IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DANIEL DAWSON
Claimant

ATHENA ISG – GTXREME INC
Employer

APPEAL NO: 10A-UI-08954-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/25/10
Claimant: Appellant (2)

Iowa Code Section 96.6-2 - Timeliness of Protest
Iowa Code Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Daniel Dawson (claimant) appealed an unemployment insurance decision dated May 21, 2010, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Athena GTX (employer) work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 10, 2010. The claimant participated in the hearing. The employer failed to comply with the hearing notice instructions and did not participate in the hearing but did submit a written statement. Employer's Exhibit One and Two were admitted into evidence. Based on the evidence, the arguments of the party, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant's appeal is timely, and if so, can the employer successfully protest the claimant's claim in a second benefit year if it did not timely protest his claim in his first benefit year?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: A disqualification decision was mailed to the claimant's last-known address of record on May 21, 2010. The claimant did not receive the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 31, 2010. The appeal was not filed until June 22, 2010, which is after the date noticed on the disqualification decision. The claimant filed an appeal to an overpayment statement issued on June 16, 2010 and the Appeal Section also attached this appeal to the disqualification decision.

The claimant was employed as a full-time manufacturing employee from January 26, 2009 through April 24, 2009 when he was discharged. After the claimant separated from the employer, he filed a claim for unemployment benefits effective April 26, 2009. A notice of claim was mailed to the employer on May 4, 2009 but the employer elected not to protest the claim

and the claimant received benefits. The employer wrote in a letter dated July 21, 2010, "History on this employee by our records shows that we did not contest the initial unemployment application and the employee was paid in accordance with IWD policies."

The claimant filed benefits for a new claim year effective April 25, 2010. The employer was mistakenly sent a subsequent notice of claim on April 27, 2010 and it protested the second notice of claim. A fact-finding interview was set up and both the claimant and the employer participated. The employer reported the claimant was discharged for using profane language on the job. The claimant reported he was discharged because the employer said it was no longer in need of his services.

The employer failed to participate in the appeal hearing but submitted a letter which stated, "Athena GTX is an "at will" employer and the employer was discharged for the reasons and specifics covered in the initial hearing on 5/19/10 in which his claim was denied. Under our policies we were not obligated to explain the details of the reason for the dismissal and the employee was within his probationary period."

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides in pertinent part:

> 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. . . . 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.

The claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See Smith v. Iowa Employment Security Commission, 212 N.W.2d 471, 472 (Iowa 1973). The claimant timely appealed the overpayment statement, which was the first notice of disqualification. Therefore, the appeal shall be accepted as timely.

The substantive issue to be determined in this case is whether the employer's protest was timely. The parties have ten days from the date of mailing the notice of claim to protest payment of benefits to the claimant. Iowa Code section 96.6-2. Another portion of Iowa Code section 96.6-2 dealing with timeliness of an appeal from a representative's decision states 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 court has held that this statute clearly limits the time to do so, and 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 the Beardslee court controlling on the portion of Iowa Code section 96.6-2 which deals with the time limit to file a protest after the notice of claim has been mailed to the employer. Compliance with the protest provisions is jurisdictional unless the facts of a case show that the notice was invalid. Beardslee, 276 N.W.2d 373, 377 (Iowa 1979); see also In re Appeal of Elliott, 319 N.W.2d 244, 247 (Iowa 1982). Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), protests are

considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). The question in this case thus becomes whether the employer was deprived of a reasonable opportunity to assert a protest 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 employer did have a reasonable opportunity to file a timely protest.

871 IAC 24.35(2) provides in pertinent part:

> 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.

The employer has not shown that the delay for not complying with the jurisdictional time limit was due to department error or misinformation or delay or other action of the United States Postal Service. Since the employer filed the protest late without any legal excuse, the employer did not file a timely protest. Since the administrative law judge concludes that the protest was not timely filed pursuant to Iowa Code section 96.6-2, the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the protest and the reasons for the claimant's separation from employment, regardless of the merits of the employer's protest. This becomes the final determination regarding the separation from employment, including carrying into subsequent benefit years. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979); Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979) and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

DECISION:

The claimant's appeal is timely. The unemployment insurance decision dated May 21, 2010, reference 01, is reversed. The employer did not timely protest the claimant's separation during his April 26, 2009 claim year, and the separation then is determined as being non-disqualifying, including in the subsequent benefit year beginning April 25, 2010. Benefits are allowed, provided the claimant is otherwise eligible.

_____
Susan D. Ackerman
Administrative Law Judge

_____
Decision Dated and Mailed

sda/css