

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID K GILSON
Claimant

APPEAL NO. 10A-UI-04631-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON PREPARED FOODS INC
Employer

**Original Claim: 09/27/09
Claimant: Respondent (1)**

Section 96.6(2) – Timeliness of Protest
Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated March 19, 2010, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 6, 2010. The claimant participated. The employer participated by Ron Wood, human resources manager. Brandi Henery, who is affiliated with TALX, was a witness on the timeliness issue. The record consists of the testimony of Brandi Henery and Employer's Exhibits 1 through 5. Official notice is taken of agency records.

ISSUE:

Whether the employer filed a timely protest.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

A notice of claim was sent to the employer on September 30, 2009, in care of TALX UCM Services Inc. The notice of claim states that any protest was due on October 13, 2009. The TALX representative prepared a letter protesting the claim that was dated on October 13, 2009. No protest was received by the agency until March 11, 2010.

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 that 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).

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 evidence in this case established that the employer, through its designated representative, received the notice of claim. Although a letter was prepared on October 13, 2009, protesting the claim, this letter was not received by Iowa Workforce Development until a protest postmarked March 11, 2010. The TALX representative testified that she prepared the letter and, according to standard procedure, the letter would be printed in the mail department and mailed. When asked if there was any proof that the protest was actually postmarked on October 13, 2009, she indicated there was no proof. Since there is no proof that the protest was actually postmarked by October 13, 2009, the administrative law judge concludes that the protest was not timely. The administrative law judge, therefore, does not have subject matter jurisdiction to consider the separation issues.

DECISION:

The representative's decision dated March 19, 2010, reference 01, is affirmed. The employer did not file a timely protest. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw