

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JODY A JOHNSON
Claimant

APPEAL NO. 16A-UI-10895-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DES MOINES COLD STORAGE CO INC
Employer

OC: 09/11/16
Claimant: Respondent (1)

Section 96.6(2) – Timeliness of Protest

STATEMENT OF THE CASE:

Des Moines Cold Storage Co., Inc. filed an appeal from the September 30, 2016, reference 01, decision that allowed benefits to Ms. Johnson and found the employer's protest untimely. After due notice was issued, a hearing was held by telephone on October 20, 2016. The claimant participated. The employer participated by Ms. Sandy Trimmell, Controller. Exhibit D-1 was admitted into the hearing record.

ISSUE:

At issue in this matter is whether the employer filed a timely protest as required by law.

FINDINGS OF FACT:

The administrative law judge, having considered all of the evidence in the record, finds that: The claimant's notice of claim was mailed to the employer's address of record on September 15, 2016. The notice of claim contains a warning that any protest must be postmarked or returned not later than ten days from the initial mailing date. Because the due date would have fallen on a Sunday, the protest was due to be postmarked, faxed, or returned by the next business day, Monday, September 26, 2016. The notice of claim filed was received at the employer's place of business in a timely fashion prior to the deadline for the protest. Des Moines Cold Storage Co., Inc. attempted to file a protest on the claim. The protest was not sent, however, until Tuesday, September 27, 2016 because the employer had purchased a new facsimile machine and had not properly set the date causing the machine to relay the facsimile report late.

In its protest, the employer disputed Des Moines Cold Storage Co., Inc.'s responsibility for the payment of unemployment insurance benefits to Ms. Johnson because the portion of the employer's business where Ms. Johnson was employed had been sold to new owners effective May 1, 2016. It is employer's belief that Crystal Distribution Company, the new owners, should, therefore, be liable for any unemployment insurance benefits paid to the claimant based upon a job separation that took place while they were the employer.

Although a segregable portion of the business may have been sold to new owners effective May 1, 2016, agency records reflect that the change in ownership had not been reported to the agency by the successor, or the predecessor, and no application for approval of the transfer was made within 90 days of the transfer. Because the provisions of Section 96.7-6 (b) had not been met, the liability was not transferred to the successor. It also appears that the ownership of that portion of the business may have also reverted back to Des Moines Cold Storage Co., Inc. because of a business failure by the successor.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 96.6(2) provides:

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. 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. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". 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. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Iowa Code § 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 administrative law judge concludes that Des Moines Cold Storage Co., Inc. was on September 15, 2016, an interested party on the claim of Jody A. Johnson because the liability

for unemployment benefits related to the employment of the claimant had not been transferred to a successor employing unit. In addition the ownership of the facility where Ms. Johnson was employed appears to have reverted to Des Moines Cold Storage Co., Inc. after Crystal Distribution Company had defaulted on the purchase.

The evidence in the record establishes, that Des Moines Cold Storage Co., Inc. did receive the notice of claim filed at the place of business prior to the deadline for the protest. The evidence establishes that Des Moines Cold Storage Co., Inc. did not file a timely protest. The protest was late because a newly purchased facsimile machine had not been set properly and transmitted the protest late.

Another portion of the 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 established good cause for not complying within the jurisdictional time limit. Therefore, the administrative law judge is without jurisdiction to entertain any protest regarding the separation from employment.

The administrative law judge concludes the employer failed to effect a timely protest within the time period prescribed by the Iowa Employment Security Law, and the delay was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the employer has failed to effect a timely protest pursuant to Iowa Code section 96.6-2, and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the claimant's termination of employment. 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 decision of the representative dated September 30, 2016, reference 01, is affirmed. Des Moines Cold Storage Co., Inc. failed to file a timely protest. Benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs