Salihovic’s residence, who typically retrieves the mail, or how the mail is typically distributed by the person who retrieves it. I also note that the appeal letter filed on November 7, 2011 makes no reference to Salihovic failing to receive the September 20, 2011 decision; rather, the letter indicates that Salihovic did not understand the 30-day deadline for appeal. Under these circumstances, I cannot conclude that Salihovic failed to receive all of the decisions at issue.

The fact that Salihovic may not have understood the import of the decisions does not excuse a failure to timely appeal.² Upon learning what the decisions meant to him on

¹ Iowa Code § 96.7(4) (2011).

² I note that the appeal letter filed by Salihovic’s attorney, Bruce Cook, mentions that Salihovic has some trouble with the English language. There is no evidence in the record to indicate that Salihovic does not understand spoken or written English. Salihovic testified at hearing without the aid of an interpreter. Additionally, Salihovic signed and presumably filled out the Report to Determine Liability that is included in the record. The evidence at hearing established that Salihovic met with both Heinle and Cook regarding this issue and neither of them indicated that they used an interpreter to communicate with Salihovic during these meetings.

November 2, Salihovic was able to get in touch with an attorney within one day and arrange a meeting to discuss the issue. The fact that Salihovic did not take action to determine the meaning of the decisions prior to that date is not grounds to excuse an untimely appeal.

The employer's appeal was not timely made. Having determined that the appeal was not timely, I have no jurisdiction to consider whether the Department was correct in determining that he was an employer during 2009 and 2010.

DECISION

The employer's appeal is dismissed because it was not timely filed.

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