

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

PEGGY S BAXTER  
513 BENTON AVE W  
WEST ALBIA IA 52531

ELLIOTT OIL COMPANY  
PO BOX 473  
OTTUMWA IA 52501-0473

Appeal Number: 05A-UI-11229-RT  
OC: 10-09-05 R: 03  
Claimant: Respondent (1)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.6-2 – Initial Determination (Timeliness of Protest)

STATEMENT OF THE CASE:

The employer, Elliot Oil Company, filed a timely appeal from an unemployment insurance decision dated October 28, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Peggy S. Baxter, because the employer's protest was not timely. After due notice was issued, a telephone hearing was held on November 16, 2005, with the claimant participating. Nicole Mobly was available to testify for the claimant but not called because her testimony was not necessary. Jeffrey Keep, Store Supervisor of the Employer's store in Ottumwa, Iowa where the claimant was employed, participated in the hearing for the employer. Department Exhibit One was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department of unemployment insurance records for the claimant.



The administrative law judge received a request from the claimant on November 9, 2005 requesting a subpoena of two witnesses. The administrative law judge called the claimant at 5:18 p.m. on November 9, 2005 and informed her that he was not going to grant the claimant's request for subpoenas for several reasons. The first and foremost issue at the hearing was going to be the timeliness of the employer's protest and those witnesses would not be necessary for that issue. Further, the claimant had, in addition to herself, two other witnesses on her witness list and an additional witness on her list who was one of the witnesses to whom the claimant requested a subpoena. Finally, the claimant conceded that the witnesses would be repeating testimony that could be obtained from other witnesses. The administrative law judge denied the claimant's request for a subpoena but did inform the claimant that if the testimony of a witness for whom the claimant had requested a subpoena was crucial for a decision in the case, the administrative law judge could recess the hearing and issue the subpoena and then receive the testimony of that witness. The administrative law judge concludes now that it is not necessary to issue any subpoenas as a result of the decision reached herein.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Department Exhibit One, the administrative law judge finds: The claimant filed a claim for unemployment insurance benefits effective October 9, 2005. A notice of the claimant's claim was sent to the employer on October 12, 2005 and received by the employer prior to October 24, 2005. The deadline for a protest, if any, was October 24, 2005. However, the employer's protest was not faxed to Iowa Workforce Development until October 27, 2005, as shown at the bottom of the protest, which is Department Exhibit One. The employer's protest was three days late. The protest was signed on October 24, 2005 but simply not faxed for three more days. Employer's witness, Jeffrey Keep, Store Supervisor for the Employer's store in Ottumwa, Iowa, where the claimant was employed, testified that he really had no excuse for a delay in faxing his protest but did state that he was training a new manager and was conducting an investigation and apparently was too busy to fax the protest promptly after a protest had been completed. The Notice of Claim was received by the employer prior to October 24, 2005, the deadline for the protest.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the employer filed a timely protest of the claimant's claim or, if not, whether the employer established good cause for such failure. The administrative law judge concludes that the employer's protest was not timely and the employer has not demonstrated good cause for delay in the filing of a protest and therefore such protest should not be accepted and the administrative law judge does not have jurisdiction to reach the remaining issues.
2. Whether the claimant's separation from employment was a disqualifying event. The administrative law judge does not have jurisdiction to reach that issue.
3. Whether the claimant is overpaid unemployment insurance benefits. The administrative law judge does not have jurisdiction to reach that issue.



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.

871 IAC 24.35(1) provides:

(1) Except as otherwise provided by statute or by department rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the department shall be considered received by and filed with the department:

a. If transmitted via the United States postal service or its successor, 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 or its successor, on the date it is received by the department.

871 IAC 24.35(2) provides:

(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 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.

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 department 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 department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

Another portion of Iowa Code section 96.6-2 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 same code section, the Iowa Supreme Court held that the 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. Iowa Department of Job Service, 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 that portion of Iowa Code section 96.6-2 which deals with the time limit in which to file a protest after notification of the filing of the claim has been mailed.

The administrative law judge concludes that the employer has the burden to prove that its protest was timely or that it had good cause for the delay in the filing of its protest. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence either that its protest was timely or that it had good cause for the delay in the filing of its protest. On its face as shown at Department Exhibit One and as set out in the Findings of Fact, the employer's protest was faxed on October 27, 2005 three days after its due date of October 24, 2005. Thus the protest was clearly three days late. The employer's witness, Jeffrey Keep, Store Supervisor of the Employer's store in Ottumwa, Iowa, where the claimant was employed, credibly and candidly testified that he had no real excuse for the delay in faxing the protest. The protest is dated October 24, 2005, and Mr. Keep testified that he filled it out on that day but simply did not fax the protest for three more days. Mr. Keep did state that he was training a new manager and he was in the process of doing an investigation and apparently had no time for faxing the protest or forgot about it. However, this is not good cause for delay in faxing the protest or filing the protest. There is no evidence that the delay in the filing of the protest was due to Iowa Workforce Development Department error or misinformation or to delay or other action by the United States Postal Service. Accordingly, the administrative law judge concludes that the employer has failed to effect a timely protest in the time period prescribed by the Iowa Employment Security Law and has further failed to establish or demonstrate good cause for such delay. Therefore, the administrative law judge concludes that the protest should not be accepted and he lacks jurisdiction to make a determination with respect to the other issues presented including the separation of employment. Finally, the administrative law judge concludes the representative's decision of October 28, 2005, reference 01, is to remain in full force and effect.

#### DECISION:

The representative's decision of October 28, 2005, reference 01, is affirmed. The employer has failed to file a timely protest and has not demonstrated good cause for delay in the filing of such protests and therefore the protest is not accepted. The decision of the representative shall stand and remain in full force and effect. The claimant, Peggy S. Baxter, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible.

kkf/kjw