

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TERRY J WEBB**  
Claimant

**APPEAL NO. 07A-UI-05966-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**K MART CORP**  
Employer

**OC: 02/18/07 R: 02**  
**Claimant: Respondent (1)**

Section 96.6-2 – Timeliness of Protest

**STATEMENT OF THE CASE:**

K-Mart Corporation (employer) appealed a representative's June 6, 2007 decision (reference 03) that concluded Terry J. Webb (claimant) was qualified to receive unemployment insurance benefits and the employer's account might be charged because the employer's protest was not timely filed. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 2, 2007. The claimant participated in the hearing and was represented by Jill Tranel, Legal Intern. Carol Kelly appeared on the employer's behalf. During the hearing, Exhibit A-1 was entered into evidence. The administrative law judge takes official notice of the Agency's Notice of Claim and protest records regarding the claimant's claim; should either party object to the taking of that official notice, that party shall file an objection with the administrative law judge stating the basis of the objection within seven days of the issuance of this decision. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision affirming the representative's decision and allowing the claimant benefits.

**ISSUE:**

Should the employer's protest be treated as timely?

**FINDINGS OF FACT:**

The claimant established a claim for unemployment insurance benefits effective February 18, 2007. A Notice of Claim was mailed to the employer's last-known address of record, third-party employer representative TALX UC eXpress, on February 21, 2007. No evidence was provided to rebut the presumption that the employer's representative received the notice. The administrative law judge further observes that on the same day this notice of claim was sent to the employer's representative regarding this employer's account, notices were also sent to the claimant's other two most recent employers, one of which was also represented by the same third-party employer representative. Both of the other two Notices of Claim regarding the claimant which were mailed on February 21 were obviously received, including the one which had been sent to the same third-party representative on behalf of the other employer's account, as timely protest were filed on both of those notices.

The February 21, 2007 notice contained a warning that a protest must be postmarked or received by the Agency by March 5, 2007. No evidence was provided that the employer's representative made any reply to the Agency regarding the claimant on behalf of this employer until it received a May 9, 2007 quarterly statement and responded on June 1, 2007. No explanation for the delay was offered.

## **REASONING AND CONCLUSIONS OF LAW:**

The law provides that all interested parties shall be promptly notified about an individual filing a claim. The parties have ten days from the date of mailing the Notice of Claim to protest payment of benefits to the claimant. Iowa Code section 96.6-2. Another portion of Iowa Code section 96.6-2 dealing with timeliness of an appeal from a representative's decision states 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 court has held that this statute clearly limits the time to do so, and 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 Beardslee court controlling on the portion of Iowa Code section 96.6-2 which deals with the time limit to file a protest after the Notice of Claim has been mailed to the employer. Compliance with the protest provisions is jurisdictional unless the facts of a case show that the notice was invalid. Beardslee, 276 N.W.2d 373, 377 (Iowa 1979); see also In re Appeal of Elliott, 319 N.W.2d 244, 247 (Iowa 1982). Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), protests are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). The question in this case thus becomes whether the employer was deprived of a reasonable opportunity to assert a protest in a timely fashion. Hendren v. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC, 212 N.W.2d 471, 472 (Iowa 1973). The record shows that the employer did have a reasonable opportunity to file a timely protest.

871 IAC 24.35(2) provides in pertinent part:

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.

The employer has not shown that the delay for not complying with the jurisdictional time limit was due to department error or misinformation or delay or other action of the United States Postal Service. Since the employer filed the protest late without any legal excuse, the employer did not file a timely protest. Since the administrative law judge concludes that the protest was not timely filed pursuant to Iowa Code section 96.6-2, the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the protest and the reasons for the claimant's separation from employment, regardless of the merits of the employer's protest. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979); Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979) and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

**DECISION:**

The June 6, 2007 (reference 03) decision is affirmed. The protest in this case was not timely, and the decision of the representative remains in effect. Benefits are allowed, provided the claimant is otherwise eligible.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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