

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JENNIFER A WIESE
Claimant

DECLEVERLES CORP
Employer

APPEAL 17A-UI-08037-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/02/17
Claimant: Respondent (1)

Iowa Code § 96.6(2) – Timeliness of Protest

STATEMENT OF THE CASE:

Employer filed an appeal from the August 1, 2017, (reference 03) decision that found the protest untimely and allowed benefits. After due notice was issued, a hearing was held by telephone conference call on August 25, 2017. Claimant participated. The employer participated by general manager Lori Warner. The administrative law judge took official notice of the administrative record, including the Notice of Claim and protest.

ISSUE:

Is the employer's protest timely?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Claimant's notice of claim was mailed to employer's address of record on July 6, 2017. Ms. Warner is not sure when the employer received the notice of claim in the mail. The employer has been at the address of record for over three years. Ms. Warner believes it takes approximately two or three days for the employer to get mail at its address of record from Des Moines, Iowa. Ms. Warner opened the notice of claim on July 24, 2017. The notice of claim contains a warning that the employer protest response is due ten days from the initial notice date and gave a response deadline of July 17, 2017. The employer did not file a protest response until July 24, 2017, which is after the ten-day period had expired.

On July 24, 2017, Ms. Warner reviewed all of the mail from July 5, 2017 to July 24, 2017. From July 5, 2017 to July 24, 2017, Ms. Warner was out of the office because her son was home on military leave. Ms. Warner did not work very much at the employer during this time period. Ms. Warner opened the notice of claim on July 24, 2017 when she returned to the employer. Ms. Warner is the only employee responsible for opening the mail. During the time period from July 5, 2017 to July 24, 2017, Ms. Warner did have an employee retrieve its mail and put it in Ms. Warner's basket, but the employer did not have any employees open the mail. As soon as Ms. Warner opened the notice of claim she filled out the employer's protest and mailed it to Iowa Workforce Development. The business was still in operation from July 5, 2017 to July 24, 2017, but it did not have anyone review mail for potentially urgent matters while Ms. Warner was away. Typically the employer only retrieves its mail once a week.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes that employer has failed to protest response within the time period prescribed by the Iowa Employment Security 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.

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.

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.

Pursuant to rule Iowa Admin. Code r. 871-24.35(1), appeals are considered filed when postmarked, if mailed. *Messina v. Iowa Dep't of Job Serv.*, 341 N.W.2d 52 (Iowa 1983). The postage meter mark on the last day for filing does not perfect a timely appeal if the postmark affixed by the United States Postal Service is beyond the filing date. *Pepsi-Cola Bottling Co. of Cedar Rapids v. Emp't Appeal Bd.*, 465 N.W.2d 674 (Iowa Ct. App. 1990).

Although Ms. Warner opened the notice of claim on July 24, 2017, Ms. Warner did not know when the notice of claim was delivered to the employer's address of record. Ms. Warner believes it normally takes two or three days for the employer to get mail from Des Moines, Iowa and the notice of claim was mailed to the employer on July 6, 2017. Although the employer had an employee retrieve its mail while Ms. Warner was away from the office, it did not have any employee open the mail during this time period. The employer's choice to not open mail while the business operations continued while Ms. Warner was away from the office was a business decision. The employer has not shown any good cause for failure to comply with the jurisdictional time limit or that the delay was due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to Iowa Admin. Code r. 871-24.35(2). 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 for a fact-finding interview. Iowa Code § 96.6(2).

DECISION:

The August 1, 2017, (reference 03) unemployment insurance decision is affirmed. Employer has failed to file a timely protest response, and the unemployment insurance decision shall stand and remain in full force and effect.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs