

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

LISA L HERNANDEZ

Claimant

and

NORTHERN IOWA DIE CASTING INC

Employer

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HEARING NUMBER: 16B-UI-04133

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.6-2

DECISION

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES AND REMANDS** as set forth below.

FINDINGS OF FACT:

On March 16, 2016 a notice of claim was mailed to Northern Iowa Die Casting (Employer). The notice was mailed to the Employer's last known address as supplied to Iowa Workforce. The Employer signed the protest on Sunday, March 27, 2016. The protest was due March 28, 2016. The postmark date on the envelope reads March 32. There is no March 32.

REASONING AND CONCLUSIONS OF LAW:

Legal Standards: 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 Board agrees with the administrative law judges of Iowa Workforce and considers the reasoning and holding of the 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.

By analogy to appeals from initial determinations, we hold that the ten day period for filing a protest is mandatory. *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). The only basis for changing the ten-day period would be where notice to the protesting party was constitutionally invalid. *E.g. Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373, 377 (Iowa 1979). The question in such cases becomes whether the protester was deprived of a reasonable opportunity to assert the protest in a timely fashion. *Hendren v. Iowa Employment Sec. Commission*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Employment Sec. Commission*, 212 N.W.2d 471 (Iowa 1973). The question of whether the appellant has been denied a reasonable opportunity to assert a protest is also informed by rule 871-24.35(2) which states that “the submission of any ...objection...not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.”

Discussion: The key issue in this matter is when the protest was mailed. The Administrative Law Judge took testimony from the Employer on when it asserts that the appeal was placed in a receptacle. There is no dispute that, in reality, the protest was placed in the receptacle in a timely fashion. But, to go by the book, the rule refers not to the physical act of mailing but to the postmark:

The employing unit may protest the payment of benefits if the protest is postmarked within ten days of the date of the notice of the filing of an initial claim. In the event that the tenth day falls on a Saturday, Sunday or holiday, the protest period is extended to the next working day of the department.

871 IAC 24.8(2)(b). This rule, of course, does not deal with all aspects of affecting a protest since, for example, it fails to address hand delivery and facsimile transmission or the SIDES. But the rule does make clear that when the protest is sent by mail the date of filing is the date of the postmark and not the date of physically placing the protest in the mail. We read rule 26.4(2) in conjunction with the more general rule:

24.35(1) Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:

a. If transmitted via the United States postal service 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.

871 IAC 24.35(1)“a”. This rule provides additional guidance to determining the date of mailing. Under 24.35(1)“a” if the postmark is not legible, or not extant, then a postage meter mark is to be used. If there is no legible postage meter mark then the rule states the date of mailing is “the date entered on the document as the date of completion”. The rule does not say that evidence should be taken to reconstruct the date of the postmark if it is not available. “[I]n the absence of a postmark” the rule mandates the use of “the date entered on the document as the date of completion”. 871 IAC 24.35(1)“a”. Here the postmark we deem to be illegible since it lists a nonexistent date. There is no postage meter mark. We thus turn to the date entered on the protest. This date in March 27, and the protest is thus timely.

Our reading may be technical but it is not without purpose. By using the document date as the fall back, the rule seeks to simplify the process of determining the mailing date. It is the same reason that the postmark rather than placement in the mailbox is used, namely, to avoid extended testimony about mailing. We have often seen contradictory and confusing *argument* submitted to us about just when an appeal was placed in a mail box. To avoid conundrums over detailed factual issues, the rule provides for easily and objectively determined dates. Both the postmark and the document date provide a relatively easy means of determining mailing. A contrary approach would result in the use of resources to determine mailing dates rather than the basic issue to be decided in the case. The rule provides a reliable and quick means of determining filing date while maintaining fairness to the party who can protect itself by merely dating its appeal.

DECISION:

The administrative law judge’s decision dated May 6, 2015 is **REVERSED AND REMANDED**. The decision of the administrative law judge is not vacated at this time, and remains in force unless and until the Department makes a differing determination pursuant to this remand. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section. The administrative law judge shall issue a decision on the merits of this case. The Administrative Law Judge may in the Administrative Law Judge’s discretion conduct an additional hearing if the judge deems it necessary to develop issues that were not adequately addressed in the first hearing because of the disposition of the issue of timeliness. After the hearing, if any, the administrative law judge shall issue a decision that provides the parties appeal rights

Kim D. Schmett

Ashley R. Koopmans

James M. Strohman