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

EDWARD L FINCH

Claimant

and

TEREX USA LLC

Employer

HEARING NUMBER: 17BUI-02959

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: 96.5-1

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

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:

Edward Finch (Claimant) worked for Terex USA LLC (Employer) from July 12, 1988 through August 21, 2015. Prior to his separation the Claimant filed a claim for benefits because of a temporary layoff. The Employer did not protest payment of benefits during these weeks. The original claim date for this claim was July 5, 2015. The Claimant continued to file weekly claims, so at no point was his claim identified as an additional or reopened claim. As a result the Employer was not sent a notice of claim filing by the agency following the August 21, 2015 separation. The Employer at no point submitted a notice of separation form to the Department. The final week of benefits for this claim year were paid out to the Claimant concerning the benefit week ending on March 12, 2016. This final $52 payment was made on

March 14, 2016. The record does not reflect that the Employer at any point filed an appeal from a statement of charges that was sent out concerning a quarter within the claim year commencing on July 5, 2015. Prior to the Claimant's separation the Employer had told him, and other workers, that the Employer did not intent to protest payment of unemployment benefits to those who accepted the retirement package.

REASONING AND CONCLUSIONS OF LAW:

As a preliminary matter we note that we do concur with the Administrative Law Judge in finding that this is not a case of severance payments and do affirm the finding that no disallowance of benefits can be based on receipt of severance payments.

Iowa Code 96.6 provides:

> 2. *Initial determination.* … Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive - but not conclusive - evidence of the date of mailing.

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 decisions of the Workforce administrative law judges 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.”

These principles govern this matter - not the good cause rule which applies to late appeals to the Board. *C.f. Houlihan v. Employment Appeal Bd.,* 545 N.W.2d 863 (Iowa 1996)(15 day appeal deadline to Board extended for good cause under Board rule 3.1). The rules of Iowa Workforce Development do not give this Board the flexibility to extend the deadline for good cause.

Since the Employer did not get notice of claim following the separation, the Employer would not be required to protest within ten days of the first continued claim filed following the separation. And while the Employer had the right to file a notice of separation form 60-0154, it will not be bound by the mere failure to file a timely notice of separation. 871 IAC 24.1(85); 871 IAC 24.8(2)(d)("the employer has the *option* of notifying the department….). But the statute does specifically provide for an appeal deadline governing those employers in this this situation:

> Within forty days after the close of each calendar quarter, the department **shall notify each employer of the amount of benefits charged** to the employer's account during that quarter. The notification shall show the name of each **individual** to whom benefits were paid, the individual's social security number, and the amount of benefits paid to **the individual**. An **employer which has not been notified as provided in section 96.6, subsection 2**, of the allowance of benefits to an individual, may within **thirty days** after the date of mailing of the notification appeal to the department for a hearing **to determine the eligibility of the individual to receive benefits.** The appeal shall be referred to an administrative law judge for hearing and the employer and the individual shall receive notice of the time and place of the hearing.

Iowa Code §96.7(2)(a)(6)(emphasis added). What this means is that if an employer does not receive notice of a claims representative decision concerning an individual's claim, and if that individual is paid benefits during a quarter, and if an employer wishes to challenge that payment based on information known to the employer at that time, then the employer must appeal within 30 days of the mailing of the statement of charges. This process is not limited to benefit charging but would entail a challenge to the "eligibility of the individual to receive benefits" and would then proceed as a §96.6(2) appeal. It is, in other words, an alternative way to protest benefits where no notice has been sent to the employer at the relevant time. *See Zimmerman v. Hemi-Ami Iowa, Inc.*, 15B-UI-02591 (EAB 2015).

The record shows that the Claimant received benefits from the date of his separation in August until March 14, 2016. The *latest* statement of charges reflecting payment to the Claimant chargeable to this Employer would have gone out 40 days after the end of that month, on Tuesday, May 10, 2016. The date to appeal this statement of charges would run, at the latest, on June 9, 2016. The Employer filed no appeal, and waited to protest until the second benefit year claim was made. The protest was filed around July 5, 2016, that is, 26 days after the appeal deadline had run on June 9.

We find that the Employer failed to timely protest/appeal the payment of benefits to the Claimant despite three statements of charges having been sent and the Employer having three opportunities to appeal the allowance of benefits. This means that even though the Employer protested the second benefit year, and even though benefits have been denied in that second

benefit year, still we cannot deny benefits for the 2015 benefit year. The issue of eligibility in that first benefit year was not raised within the time provided for by statute.

Key to this analysis is the recognition that benefits are paid on claims. Central to the Employment Security Law is the concept of "claim." Benefits are paid on a claim. The amount of benefits is calculated by reference to the original claim date. Eligibility determinations are specific to the claim for the week in question. The very idea that claims are separate underlies allowing an Employer who did not protest one claim to protest a subsequent benefit year claim. We think disqualifications, except of course for prior adjudications, are similarly tied to a claim. At least this is true with disqualifications under §95.5(1). If a chargeable base period employer from whom a claimant has been separated does not protest a claim, has benefits charged to it during the claim year, does not appeal any statement of charges, and does not file a notice of separation then benefits on the that *first* claim cannot be found to be wrongly paid based on a "nature of the separation" protest of a *second* claim. In short, one claim per protest.

It is true that an overpayment is not, by its terms, limited to the benefit year in which the overpayment decision is issued. We would certainly agree that in cases of week-to-week eligibility under Iowa Code §96.4 an overpayment is not limited to the current benefit year. An employer has no opportunity to protest whether the Claimant is able and available for a given week under §96.4. Indeed, the reasons that make a Claimant unavailable are often unknown to an employer. Also, of course, a Claimant is required to *certify* availability for *any week* in which benefits are collected. 871 Iowa Admin. Code 24.2(1)(b). Thus the Code does not, and cannot, require a protest for §96.4 eligibility issues. The question of disqualification based on the nature of the separation from a chargeable base period employer is a different question.

Finally, we are aware that the question of timeliness of appeals/protest was not noticed for hearing. Ordinarily this would mean we would have to remand the matter. This is not an ordinary case. The Employer here indicated in writing at the time of separation that it did not intend to protest. The Employer then did not appeal any of the statement of charges, or send notice of the separation to the Department. Then after the remand from Court the Employer not only failed to come to the hearing but also called the Administrative Law Judge to express that it did not intend to participate. In this context, and given how long the case has been pending, we believe that a remand on the question on failure to appeal the statements of charges would be pointless. It appears clear from the record that the Employer did not appeal because the Employer did not intend to protest benefits in the first benefit year – as it had promised. Now we emphasize that a promise not to protest is *not binding* and the Employer could have protested or appealed had it wished, promise notwithstanding. But when the Employer did not appeal or protest then the agency cannot in a subsequent benefit year act as if the Employer had protested or appealed. *See generally Irving v. Employment Appeal Bd*., 883 NW 2d 179 (Iowa 2016). We recognize that perhaps we are wrong in construing the Employer's apparent abandonment of the right to contest benefits for that first benefit year. Because of this we emphasize to the Employer that **if the Employer does wish to present evidence on the question of why it did not protest, or appeal a statement of charges concerning, the July 5, 2015 claim then the Employer must apply for rehearing within 20 days of today's decision.** Failure to file such an application for rehearing within 20 days of today's decision will be waiver by the Employer of the right to contest whether it timely challenged the payment of benefits in the 2015 claim year.

We conclude that there was no power at this point to adjudicate concerning the July 5, 2015 claim that the Claimant was disqualified based on the nature of his separation from Terex USA.

DECISION:

The administrative law judge's decision dated May 12, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Employer failed to raise a contest to the payment of benefits in a timely fashion and that, as a result, there was no jurisdiction to deny benefits in the 7/5/2015 claim year based on the nature of the separation from the Employer. Accordingly, benefits are allowed for the duration of the claim year starting on July 5, 2015. The overpayment decision made concerning this claim is vacated and set aside. The overpayment amount **will be chargeable** to Terex USA.

We again remind the Employer that if we have misconstrued its nonparticipation and the Employer would indeed like to present evidence on the reasons it did not make an appeal of any of the statements of charges, the Employer must apply for rehearing and we would, at that time, remand the case for a hearing on the issue of timeliness of the protest or appeal. Failure to file such an application for rehearing within 20 days of today's decision will be waiver by the Employer of the right to contest whether it timely challenged the payment of benefits in the 2015 claim year.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv