IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSHUA A BJORK
Claimant

BRUENING ROCK PRODUCTS INC
Employer

APPEAL NO. 09A-UI-01295-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/04/09 R: 04
Claimant: Respondent (1)

Section 96.6-2 – Timeliness of Protest

STATEMENT OF THE CASE:

Bruening Rock Products, Inc. (employer) appealed a representative's January 23, 2009 decision (reference 01) that concluded Joshua A. Bjork (claimant) was qualified to receive unemployment insurance benefits and the employer's account might be charged because the employer's protest was not timely filed. Hearing notices were mailed to the parties' last known addresses of record for a telephone hearing to be held at 9:00 a.m. on February 13, 2009. The claimant responded to the hearing notice and indicated that he would participate in the hearing. When the administrative law judge contacted the claimant for the hearing, he agreed that the administrative law judge should make a determination based upon a review of the information in the administrative file. Based on a review of the information in the administrative file and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Should the employer's protest be treated as timely?

FINDINGS OF FACT:

The claimant established a claim for unemployment insurance benefits effective January 4, 2009 after a layoff from his most recent employer. A notice of claim was mailed to Bruening Rock Products, Inc., the claimant's prior employer, at the employer's last-known address of record on January 9, 2009. No evidence was provided to rebut the presumption that the employer received the notice within a few days thereafter. The notice contained a warning that a protest must be postmarked or received by the Agency by January 20, 2009. The protest was not filed until it was faxed on January 21, 2009, which is after the date noticed on the notice of claim.

The explanation offered in the employer's appeal letter was that the bookkeeper who completed the protest form had been on vacation and no one else with the employer had taken care of the form in her absence. However, no specifics were provided as to the dates of the vacation absence or whether there was not someone else with the employer's organization who could and should have been monitoring the mail for time-sensitive matters. Further, the signature on

the protest form was dated January 19, 2009; fax transmission or mailing on either that day or the next day would have been timely. However, the fax transmission was not made until January 21; no explanation for this discrepancy and delay was provided.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.35(2) provides in pertinent part:

> 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 department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.

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 filed the protest late without any legal excuse, the employer did not file a timely protest. 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. 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 January 23, 2009 (reference 01) decision is affirmed. The protest in this case was not timely, and the decision of the representative remains in effect. Benefits are allowed, provided the claimant is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/css