

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA K DELANEY-KOHN
Claimant

APPEAL NO. 17A-UI-08825-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CHEROKEE FAMILY PRACTICE INC
Employer

OC: 07/30/17
Claimant: Respondent (1)

Iowa Code Section 96.6-2 - Timeliness of Protest

STATEMENT OF THE CASE:

The employer filed an appeal from the August 22, 2017, reference 02, decision that allowed benefits to the claimant provided she was otherwise eligible, that held the employer's account could be charged for benefits, and that held the employer's protest could not be considered because it was untimely. After due notice was issued, a hearing was held by telephone conference call on September 18, 2017. Claimant Melissa Delaney-Kohn participated. Barb Myking represented the employer. Exhibit 1 and Department Exhibit D-1 were received into evidence. The administrative law judge took official notice of the Agency's administrative record of the claimant's quarterly wages for the period subsequent to separation from this employer and prior to the claim that was effective July 30, 2017.

ISSUE:

Whether the employer's protest of the claim for benefits was timely.
Whether there is good cause to deem the employer's late protest as timely.

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: On August 7, 2017, 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 August 17, 2017. The notice of claim was received at the employer's address of record in a timely manner, on or before August 11, 2017. On Tuesday, August 15, 2017, Barb Myking, Office Manager, completed the employer's protest information on the notice of claim form. Ms. Myking made one attempt to fax the protest to Iowa Workforce Development that afternoon, but the employer's fax machine did not successfully transmit the protest to Iowa Workforce Development. Ms. Myking did not monitor the process to see whether the protest was successfully transmitted. On that same afternoon, the employer's fax machine generated a fax transmission report indicating that the fax transmission had not been successful. At some point, one of Ms. Myking's colleagues moved the fax transmission report from the fax machine to

Ms. Myking's desk. Ms. Myking did not work on Thursday, August 17, 2017. Ms. Myking discovered the fax transmission report on her desk when she returned to work on August 18, 2017. Ms. Myking contacted Iowa Workforce Development and was provided with three different fax numbers to which she could direct the protest. On August 18, 2017, Ms. Delaney-Kohn faxed the protest to Iowa Workforce Development. The Unemployment Insurance Service Center received the protest by fax on August 18, 2017.

Subsequent to separating from this employment, and prior to establishing the claim for benefits that was effective July 30, 2017, claimant Melissa Delaney-Kohn worked in additional covered employment from which she earned substantially more than 10 times her weekly benefit amount.

REASONING AND CONCLUSIONS OF LAW:

Iowa Admin. Code r. 871-24.35(1) provides:

Date of submission and extension of time for payments and notices.

(1) Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:

a. If transmitted via the United States postal service 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 on the date it is received by the division.

Iowa Admin. Code r. 871-24.35(2) provides:

Date of submission and extension of time for payments and notices.

(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 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.

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 division 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 division error or misinformation or delay or other action of the United

States postal service, the division 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 untimely. The evidence establishes that the employer had a reasonable opportunity to file a timely protest. The employer received the notice of claim in a timely manner, on or before August 11, 2017. At that point, the employer had a full week in which to file a timely protest by the August 17, 2017 protest deadline. On August 15, 2017, Ms. Myking attempted to fax the protest. For some reason, the employer's fax machine did not successfully transmit the protest. The employer speculates that the August 15, 2017 attempt at faxing was unsuccessful because the Workforce Development fax line was busy, but there could have been any number of reasons the fax was not successfully transmitted. The employer did not submit the fax report for the hearing. Even if the protest did not go through at that time on August 15, 2017 because one of three Workforce Development fax lines was busy, a reasonable person would anticipate such events and adjust accordingly. A reasonable person transmitting anything by fax would continue to monitor the process to confirm successful transmission. Ms. Myking did not do that and did not ask anyone else to do that. In any event, the employer's fax machine produced a written report on August 15, 2017 that told the employer the fax had not been successfully transmitted. At that point, the employer still had the balance of August 15 and two additional days in which to file a timely protest. However, no one took any further action on the time-sensitive matter until August 18, 2017, one day past the protest deadline, when Ms. Myking successfully transmitted the protest by fax to Iowa Workforce Development and Iowa Workforce Development received the faxed protest. The evidence establishes that the employer's failure to file a timely protest was attributable to deficiencies in the employer's internal operations, and not attributable to Workforce Development error or misinformation or delay or other action of the United States Postal Service. Accordingly, there is not good cause to treat the late protest as a timely protest. Because the protest was untimely, the administrative law judge lacks jurisdiction to disturb the Agency's initial determination regarding the nature of the claimant's separation from the employment, the claimant's eligibility for benefits, or the employer's liability for benefits. The Agency's initial determination of the claimant's eligibility for benefits and the employer's liability for benefits shall remain in effect.

DECISION:

The August 22, 2017, reference 02, decision, is affirmed. The employer's protest was untimely. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs