BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

SCOTT R BUSS

Claimant

HEARING NUMBER: 15B-UI-04637

EMPLOYMENT APPEAL BOARD DECISION

SECTION: 10A.601 Employment Appeal Board Review

D E C I S I O N

FINDINGS OF FACT:

A hearing in the above matter was held May 15, 2015. The administrative law judge's decision was issued May 18, 2015. Employer Denso International America was not sent notice of hearing, and did not participate in the hearing. The administrative law judge's decision has been appealed to the Employment Appeal Board. The record of the hearing is inadequate on the issue of timeliness of an appeal by the Employer. Further we remand because the Employer is directly affected by this matter and should be present at any hearing. Thus the remand requires addressing the timeliness of appeal and, if necessary, the merits of the substitution of quarters issue.

REASONING AND CONCLUSIONS OF LAW:

Remand On Timeliness: Too numerous to count are the number of decisions by Workforce and this Board where we note that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the Administrative Law Judge and this Board have no authority to change the decision of a representative if a timely appeal is not filed. *Franklin v. Iowa Dept. Job Serv.,* 277 N.W.2d 877, 881 (Iowa 1979). The ten day period for appealing an initial determination concerning a claim for benefits has been described as jurisdictional. *Messina v. Iowa Dept. of Job Service*, 341 N.W.2d 52, 55 (Iowa 1983); *Beardslee v. Iowa Dept. Job Service,* 276 N.W.2d 373 (Iowa 1979).

Now we are aware that for monetary determination "[i]f newly discovered facts are obtained by the department or a written request for reconsideration is filed by the individual and is timely, an unemployment insurance representative shall examine the facts or the written request for reconsideration and shall promptly issue a redetermination or transfer the written request to an administrative law judge." 871 IAC 25.9(1)(c). The immediately prior rule states "[t]he monetary record shall constitute a final decision unless newly discovered facts which affect the validity of the original determination or a written request for reconsideration is filed by the individual within ten days of the date of the mailing of the monetary record specifying the grounds of objection to the monetary record." 871 IAC 24.9(1)(b). Perhaps

these can be read so that the "timely" language does not apply to an agency initiated redetermination. The problem here is that rule 24.7(6) states that when a determination to substitute quarters is made then "The employer responsible for the workers' compensation or indemnity insurance benefits shall have the right to protest as provided in rule 24.8." Then rule 24.8 sets out a protest process with its usual ten day time limitation. Here a substitute quarter decision was made *favorable to the Claimant*, and notice was sent to Denso per rule 24.7(6). That notice gave until 3/16/15 to appeal. This then is like any other appeal to the Administrative Law Judge and we would expect a lack of "jurisdiction" if there was an appeal – not a decision to come down three weeks after the appeal deadline. We should think that if information came from Denso within the 10 days then a redetermination could have been made too. But we have no evidence pertaining to action by Denso in reaction to the 3/6/15 decision.

Since the Employer Denso had to protest or appeal within 10 days of the decision, and we have no information on whether it did, or when, or why it was late (if it was late) we have to remand this matter to the Administrative Law Judge to address these circumstances.

Notice to Employer: The same fact that causes the issue of timeliness to be raised also raises the issue of the exclusion of Denso from the hearing. The representative decision of April 7, 2015 lists Denso as the employer whose "account will not be charged." Because this is a "typed decision" and a redetermination, rather than through the automated non-monetary decision system [ANDS] the agency and not the employer was listed in the hearing caption and the employer was not included in the notice of hearing. But the Employer is listed in the ANDS decision of March 6, 2015 (ref 01) which states "this decision becomes final unless an appeal is postmarked by 3/16/15…." Thus it is this employer we'd expect to have appealed the ANDS decision of 3/6/15, and who would have the information on any appeal or protest. Further this is the entity with the money at stake. Iowa Code section 17A.12 provides all parties to a contested case shall be afforded an opportunity for hearing after reasonable notice in writing. Here the notice of hearing was not even sent to Denso. This, of course, prevents us from addressing the issue of timeliness of any appeal by Denso, and the substance of the substitution of quarters. Iowa Code §17A.12; *Silva v. Employment Appeal Board*, 547 N.W.2d 232, 235 (Iowa 1996).

Thus we remand so the Employer can have a chance to participate in the hearing as well.

Merits: We do not rule on the merits, since we are remanding, but some observations are in order. In her decision the Administrative Law Judge cites code section 96.5(5) dealing with the offset of benefits by certain Workers' Compensation Benefits, and rule 24.13(3)(3) dealing with the same subject. But this case is about substitution of quarters under Iowa Code §96.23, rule 871 IAC 24.1(11) and rule 871 IAC 24.7. The question of set-off doesn't even come up until the Claimant is monetarily eligible.

Furthermore the typed decision of April 7, 2015 refers to "law section 96..7-2A(2)" – the double dots in the original. Assuming this is Iowa Code §96.7(2)(a)(2) that subparagraph discusses the order of charging benefits and then has five divisions (a) through (e). Division (a) deals with charging when the employee still works for a part-time base period employer, division (b) deals with charging when an employee is disqualified under §96.5(1)-(2), division (d) deals with disaster relief, and division (e) deals with charging for a worker laid off when bumped by certain returning service members. Only (c) discusses "workers' compensation" and states "[t] he amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the

employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits." So the work comp paying employer is on the hook when quarters are substituted not the wage-paying employer, although this is often the same entity. But we cannot discern what that has to do with the rule devised by Workforce that "you cannot have a second claim using the same wages that were used on a prior claim." This makes sense for normal cases since regular base periods are not going to overlap on subsequent benefit years. It is theoretically possible that an overlap of base periods can occur. When a benefit year using an alternative base period is immediately followed by a benefit year using the regular base period there is an overlap of quarters. For example, a January 2014 claim would have an alternative base period of calendar year 2013. If this is followed by a January 2015 claim using the regular base period then the last quarter of 2013 would be in both claims. The Code anticipates this and says "Wages that fall within the alternative base period established under this paragraph 'b'are not available for qualifying benefits in any subsequent benefit year." Iowa Code §96.4(4)(b)(1). But we see no similar provision in Iowa Code §96.23 – likely because cases like this one are rare. We do note some limitations on charging more to an employer than available credits, Iowa Code §96.7(2)(a)(3), and maybe this means that in a case such as this the Claimant can only collect in the aggregate over *both claim years* up to the amount of wage credits (or the MBA if less) – but even if law does have a limit on *credit* usage, this does not mean the same *wages* cannot be used for qualification purposes. If there is some provision in the law that prevents the use of the same substituted wages in a subsequent benefit year for qualification purposes then citation of that law by Workforce would be helpful to all involved.

DECISION:

The decision of the administrative law judge dated May 18, 2015, is not vacated at this time. This matter is **remanded** to an administrative law judge in the Workforce Development Center, Appeals Section. The administrative law judge shall conduct a hearing following due notice in order to address the issue of timeliness of appeal to the Administrative Law Judge, and whether the Claimant will be allowed to substitute quarters in his 2015 benefit year, and any other relevant issue to which the parties have received, or waived, notice. **Notice of hearing should also go to Denso International America, Inc. so that it can participate if it chooses.** After the hearing, the administrative law judge shall issue a decision, which provides the parties appeal rights.

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RRA/fnv
DATED AND MAILED_____

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