

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHERYL L LEBECK
Claimant

APPEAL NO. 13A-UI-12878-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADVANCE SERVICES INC
Employer

OC: 05/19/13
Claimant: Respondent (2-R)

Iowa Code Section 96.6-2 - Timeliness of Protest

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 19, 2013, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that found the employer's protest untimely. After due notice was issued, a hearing was held by telephone conference call on December 10, 2013. The claimant did not respond to the hearing notice instructions and did not participate. Michael Payne represented the employer. Exhibits One, Two and Three were received into evidence.

ISSUE:

Whether the employer's protest of the claim for benefits was timely. It was.

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: On August 22, 2013, Iowa Workforce Development mailed a notice of claim concerning the above claimant to the employer's address of record. The notice of claim contained a warning that any protest must be postmarked, faxed or returned by the due date set forth on the notice, which was September 3, 2013. The notice of claim was received at the employer's address of record on August 26, 2013. On that same day, the employer completed its protest information on the notice of claim and faxed the notice of claim/protest to Iowa Workforce Development at the correct fax number. The employer kept a fax transmission record that documented successful transmission of the protest to the Unemployment Insurance Service Center on August 26, 2013. Iowa Workforce Development misplaced the employer's protest after it was received by the agency and did not docket the protest that was transmitted on August 26, 2013.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.35(1) provides:

- (1) Except as otherwise provided by statute or by department rule, any payment, appeal, application, request, notice, objection, petition, report or other information or

document submitted to the department shall be considered received by and filed with the department:

- a. If transmitted via the United States postal service or its successor, 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.
- b. If transmitted by any means other than the United States postal service or its successor, on the date it is received by the department.

871 IAC 24.35(2) provides:

- (2) 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.
- a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
- b. The department shall designate personnel who are to decide whether an extension of time shall be granted.
- c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.
- d. If submission is not considered timely, although the interested party contends that the delay was due to department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

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 administrative law judge considers the reasoning and holding of the court 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 evidence in the record establishes that the employer's protest was timely. The employer faxed its protest on August 26, 2013, well before the September 3, 2013 deadline. The employer has presented evidence to establish that the fax transmission was successful and that the Unemployment Insurance Service Center received the protest on August 26, 2013. The weight of the evidence indicates that Iowa Workforce Development lost the protest and failed to docket what had been a timely protest. The employer has preserved its right contest liability on the claimant. Because the separation issues were not set for hearing as part of the appeal, and because the claimant was not available to waive formal notice on those issues, this matter will be remanded to the Claims Division for adjudication of the claimant's eligibility for benefits in connection with the separation and employer's liability for benefits.

DECISION:

The Agency representative's November 19, 2013, reference 01, decision is reversed. The employer's protest was timely. This matter is remanded to the Claims Division for adjudication of the claimant's eligibility and employer's liability based on the employment separation.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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