

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THEDOUS A JENKINS
Claimant

APPEAL NO. 13A-UI-12091-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GRIFFIN NURSING CENTER INC
Employer

OC: 09/29/13
Claimant: Respondent (4-R)

Iowa Code Section 96.6-2 - Timeliness of Protest

STATEMENT OF THE CASE:

The employer filed an appeal from the October 18, 2013, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that found the employer's protest regarding the claimant's separation untimely. After due notice was issued, a hearing was held by telephone conference call on November 20, 2013. Claimant Thedous Jenkins participated. Sandra Dykstra represented the employer. Lisa Crisp was also present on behalf of the employer. Exhibit One and Department Exhibit D-1 were received into evidence.

ISSUE:

Whether the employer's protest regarding the claimant's separation was timely.

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Claimant Thedous Jenkins established a claim for unemployment insurance benefits that was effective September 29, 2013 in response to a cut in her work hours. On October 1, 2013, Iowa Workforce Development mailed a notice of claim concerning Ms. Jenkins to the employer's last-known address of record. The employer received the notice of claim in a timely manner, prior to the protest deadline. The notice of claim contained a warning that any protest must be postmarked, faxed or returned by the due date set forth on the notice, which was October 11, 2013. The notice of claim contained the following language: "Claim is filed as temporary layoff, job attached; work search is waived. If status changes during claim, notify your local Workforce Development Center. In other words, the notice of claim acknowledged that Ms. Jenkins was still attached to the employment and had not yet separated from the employment. The employer did not wish to contest Ms. Jenkins' unemployment insurance benefit eligibility in connection with the reduction in work hours. The employer did respond to the October 1, 2013 notice of claim by the October 11, 2013 deadline set forth on the notice of claim.

On October 1, 2013, the employer discharged Ms. Jenkins from the employment. The discharge occurred the same day the notice of claim regarding the "temporay layoff, job attached" was mailed to the employer. The employer assumed it would receive a subsequent notice of claim pertaining to the separation.

On October 14, 2013, the employer wrote information on the October 1, 2013 notice of claim document and faxed it the Iowa Workforce Development. The employer noted on that document that Ms. Jenkins had been discharged from the employment. The Unemployment Insurance Services Center received the employer's protest by fax on October 14, 2013 and marked it as being late.

REASONING AND CONCLUSIONS OF LAW:

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.

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 the court 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.

The evidence in the record establishes that the employer's protest in response to the October 1, 2013 notice of claim was untimely. The evidence establishes that the employer had a reasonable opportunity to file a timely protest in response to that notice of claim. The evidence establishes that the employer's failure to file a timely protest in response to the October 1, 2013 notice of claim was not attributable to Workforce Development error or misinformation or delay or other action of the United States Postal Service. Accordingly, the administrative law judge would not have any jurisdiction to disturb the agency's initial determination of the employer's liability *in connection with the "temporary layoff, job attached" issues*.

However, the October 1, 2013 notice of claim indicated on its face that it was *not* dealing with the separation. The document indicated that the separation, the change in employment status, would be addressed later, after the employer gave notice to Workforce Development that there had been a change in status. It was error on the part of the Agency to treat the employer's late protest of the notice of claim dealing with the "temporary layoff" issue as a late protest also of the separation issue. The employer's notation on the October 1, 2013 notice of claim, that there had been a separation, could reasonably be interpreted as the employer notifying the agency, as directed by the October 1 notice of claim, that there had been a change of status that needed to be adjudicated by the Agency.

This matter will be remanded to the Claims Division for issuance of a new notice of claim to begin the process of adjudicating the claimant's *separation* from the employment. The employer will have to provide a timely response to that new notice of claim in order to preserve its rights to be heard on issues relating to the employment separation.

DECISION:

The Agency representative's October 18, 2013, reference 01, decision is modified. The Agency's initial determination of the claimant's eligibility for benefits and the employer's liability for benefits in connection with the temporary layoff or partial unemployment shall stand. That portion of the October 18, 2013, reference 01, decision that addressed the claimant separation from the employment is set aside.

This matter is remanded to the Claims Division for issuance of a new notice of claim to begin the process of adjudicating the claimant's *separation* from the employment. The employer will have to provide a timely response to that new notice of claim in order to preserve its rights to be heard on issues relating to the employment separation.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs