

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN W PANCO

Claimant

APPEAL NO: 10A-EUCU-00119-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARGILL MEAT SOLUTIONS CORP

Employer

OC: 11/15/09

Claimant: Respondent (5)

Section 96.6-2 – Prior Adjudication
Section 96.6-2 – Timeliness of Protest

STATEMENT OF THE CASE:

Cargill Meat Solutions Corporation (employer) appealed a representative's February 15, 2010 decision (reference 02) that concluded Kevin W. Panco (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. Hearing notices were mailed to the parties' last-known addresses of record for a telephone hearing to be held on April 5, 2010. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Jessica Sheppard appeared on the employer's behalf. Based on the evidence, Agency records reviewed during the course of the hearing, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Has there been a prior determination on the eligibility of the claimant on the same separation as raised in this appeal which is binding on the parties and the outcome of this appeal?

FINDINGS OF FACT:

The claimant's last day of work was November 11, 2008; the employer considered his employment ended as of November 22, 2008. He established a claim for unemployment insurance benefits effective November 16, 2008. A notice of claim was sent to the employer's third party representative, then Frick UC Express (TALX), at P.O. Box 283, St. Louis, MO 63166, on November 21, 2008. No evidence was provided to rebut the presumption that the third party representative received the notice within a few days. The deadline for responding to the notice and protesting the claim was December 1, 2008. No response or protest was made on behalf of the employer, and a de facto decision was made that the claimant was eligible to receive unemployment insurance benefits. He received benefits through that claim year, which expired November 14, 2009.

Upon expiration of that claim year, the claimant established a second claim year effective November 15, 2009. A notice of this new claim was sent to the employer's third party

representative, by then Barnett & Associates, P.O. Box 7340, Garden City, NY 11530 on November 19, 2009, with a deadline for response and protest of November 30. The employer's new third party representative filed a timely protest to the 2009 notice of claim on November 30.

Based on the November 30, 2009 protest, while the Claims representative noted that there had not been a timely protest on the prior claim year, the representative proceeded to conduct a fact-finding interview on January 22, 2010 in which the claimant participated, but no one on behalf of the employer was available. The representative then issued two decisions, one dated February 15, 2010 (reference 02), the subject of this appeal, addressing the merits of the November 2008 separation, one dated February 16, 2010 (reference 04), concluding that as of January 17, 2010 the claimant was no longer eligible for unemployment insurance benefits because he was no longer able and available for work due to illness. The employer then appealed the reference 02 decision; it does not appear that the claimant has appealed the reference 04 decision.

REASONING AND CONCLUSIONS OF LAW:

If a prior determination has been made on the same issue and was not appealed in a timely manner, that determination has become final and is not subject to further review, and will be binding on the parties in related proceedings. Iowa Code § 96.6-2. The law further provides that an affected employer shall be promptly notified about an individual filing a claim. Iowa Code § 96.6(2). The employer then has ten days from the date of mailing the notice of claim to protest payment of benefits to the claimant. Iowa Code § 96.6-2. A failure to protest is deemed to be a waiver on the part of the employer of an opportunity to assert that, in the case of a separation from employment, the separation should be determined to be for disqualifying reasons.

The administrative law judge notes that the separation issue here should in fact not even have been reviewed by the Claims Section, as there was only one separation from employment, the one that occurred in November 2008. By law, as the employer had the opportunity to challenge that separation in the 2008 prior claim year and did not; the de facto determination was that the November 2008 separation was not disqualifying. This became final and should not have been subject to review in the subsequent benefit year; the creation of a new benefit year does not create a new opportunity for an employer to protest where that employer had a prior opportunity to protest that it did not pursue. Iowa Code § 96.6-2; Beardslee v. Iowa Department of Job Service, 276 N.W.2d 373 (Iowa 1979); see also In re Appeal of Elliott, 319 N.W.2d 244, 247 (Iowa 1982); Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983); Hendren v. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC, 212 N.W.2d 471, 472 (Iowa 1973); 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); 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1).

The employer did not file a timely protest to the initial notice of claim issued on November 21, 2008. Since the administrative law judge concludes that the protest was not timely filed pursuant to Iowa Code § 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. 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). As a result, the claimant was eligible to receive unemployment insurance benefits after the separation from employment so long as he was otherwise eligible.

DECISION:

The representative's February 15, 2010 decision (reference 02) is modified with no effect on the parties. The claimant is qualified to receive unemployment insurance benefits, so long as he was otherwise eligible, as the determination that his November 2008 separation from the employer was not disqualifying because the employer did not make timely protest has become final and is not subject to further review in the new claim year.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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