

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

LOREAL N LESTER
Claimant

APPEAL NO: 19A-UI-09094-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WICKWIRE CHIROPRACTIC & WELLNESS
Employer

OC: 07/21/19
Claimant: Respondent (1)

Iowa Code section 96.6(2) – Timeliness of Protest
Iowa Code section 96.7(2)a(6) – Application for Redetermination

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 8, 2019, Statement of Charges which listed benefit charge information for the third quarter of 2019. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on December 12, 2019. The claimant did not respond to the hearing notice and did not participate in the hearing. Dr. Lee Wickwire, Owner, participated in the hearing on behalf of the employer. Department's Exhibit D-1 was admitted into evidence. Department's Exhibit D-1 was admitted into evidence.

ISSUE:

The issue is whether the employer's protest and appeal from the Statement of Charges are timely.

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: The claimant's notice of claim was mailed to the employer's address of record on July 25, 2019, and received by the employer. The notice of claim contains a warning that any protest must be postmarked, faxed or returned not later than ten days from the initial mailing date. That date fell on August 5, 2019. The employer testified it bought the business from Family Health Chiropractic and assumed that business would be responsible for the claimant's claim and consequently did not return the notice of claim form.

The employer received the Statement of Charges mailed November 8, 2019, for the third quarter of 2019. The employer submitted its appeal for the Notice of Claim and Statement of Charges on November 14, 2019, which was within thirty days of November 8, 2019.

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.

Iowa Code section 96.7(2)a(6) provides:

2. Contribution rates based on benefit experience.

a. (6) Within forty days after the close of each calendar quarter, the department shall notify each employer of the amount of benefits charged to the employer's account during that quarter. The notification shall show the name of each individual to whom benefits were paid, the individual's social security number, and the amount of benefits paid to the individual. An employer which has not been notified as provided in section 96.6, subsection 2, of the allowance of benefits to an individual, may within thirty days after the date of mailing of the notification appeal to the department for a hearing to determine the eligibility of the individual to receive benefits. The appeal shall be referred to an administrative law judge for hearing and the employer and the individual shall receive notice of the time and place of the hearing.

An employer who did not receive notice of the claim may appeal to the department for a hearing to determine the eligibility of an individual to receive benefits. Iowa Code section 96.7(2)a(6).

In this case, the employer filed the appeal to the statement of charges within the 30 day deadline. The only issue is whether the employer received the notice of claim.

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 that 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. The employer has not shown any good cause for not complying with the jurisdictional time limit. Therefore, the administrative law judge is without jurisdiction to entertain any appeal regarding the separation from employment.

By analogy to appeals from initial determinations, 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 Dep't of 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. *Beardslee v. Iowa Dep't of 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 manner. *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 administrative law judge concludes that the employer did receive notice of the claim at its address and therefore it was not deprived of a reasonable opportunity to assert the protest in a timely fashion. The employer had the opportunity to respond to the notice of claim and failed to do so.

In summary, the employer received prior notice of claim and had a reasonable opportunity to respond to it but failed to do so in a timely manner. Therefore, the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the claimant's separation from employment or authority to remand the case for a fact-finding interview. Iowa Code section 96.6-2. The charges related to the claimant's separation will remain in effect and the claimant is allowed benefits.

DECISION:

The November 8, 2019, statement of charges is affirmed. The employer did not file a timely protest to the notice of claim. The charges shall remain in full force and effect. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn

Note to the employer regarding questions about successorship. These are the Iowa Administrative Code rules that address that issue.

Iowa Admin. Code r. 871-23.30(1),(2) provide:

Successorship--liability for contributions and payments in lieu of contributions.

(1) Any employer who becomes a successor to an employer account shall be held liable for any unpaid contributions, reimbursable benefit payments, interest, penalties or costs which are owed to the department by the predecessor at the time of the transfer. An employer which is found to be a successor to a reimbursable account shall also be liable to reimburse the department for benefits paid after the date of acquisition that are based

on wages paid by the reimbursable predecessor prior to the date of acquisition whether or not the successor has elected, or is eligible to elect, to become a reimbursable employer with respect to the successor's payroll.

(2) Transfers under the Bulk Sales Act, uniform commercial code of Iowa, shall not be held by the department to be exempted from the provisions of Iowa Code section 96.7. The transferee shall be held a successor to the employer account of the transferor and liable for any unpaid contributions, reimbursable benefit payments, interest, penalty, and costs owed to the department by the transferor notwithstanding any agreement between the two parties pursuant to the Bulk Sales Act, provided the transferee continues to operate the business.

This rule is intended to implement Iowa Code section 96.7.

Iowa Admin. Code r. 871-23.29(1),(2) provide:

Transfer of entire business.

23.29(1) *Notice of acquisition.*

a. Whenever any employing unit in any manner succeeds to or acquires from an employer either the organization, trade or business or substantially all the assets thereof and continues such organization, trade or business, such employing unit shall notify the department for the purpose of accomplishing the transfer of the reserve account of the predecessor employer to the successor employing unit. Such notification must be in writing on Form 60-0126, Report to Determine Liability, and include the name and address of the predecessor, the date of acquisition, and the name and address of the successor. When such notice has been received or in the absence of the notice when necessary information establishing that the acquisition occurred has been received by the department, the actual contribution and benefit experience and taxable payrolls of the predecessor shall be transferred to the successor employing unit for determining its rate of contribution. Thereafter, benefits chargeable because of employment for such transferred organization, trade, or business shall be charged to the account of the successor. The predecessor must submit in writing a completed Form 60-0111, Employer Notice of Change.

b. Where one or more employing units have been reorganized, merged or consolidated into a single employing unit and the successor employing unit continues to operate such merged or consolidated enterprise, the employing units involved shall file change of ownership Forms 60-0111, Employer Notice of Change, and 60-0126, Report to Determine Liability, with the workforce development department within 30 days from the date of the transaction. In addition to Forms 60-0111 and 60-0126, all entities involved in the merger shall file with the workforce development department the articles of merger, or if there are no articles of merger, a statement advising that the merger has transpired.

(1) The predecessor business or businesses involved in the merger shall each file a final quarterly payroll report form as soon as possible after the merger has occurred but in no case later than 30 days after the close of the quarter in which the merger occurred.

(2) The successor entity shall indicate on Form 60-0126, Report to Determine Liability, whether or not the experience rates of all accounts are to be combined and the rate recomputed for the balance of the calendar year in which the merger took place.

23.29(2) *Contribution rate.* The successor's contribution rate for the remainder of the calendar year beginning with the date of acquisition shall be assigned as follows:

a. If the successor had no account prior to the transfer and the successor purchased the business of only one predecessor, or more than one predecessor with identical rates, the rate assigned will be the rate of the predecessor employer or employers.

b. If the successor had no account prior to the transfer and purchased the business of more than one predecessor on the same day, the rate assigned will be a computed rate based on the combined experience of all the predecessor employers.

c. If the successor had an account prior to the transfer, the rate assigned will be the successor's existing rate. However, the successor may apply for a recomputed rate based on the combined experience of the predecessor or predecessors and the experience of the successor.