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

BRENDA M PUCCIO

Claimant,

and

L A LEASING INC

Employer.

HEARING NUMBER: 08B-UI-08154

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. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant's notice of claim was mailed to the Employer's address of record on June 6, 2008, and received by the Employer before the due date. The decision contains a warning that any appeal must be postmarked or returned not later than ten days from the initial mailing date. Based on the credible evidence, the Employer, by its authorized representative, did fax a timely appeal on June 11, 2008.

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."

The question in this case is whether the protest was actually ever faxed. If it was not then the date of filing is "never". If so then the date of filing is the date the document was faxed. 871–26.4(2). The Employer claims that it did fax the appeal on time and offers first-hand testimony that it did as well as documentary proof. We should be happier if the Employer's fax receipt had an imprint of the document faxed on it, but, given the first-hand testimony we do not find this flaw fatal. Under the circumstances we find it credible that the Employer did fax the appeal and that it has been mislaid. Applying the rules to this state of facts we find that the appeal was filed on June 11 and that it was therefore timely.

We note that since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative issued on June 6, 2008, 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.
>
> b. However, if the decision is subsequently reversed by higher authority:
>
> (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); See also Reichl v IDJS, 333 N.W.2d 836 (Iowa 1983)(double affirm followed by remand means no recovery of overpayment). 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 October 6, 2008 is **REVERSED**. This matter is remanded to the Iowa Workforce Development Center, Appeals Section, for consideration of the Employer's appeal 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.

_____
Elizabeth L. Seiser

_____
Monique Kuester

RRA/fnv

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

_____
John A. Peno

RRA/fnv