BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

CAROL A MOSS

Claimant,

and

THE UNIVERSITY OF IOWA

Employer.

HEARING NUMBER: 09B-UI-08856

EMPLOYMENT APPEAL BOARD
DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.6-2

D E C I S I O N

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

A representative's decision was mailed to the Claimant on June 3, 2009 and received by the Claimant before the due date. The decision contains a warning that any appeal must be postmarked or returned not later than ten days from the initial mailing date. The Claimant called the Employer and discussed the erroneous statement of vacation pay. The Employer assured the Claimant that the Employer would try to correct the problem with Workforce. On June 11, 2009 the Employer faxed a document stating "Per Ms. Moss, we are sending you copies of her Paycheck Review to show the pay back of her vacation payout." This corrected information was sent by the Employer on behalf of the Claimant with the intention of convincing Workforce to change the decision of June 3 in the Claimant's favor. The Claimant appealed the decision, via the Employer's letter, on June 11, 2009.

The actual vacation pay paid to the Claimant was $438.26 applying to the period of February 3 to February 5, 2009.

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.

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 Board agrees with the administrative law judge and considers the reasoning and holding of the 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.

By analogy to appeals from initial determines, we hold that 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 Dept. 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. E.g. Beardslee v. Iowa Dept. 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 fashion. 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 question of whether the Employer has been denied a reasonable opportunity to assert a protest is also informed by rule 871-24.35(2) which states that "the submission of any … objection… 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."

The question in this case is whether the fax sent by the Employer "per Ms. Moss" could count as a timely appeal. The Code says that an appeal to the Administrative Law Judge can be made by "the claimant or other interested party." Iowa Code §96.6(2). Naturally, this is taken to mean that the *losing* party can appeal. We would never expect Workforce to treat an appeal by a winning party as an appeal. What is different about this case is that the Employer filed its appeal at the behest of the Claimant. The Claimant testified she called the Employer about the overpayment within the appeal period. She further testified that she was assured by the Employer that it would take care of the matter for her. Then, and key to this case, the Employer took on the task of making things right with Workforce. The Employer acted on the Claimant's behalf and faxed a document, with corrected dates, on June 11, 2009 that stated it was "per Ms. Moss." The circumstances of this case are novel, nearly unique, yet they do convince

us. The Claimant appealed on June 11, 2009 through the fax sent on her behalf by the *Employer*. The appeal is therefore timely.

We have made a fact finding on the vacation payout consistent with the argument filed by the Employer. Although, technically, there is no exhibit or testimony on the vacation payout the Employer has repeatedly *argued* that the payout was other than found by Workforce. This argument actually is to the detriment of the Employer. When an allegation, which militates against the party making it, is made on pleadings or in a brief, and such allegation has not been withdrawn or superseded, it binds the party making it and must be taken as true by a court, administrative agency, or other finder of fact. See Grantham v. Potthoff-Rosene Company, 257 Iowa 224, 230-31, 131 N.W.2d 256 (1965)(cited in Wilson Trailer Co. v. Iowa Employment Security Comm'n, 168 N.W.2d 771, 776 (Iowa 1969)). See also Larson v. Employment Appeal Board, 474 N.W.2d 570, 572 (Iowa 1991). Thus based on binding admission alone we have found facts regarding the vacation pay out precisely as urged by the Employer in its argument to us.

We make our decision day with all due concern. We are aware of the maxim that "novelty does not benefit so much by utility as it disturbs by novelty." We have attempted to limit any disturbing effect of this novel case by emphasizing its novelty. Based on extraordinary circumstances we have found the Employer took on the task of appealing on behalf of the Claimant and did so in a timely fashion. We have found this, but only just. We would not expect to see another case like this one for a very long time.

DECISION:

The administrative law judge's decision dated July 8, 2009 is **REVERSED**. This matter is remanded to the Iowa Workforce Development Center, Claims Section, for recalculation of the Claimant's benefit eligibility, and overpayment if any, based on our findings regarding the vacation pay.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv