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

JOSHUA A PALMER Claimant, and AREA AMBULANCE AUTHORITY Employer.	:	HEARING NUMBER: 07B-UI-10200 EMPLOYMENT APPEAL BOARD DECISION

N O T I C E

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

D E C I S I O N

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** as set forth below.

FINDINGS OF FACT:

A notice of claim was mailed to Area Ambulance Authority (Employer) on October 8, 2007. The protest of this claim was due on Thursday, October 18, 2007. The Employer did not receive the notice of claim until October 19, 2007, which is after the time to respond. On October 29, 2007 the Employer did fax in its appeal as shown by Exhibit D-1. The Employer had prepared the appeal earlier but delayed until the 29th while it gathered information.

REASONING AND CONCLUSIONS OF LAW:

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 judge 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 determines, we hold that the ten-day period for filing a protest is jurisdictional. 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 Employer 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."

Here the Employer clearly must be relieved of the requirement of sending the protest in by the 18th since the Notice of Claim was not received until after this deadline. The question, then, is how long the Employer should be given to effect its protest. There are several possibilities. Perhaps, as the Administrative Law Judge seemed to hold, the Employer should be given no longer than reasonably necessary to make a bare-bones protest (notwithstanding that the Notice form instructs the Employer to "furnish… detailed information justifying relief from such charges."). Perhaps the Employer should be given an additional seven days on the theory that mail usually gets where it is going in three days. Perhaps it should be given as many days as its receipt is late. Perhaps it should be required to file on the very date of receipt. All are defensible yet all of these share one problem: how is the Employer supposed to know when the deadline is? The Notice of Claim gives a date certain. If that date is in the past the Employer is given no clue as to what alternative date to use. Yet *some* deadline must apply – the Employer cannot wait an eternity to appeal. To our mind the easiest and most workable rule, as well as the fairest to the parties, is to use ten days from receipt as the new deadline where Workforce or Post Office error has caused the

original deadline to run without notice to the Employer. This new deadline is adequately short as to promote prompt action while also giving the Employer plenty of notice. An employer who tried to claim more time than this could be fairly answered by saying that the mailing error should not put the employer in a *better* position than it would have been without error. A claimant who tried to argue for less time could be fairly answered by saying the mailing error should not put the employer in a *worse* position than it would have been without error. Here the Employer's protest was within ten days of the late receipt, and we find the Employer's protest timely.

We also note that since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule. This rule is based on Iowa Code section 96.6(2) (2007):

> ...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....

The rule itself specifies:

> Rule of two affirmances.
>
> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

871 IAC 23.43(3). Thus even if Workforce ultimately finds that the Claimant is ineligible for benefits the Claimant would not as a result of that determination be liable for any overpayment of benefits resulting from the collection of benefits prior to the determination of ineligibility. In such an event the Employer's account would not be charged. Of course, if the Claimant is ultimately allowed benefits this rule will not come into play.

DECISION:

The administrative law judge's decision dated November 21, 2007 is **REVERSED**. This matter is remanded to the Iowa Workforce Development Center, Claims Section, for consideration of the Employer's protest and a determination of the issue of whether or not the claimant is eligible for benefits. The case will thereafter be processed as usual and as warranted by the circumstances.

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Elizabeth L. Seiser

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Mary Ann Spicer

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John A. Peno

RRA/fnv