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

CRAIG CREASON
Claimant

APPEAL NO: 10A-UI-14948-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PINNACLE HEALTH FACILITIES XVII
Employer

OC: 01/04/09
Claimant: Appellant (2)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.6-2 - Timeliness of Protest

STATEMENT OF THE CASE:

Craig Creason (claimant) appealed an unemployment insurance decision dated October 26, 2010, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Pinnacle health Facilities XVII, LP (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 7, 2010. The claimant participated in the hearing. The employer participated through Administrator Kathleen Jones and Jeannette Cunningham, Dietary Manager. 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:

The issue 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, and if so, whether the employer discharged the claimant for work-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant filed an original claim for benefits effective January 4, 2009. A notice of claim was sent to the employer on January 9, 2009. The employer did not protest the notice of claim because it did not receive it from its corporate office in a timely manner. As a result of this separation, the claimant received regular unemployment insurance benefits from January 20, 2009 through July 11, 2009 when they were exhausted. He then received emergency unemployment insurance benefits from January 18, 2009 through June 5, 2010 when they became exhausted.

The claimant's original benefit year expired on January 3, 2010 and he had to file for a new benefit year. Iowa Workforce mistakenly sent the employer a new notice of claim dated February 26, 2010 and the employer submitted its protest within ten days. A fact-finding

interview was held and the claimant was denied benefits. The claimant appealed that decision which prompted this appeal hearing today.

Unrelated to this appeal, a second benefit year disqualification was issued to the claimant on March 2, 2010 and that decision has become final.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue to be determined in this case 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 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* at 377; 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 and its failure to submit a protest was due to its corporate office not forwarding the notice of claim in a timely manner.

The employer has not shown that the delay for not complying with the jurisdictional time limit was due to department error or misinformation or delay or other action of the United States Postal Service. Since the employer did not file a protest to the claimant's original notice of claim, the protest filed on a second notice of claim is not timely. Since the administrative law judge concludes that the protest was not timely filed pursuant to Iowa Code § 96.6-2, the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the protest and the reasons for the claimant's separation from employment, regardless of the merits of the employer's protest. 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).

DECISION:

The unemployment insurance decision dated October 26, 2010, reference 01, is reversed. The employer did not timely protest the claimant's separation during his January 4, 2009 claim year, and the separation then is determined as being non-disqualifying. Benefits are allowed for the claim year January 4, 2009. The claimant has been disqualified for a second benefit year due to an unrelated disqualification decision.

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Susan D. Ackerman
Administrative Law Judge

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Decision Dated and Mailed

sda/pjs