

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOHN P MARTINI**  
Claimant

**APPEAL NO. 12O-UI-08471-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**H & L CONSTRUCTION LLC**  
Employer

**OC: 01/08/12**  
**Claimant: Respondent (1)**

Iowa Code Section 96.6-2 - Timeliness of Protest

**STATEMENT OF THE CASE:**

This matter was before the administrative law judge based on an Employment Appeal Board remand for a new hearing in Hearing Number 12B-UI-02440. The employer filed an appeal from the March 5, 2012, reference 01, decision that allowed benefits and that found the employer's protest untimely. After due notice was issued, a hearing was held by telephone conference call on August 29, 2012. Claimant John Martini participated and presented additional testimony through Melissa Martini. Joy Christians, Accountant, represented the employer. Exhibit A and Department Exhibits D-1 and D-2 were received into evidence.

**ISSUE:**

Whether the employer's protest of the claim for benefits was timely.

**FINDINGS OF FACT:**

Having reviewed the evidence in the record, the administrative law judge finds: On February 16, 2012, Iowa Workforce Development mailed a notice of claim concerning the above claimant to the employer's address of record. 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 February 27, 2012. The employer's address of record on file with workforce development was at that time 1311 9th Street in Milford, IA 51351. That address was the residence of H & L Construction, L.L.C. owner, Jim Humphrey until January 2012. Neither Mr. Humphrey nor the employer notified workforce development of a change in address prior to the above referenced notice of claim having been mailed to the employer on February 16, 2012. In January 2012, the employer notified United States Postal Service of its need to have the mail that was addressed to the ninth Street address forwarded to P.O. Box 182 in Milford, IA 51351. On or before February 27, 2012, the notice of claim was received at the employer's post office box. While the employer's witness, Joy Christians, asserts that the document was received on February 27, Ms. Christians did not collect the document from the post office box. February 27, 2012 was a Monday. The employer did not keep the envelope in which the notice of claim arrived.

On February 27, 2012, Ms. Christians received the notice of claim into her possession from another person associated with H & L Construction L.L.C. Ms. Christians filled out the

employer's protest information on the notice claim. Ms. Christians then delivered the document to the post office to be mailed, but did so after the last scheduled mail collection that day. As a result, the protest was postmarked February 28, 2012. Workforce Development received the employer's protest on March 1, 2012.

#### **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 protest in question was filed on February 28, 2012, the postmark date on the envelope in which the protest arrived.

The employer did not present any testimony from the person who actually collected the notice of claim from the employer's post office box. The evidence establishes, at minimum, that Ms. Christians had the document in her possession on the day the protest was due, saw that the protest was due, but placed the document in the mail stream too late for it to be collected or postmarked that day. The evidence also establishes, at minimum, that someone else associated with the employer possessed the document before Ms. Christians got it. While Ms. Christians asserts the employer only just received the notice of claim on February 27, 2012, the employer has presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish that to be the case. Employer had the ability to present testimony from the person who collected the notice of claim from the post office box, but elected not to.

The evidence in the record establishes that the employer's protest was untimely. The evidence establishes that the employer had a reasonable opportunity to file a timely protest. The evidence establishes that the employer's failure to file a timely protest 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 lacks jurisdiction to disturb the Agency's initial determination regarding the nature of the claimant's separation from the employment, the claimant's eligibility for benefits, or the employer's liability for benefits. The Agency's initial determination of the claimant's eligibility for benefits and the employer's liability for benefits shall stand and remain in full force and effect.

The administrative law judge acknowledges that this was a rehearing of the protest issue prompted by the absence of a digital record of that earlier proceeding. The administrative law judge cannot assume that the evidence presented or considered in connection with the earlier hearing was the same as the evidence presented during the hearing on August 29, 2012 and considered by the administrative law judge in making this decision.

**DECISION:**

The Agency representative's March 5, 2012, reference 01, decision is affirmed. The Agency's initial determination of the claimant's eligibility for benefits and the employer's liability for benefits shall stand and remain in full force and effect.

In the event that the present decision is reversed upon appeal, there is sufficient evidence in the record for a ruling on the merits of the employer's protest.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs