

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

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**JARED R ZIMMERMAN**

Claimant

and

**HEMI-AMI IOWA INC**

Employer

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**HEARING NUMBER: 15B-UI-02591**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**NOTICE**

**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:** 96.6-2, 96.6-2

**DECISION**

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. With the following modification, the administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION**:

The Board affirms the Administrative Law Judge but on the alternate ground that the protest was untimely.

The Board makes the following finding of fact in addition to those made by the Administrative Law Judge: The Employer signed the protest on July 31, 2014 and had thus received the notice of claim prior to that date.

The Board makes the following Conclusion of Law in lieu of those made by the Administrative Law Judge:

## REASONING AND CONCLUSIONS OF LAW:

Legal Standards: 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 Board agrees with the administrative law judges of Iowa Workforce 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 determinations, we hold that the ten day period for filing a protest is mandatory. *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 appellant 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.”

Discussion: The address problem may very well have affected the Employer's ability to appeal fact finding decision issued on August 7, 2014, and so we agree with the Administrative Law Judge that the appeal from that decision should be found timely. This means, then, that we can now consider the issue of the timeliness of the protest.

The Employer clearly received the notice of claim in time to protest. The protest is signed on July 31, 2014. It was not due until Friday, August 1, 2014. Clearly any postal delay – even assuming there was one – did not affect the Employer's ability to fill out the protest and sign it in a timely fashion. It did so. But then the fax was not sent for four more days. The actions of the post office have no impact on the delay between signing the protest (July 31) and faxing the protest (August 4). Indeed in its appeal to the Administrative Law Judge the Employer asserts that “We did not have to provide much for this claim. We faxed the claim on 7/31/14.” Thus the Employer does not assert that some mail delay caused the late protest, but rather that it in fact did protest in time. The issue then become whether the fax was sent on July 31, 2014 or Monday, August 4, 2014.

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We have found credible the face of the protest showing “08/04/2014 13:49 5053230401 PAARU CONST CORP” along the top, and “Receive time August 4, 2014 3:04 PM No. 3657” along the bottom and a stamp “RCVDUIISC Aug 04, 2014” on the top. We conclude that the fax was sent at 1:49 p.m. Albuquerque time which is 2:49 central time, and was received at 3:04 pm central time that same day. We note that the number along the top of the protest is hand written in by the employer as its fax number in the protest. Baring some transmission report from the Employer showing otherwise we find that the protest was in fact faxed on August 4, and note that the Administrative Law Judge made this same finding. Again, since the protest was signed the day before the deadline any *previous* postal delay has no effect whatsoever on the Employer’s ability to get to its own fax machine, or to the post office. The protest is untimely.

Having found the protest untimely it does not follow automatically that the Claimant receives benefits. The Code directs that “[t]he representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid...and whether any disqualification shall be imposed.” Iowa Code §96.6(2). The untimeliness of the protest means only that the protest and any supporting information must be disregarded. The claims representative still has the obligation to consider other available information to determine if benefits should be allowed. In addition to examining the separation from the Employer, the claims representative would also have examined whether the Claimant was monetarily eligible, whether he was able to work, and other related questions of eligibility. The disposition of such matters, if adverse to the claimant, would result in separate decisions that would be separately appealable. We are unaware of any such disposition in this case (which is why the Claimant was paid benefits as shown on the statement of charges). For our purposes, what matters is that the claims representative examined the information, other than the protest, relating to the separation at issue here and found no disqualification should be imposed. This meets the requirements of §96.6(2). The protest was untimely, the protest may not be considered, and we therefore find that benefits are allowed.

Finally, we must explain that we do not follow the Administrative Law Judge’s rule that the appeal of the statement of charges cannot bring up the question of disqualification. To our mind had the Employer received neither the notice of claim (and it did) nor a decision of the claims representative then the Employer could raise the issue of disqualification in an appeal of the statement of charges. In such cases the appeal period by statute is 30 days following the quarterly statement of charges:

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 claim, and 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, then the employer can appeal within 30 days of the mailing of the statement of charges. Here the total wage credits for this Claimant which can be charged to the Employer is shown on the notice of claim to be \$3,250.67. This is the amount shown on the statement of charges for the fourth quarter of 2014. This means that this statement of charges, which was mailed on 2/9/15, is the first statement this Employer would have received showing benefits to the Claimant charged to the Employer's account. *Had the Employer not received the protest or the claims decision*, then it could have appealed the February 9, 2015 statement of charges and sought a hearing "to determine the eligibility of the individual to receive benefits." Iowa Code §96.7(2)(a)(6). So we disagree with the Administrative Law Judge on the idea that a statement of charges appeal cannot involve a challenge to benefit eligibility. But ultimately we affirm the Administrative Law Judge because the protest was in fact received by the Employer and so Code §96.7(2)(a)(6) does not apply. Having received the statement of charges, having signed the protest on July 31, the Employer was required to protest by August 1, 2014 but it simply did not do so. There is no basis for excusing this failure to protest timely, and we affirm the Administrative Law Judge on the ground that the protest was untimely.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv