

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARY M ULTSCH
Claimant

APPEAL NO. 08A-UI-01349-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMF CONSULTING INC
SPIRIT HALLOWEEN SUPER STORE
Employer

OC: 01/06/08 R: 04
Claimant: Respondent (1)

Section 96.6-2 - Timeliness of Protest

STATEMENT OF THE CASE:

AMF Consulting, Inc., doing business as Spirit Halloween Super Store, filed an appeal from the January 31, 2008, reference 03, decision that allowed benefits and found the employer's protest untimely. After due notice was issued, a hearing was held by telephone conference call on February 25, 2006. The claimant did not participate. The employer participated through Angie Fitzgibbons, President. The administrative law judge took official notice of the Agency's record of the claimant's base period wages. Department Exhibits D-1 was received into evidence.

ISSUE:

Whether the employer's protest of the claim for benefits was timely.

Whether good cause existed for a late filing of the protest.

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Claimant's notice of claim was mailed to the employer's address of record on January 11, 2008. The notice of claim contained a warning that any protest must be postmarked, faxed or returned by the due date set forth on the notice, which was January 22, 2008. The employer's address of record is a Post Office box in Omaha, Nebraska. However, the employer is currently in Hawaii performing consulting work. The employer has an arrangement with the United States Postal Service in Omaha, whereby once a week the Postal Service collects the mail in the Post Office box and mails it to the employer in Hawaii. The weight of the evidence indicates that the notice of claim was received at the employer's address of record in a timely fashion and that the employer received the notice of claim in Hawaii on or before January 22, 2008. On January 22, 2008, Mike Fitzgibbons, Secretary/Treasurer, completed the employer's protest information on the notice of claim form. On Saturday, January 26, 2008, Mr. Fitzgibbons faxed the employer's protest to Iowa Workforce Development. The greater weight of the evidence indicates that the employer's protest arrived at Iowa Workforce Development on Saturday, January 26, 2008. The Unemployment Insurance Service Center date-stamped the employer's protest as received on Monday, January 28, 2008.

REASONING AND CONCLUSIONS OF LAW:

The weight of the evidence indicates that the employer did have a reasonable opportunity to file a timely protest by the January 22, 2008 deadline. The employer's faxed protest was deemed filed on January 26, 2008, the day it was actually received at Iowa Workforce Development. The protest was received after the deadline for protest had expired.

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.

Iowa Code section 96.6-2 provides in pertinent part:

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.

Another portion of this same Code section dealing with timeliness of an appeal from a representative's decision states that such an appeal must be filed within ten days after notification of that decision was mailed. In addressing an issue of timeliness of an appeal under that portion of this Code section, the Iowa Supreme Court held that this statute prescribing the time for notice of appeal clearly limits the time to do so, and that compliance with the appeal notice provision is mandatory and jurisdictional. Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979).

The administrative law judge considers the reasoning and holding of that court in that decision to be controlling on this portion of that same Iowa Code section which deals with a time limit in which to file a protest after notification of the filing of the claim has been mailed. The employer has not shown any good cause for not complying with the jurisdictional time limit. Therefore, the administrative law judge is without jurisdiction to entertain any appeal regarding the separation from employment.

The employer failed to file a timely protest. The evidence establishes that the employer's failure to file a timely protest was not attributable to Iowa Workforce Development error or misinformation or delay or other action of the United States Postal Service. Accordingly, the administrative law judge lacks jurisdiction to make a determination regarding the nature of the claimant's separation from the employment, the claimant's eligibility for benefits, or the employer's liability for benefits. The Agency's initial determination of the claimant's eligibility for benefits and the employer's liability for benefits shall stand and remain in full force and effect.

DECISION:

The Agency representative's January 31, 2008, reference 03, decision is affirmed. The Agency's initial determination of the claimant's eligibility for benefits and the employer's liability for benefits shall stand and remain in full force and effect.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw