

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DARIO O SALVATORI
Claimant

APPEAL NO: 13A-UI-00068-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PINERIDGE FARMS LLC
Employer

OC: 09/23/12
Claimant: Appellant (2/R)

Section 96.6-2 – Timeliness of Protest
Section 96.6-2 – Prior Adjudication

STATEMENT OF THE CASE:

Dario O. Salvatori (claimant) appealed a representative's December 14, 2012 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Pineridge Farms, L.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was convened on February 6, 2013, and was reconvened and was concluded on February 26, 2013. The claimant participated in the hearing. John Anderson appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Has there been a prior determination on the eligibility of the claimant on the same separation as raised in this appeal which is binding on the parties and the outcome of this appeal?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant's last day of work for the employer was on or about November 14, 2011. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

The claimant established an initial unemployment insurance benefit year effective the week beginning November 13, 2011. A notice of the claim's filing was sent to the employer on November 21, 2011. No evidence was provided to rebut the presumption that the employer received that notice. At the very latest the employer was aware of the filing of the claimant's claim when it received the quarterly statement of charges for the fourth quarter 2011. The employer did not make a protest to that claim or respond to the statement of charges; it paid the resulting charges to its account for the three quarters which followed.

Upon the expiration of the claimant's 2011 benefit year, he established a second benefit year effective November 11, 2012. A new notice was sent to the employer on November 20, 2012, but this time the employer did submit a response to the notice by protesting the claim on November 26, 2012. The representative's decision regarding the November 2011 separation followed as a result of the employer's protest to the notice of the November 2012 claim year.

While the claimant established a second claim year effective November 11, 2012, he has not received unemployment insurance benefits under that new claim year, as there has been a separate determination made that the claimant is not monetarily eligible for a second claim year as he has not had any earnings after establishing his November 13, 2011 claim year. Rather, the benefits the claimant has been receiving since exhausting his regular unemployment insurance benefit eligibility as of April 21, 2012 have been emergency unemployment compensation (EUC) benefits and training extension benefits (TEB), neither of which is chargeable against the employer's account.

REASONING AND CONCLUSIONS OF LAW:

The first and in this case determinative issue in this matter is whether the employer can successfully protest the claimant's claim in a second benefit year if it did not timely protest his claim in his first benefit year. The law provides that all interested parties shall be promptly notified about an individual filing a claim. The parties have ten days from the date of mailing the notice of claim to protest payment of benefits to the claimant. Iowa Code § 96.6-2. Another portion of Iowa Code § 96.6-2 dealing with timeliness of an appeal from a representative's decision states 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 court has held that this statute clearly limits the time to do so, and 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 *Beardslee* court controlling on the portion of Iowa Code § 96.6-2 which deals with the time limit to file a protest after the notice of claim has been mailed to the employer. Compliance with the protest provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), protests are considered filed when postmarked, if mailed. *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983). The question in this case thus becomes whether the employer was deprived of a reasonable opportunity to assert a protest in a timely fashion. *Hendren v. IESC*, 217 N.W.2d 255 (Iowa 1974); *Smith v. IESC*, 212 N.W.2d 471, 472 (Iowa 1973). The record shows that the employer did have a reasonable opportunity to file a timely protest in 2011 but chose not to do so.

Since the employer chose not to protest in 2011, the Agency's de facto determination was that claimant's November 14, 2011 separation was non-disqualifying, so that the claimant should be eligible for unemployment insurance benefits. This becomes the final determination regarding the separation from employment, including carrying into subsequent benefit years. See, *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979); *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979) and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990). The employer's decision to protest the claimant's claim in the second claim year does not change the circumstances of the separation; it was either a disqualifying separation or it was not. Allowing an employer who received proper notice of a claim in an initial benefit year but

who chose not to protest to make an effective protest in a second benefit year is contrary to the interests of justice in having the circumstances of the separation determined in as close proximity in time to the date of the separation as possible, rather than encouraging delay and the loss of memory and pertinent information due to the passage of time. Further, if the November 14, 2011 separation was disqualifying, it would follow that the benefits that were paid to the claimant in that November 2011 claim year, which the employer did not protest, should not have been paid to him and should be recovered. Where the employer has no excusable reason for not protesting the claim in the original claim year, the employer should be barred from being given a second opportunity to correct its error in a second claim year.

The administrative law judge concludes that the employer's protest in the second claim year was not filed timely within the meaning and intent of Iowa Code § 96.6-2; the prior claim year's determination that the separation was non-disqualifying has become final, so that the Agency lacked jurisdiction to make a contrary determination with respect to the same separation from employment in the second claim year, regardless of the merits of the employer's protest.

DECISION:

The representative's December 14, 2012 decision (reference 01) is reversed. The claimant is qualified to receive unemployment insurance benefits, so long as he was otherwise eligible, as the determination that his November 2011 separation from the employer was not disqualifying because the employer did not make timely protest has become final and is not subject to further review in the new claim year.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs