

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ALEC C KECK
Claimant

FROG LEGS INC
Employer

APPEAL NO. 19A-UI-06828-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/28/19
Claimant: Respondent (1)

Iowa Code Section 96.6-2 - Timeliness of Protest

STATEMENT OF THE CASE:

The employer filed an appeal from the August 20, 2019, reference 02, decision that allowed benefits to the claimant provided he was otherwise eligible, that held the employer's account could be charged for benefits, and that held the employer's protest could not be considered because it was untimely. After due notice was issued, a hearing was held by telephone conference call on September 20, 2019. Claimant Alec Keck did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Kristin Boling represented the employer. Exhibit 1 and Department Exhibits D-1 through D-3 were received into evidence. The administrative law judge took official notice of the Agency's administrative record of the claimant's wages subsequent to separation from this employment (WAGEA).

ISSUES:

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

Whether there is good cause to deem the employer's late protest as timely.

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: On July 31, 2019, 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 August 12, 2019. The employer's mailbox is part of a United States Postal Service cluster box unit (CBU). The weight of the evidence establishes that the notice of claim was received at the employer's address of record in a timely manner, prior to the deadline for protest. Employer witness Kristin Boling, Human Resources Manager, received the notice of claim into her possession on August 12, 2019. However, Ms. Boling did not collect the correspondence from the mailbox. Instead, Tracy Van Weelden collected the mail from mailbox and subsequently provided the correspondence to Ms. Boling. Ms. Boling speculates that the notice of claim may have been initially distributed to another mailbox in the cluster box unit and only later rerouted to the employer's mail box. When Ms. Boling received the correspondence into her possession, it

did not bear a yellow sticker or other marking that would indicate it had been misrouted or delayed in reaching the employer. On August 12, 2019, Ms. Boling completed the employer's protest information on the notice of claim form. Ms. Boling did not note on the notice of claim/protest form any concern about the date the employer received the notice of claim. Ms. Boling elected to mail the protest. Ms. Boling asserts she took the correspondence to the Ottumwa post office and placed the correspondence in the collection box between 3:30 p.m. and 5:00 p.m. on August 12, 2019. The protest bears an August 14, 2019, 2:00 p.m. Des Moines postmark. Iowa Workforce Development received the protest on August 16, 2019.

After the claimant left this employment in February 2019, and before the he established the original claim for benefits that was effective July 28, 2019, he worked in new employment for which he was paid wages that exceeded 10 times his weekly benefit amount.

REASONING AND CONCLUSIONS OF LAW:

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.

Iowa Administrative Code Rule 871-24.8(2)(a) and (b) provide as follows:

- (2) Responding by employing units to a notice of the filing of an initial claim or a request for wage and separation information and protesting the payment of benefits.
 - a. The employing unit which receives a Form 65-5317, Notice of Claim, or a Form 68-0221, Request for Wage and Separation Information, must, within ten days of the date of the notice or request, submit to the department wage or separation information that affects the individual's rights to benefits, including any facts which disclose that the individual separated from employment voluntarily and without good cause attributable to the employer or was discharged for misconduct in connection with employment.
 - b. The employing unit may protest the payment of benefits if the protest is postmarked within ten days of the date of the notice of the filing of an initial claim. In the event that the tenth day falls on a Saturday, Sunday or holiday, the protest period is extended to the next working day of the department. If the employing unit has filed a timely report of facts that might adversely affect the individual's benefit rights, the report shall be considered as a protest to the payment of benefits.

Iowa Administrative Code Rule 871-24.35(1) provides:

Date of submission and extension of time for payments and notices.

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

a. If transmitted via the United States Postal Service 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 via the State Identification Data Exchange System (SIDES), maintained by the United States Department of Labor, on the date it was submitted to SIDES.

c. If transmitted by any means other than those outlined in paragraphs 24.35(1)"a" and "b", on the date it is received by the division.

Iowa Administrative Code Rule 871-24.35(2) provides:

Date of submission and extension of time for payments and notices.

(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 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.

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

The weight of the evidence in the record establishes that the employer's protest was untimely. The employer presented insufficient evidence to prove by a preponderance of the evidence that the employer received the notice of claim on August 12, 2019, rather than earlier. The notice of claim was mailed from Des Moines on July 31, 2019. A reasonable person would conclude it would not take more than a day or two for the notice of claim to arrive the employer's mailbox in Ottumwa. The employer elected not to make available for the hearing the person who collected the mail from the mail box. Ms. Boling completed the employer's protest information on the notice of claim form on August 12, 2019, but omitted any reference to alleged delayed receipt of

the notice of claim. Though Ms. Boling asserts that she placed the notice of claim in the mail on August 12, 2019, this is inconsistent with an August 14, 2019 afternoon postmark. The protest was filed on August 14, 2019, the postmark date. The administrative law judge concludes that the employer had reasonable opportunity to file a timely protest, but filed it late. The administrative law judge cannot conclude, based on the particular facts in evidence, that Iowa Workforce Development or the United States Postal Service caused the protest to be filed late. Accordingly, there is not good cause to treat the late protest as a timely protest. Because the protest was untimely, 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 remain in effect.

DECISION:

The August 20, 2019, reference 02, decision is affirmed. The employer's protest was untimely. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs