IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DONALD F KESSLER
Claimant

ATLANTIC CARRIERS INC
Employer

APPEAL NO. 14A-UI-05998-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/17/13
Claimant: Respondent (1)

Iowa Code Section 96.6-2 - Timeliness of Protest

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 29, 2014, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible, that held the employer's account could be charged for benefits, and that found the employer's protest untimely. After due notice was issued, a hearing was held by telephone conference call on July 3, 2014. Claimant Donald Kessler participated. Jacque Park represented the employer and presented additional testimony through Joe Bateman. Department Exhibit D-1 and Exhibits One through Four were received into evidence at the time of the hearing. The administrative law judge took official notice of the agency's administrative record of the wages reported by or for the claimant, which record indicates that the claimant earned at least ten times his weekly benefit amount between the time that he separated from the employer and when he established his claim for benefits.

The administrative law judge left the hearing record open for the limited purposes of allowing the employer additional opportunity to submit phone records documenting transmission of a timely protest. On July 9, 2014, the employer provided a written statement from Ms. Park indicating that the employer could not provide such documentation. Ms. Park's statement was received into the record as Exhibit Five.

ISSUES:

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 November 19, 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 December 2, 2013. The notice of claim was received at the employer's address of in a timely manner, prior to the deadline for protest. On November 29, 2013, Joe Bateman, President, completed the employer's protest information on the notice of claim form.

Mr. Bateman notified on the form that the form had been faxed on November 29, 2013. Workforce Development did not receive a protest from the employer on November 29, 2013 or at any time before the December 2, 2013 protest deadline. The employer's fax machine provides a fax log, but the employer is unable to provide a fax log documenting submission of the protest by the December 2, 2013 deadline. The employer was also unable to locate phone records that document submission of the protest by the December 2, 2013 deadline.

After Mr. Bateman's actions on November 29, 2013, the employer took no further action on the matter until after the employer received the quarterly statement of charges that Workforce Development mailed to the employer on May 9, 2014. The employer was aware that a fact-finding interview would ordinarily be scheduled in response to Workforce Development's receipt of a protest. On May 14, 2014, the employer contacted the Workforce Development Chargeback by email to contest the charge to the employer's account.

REASONING AND CONCLUSIONS OF LAW:

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

> (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.
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> 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:

> (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.
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> 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.
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> 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.

When a protest is received, the rules require that Workforce Development mail to the parties notice of a fact-finding conference, that such a conference be held, and then that a determination be made regarding the protest. Iowa Admin. Code r. 871 - 24.9. Regular proceeding by the agency would have meant that the protest would be retained, a protest would be docketed, a fact-finding interview would be scheduled and held, and a decision would be issued. None of this occurred before the employer's protest was received by email on May 14, 2014. Had a protest been received prior to May 14, 2014, the regular process should have been triggered, but it was not. "The proceedings of all officers and courts of limited and inferior jurisdiction within the state shall be presumed regular". Iowa Code section622.56; accord City Of Janesville v. McCartney, 426 N.W.2d 785 (Iowa 1982). Thus, there is a presumption, from Workforce Development having no record of a protest prior to May 14, 2014, that no protest was received by Workforce. This is not an absolute presumption, but is instead a presumption that may be overcome with sufficiently probative evidence.

Now we come to the heart of the matter. The administrative law judge concludes that the employer simply did not supply evidence sufficient to overcome the presumption. The employer witness testified that the protest was sent by fax on November 29, 2013. The employer provided no transmission report, no phone records, no fax cover sheet pertaining to the purported November 2013 fax. The employer is not helped by the fact that after it supposedly sent in the fax on November 29, 2013, it did nothing for five months. Had a protest been sent, one might expect a call from Workforce Development before four months were up. The notice of claim says as much. (See Exhibit Three.) Why then no follow up from the employer to see what was happening? The lack of such a call – after five months – certainly does nothing to advance the employer's argument that a fax was indeed sent in November 2013. The testimony of Mr. Bateman, five months after the fact that he faxed the protest, coupled with the absence of a fax log and phone record that could have documented submission of the protest, is insufficient to establish that a protest was indeed faxed prior to the December 2, 2013 deadline. Even if the administrative law judge were convinced that a fax was successfully transmitted – and he is not convinced of that – there is no convincing evidence that the fax was sent to the *right* number. C.f. Walter v. Coon Domestic Account, 06B-UI-03804 (A number only one digit off the Appeals Section number is the fax number for the Athletic Director of East High School in Des Moines). Weighing the evidence carefully, the administrative law judge concludes that the protest was not timely filed because it was not in fact received by Workforce Development by the December 2, 2013 deadline and not received until May 14, 2014.

The evidence in the record establishes an untimely protest. The evidence establishes that the employer's failure to file a timely protest was not attributable to Workforce Development error or misinformation or delay or other action of the United States Postal Service. Accordingly, 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 stand and remain in full force and effect.

DECISION:

The Claims Deputy's May 29, 2014, reference 01, decision is affirmed. The agency's initial determination of the claimant's eligibility for benefits and the employer's liability for benefits shall stand and remain in full force and effect.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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