

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MARK D PERERA
2920 DODGE AVE
SIOUX CITY IA 51106

L. A. CARLSON CONTRACTING INC
20984 C-43
MERRILL IA 51038

Appeal Number: 05A-UI-12234-RT
OC: 01-02-05 R: 01
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.6-2 – Initial Determination (Timeliness of Protest)

STATEMENT OF THE CASE:

The employer, L. A. Carlson Contracting, Inc., filed a timely appeal from an unemployment insurance decision dated December 2, 2005, reference 02, allowing unemployment insurance benefits to the claimant, Mark D. Perera, because the employer's protest was not timely. After due notice was issued, a telephone hearing was held on December 20, 2005, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where he or any of his witnesses could be reached for the hearing, as instructed in the Notice of Appeal. Lynn Carlson, President, participated in the hearing for the employer. Department Exhibit One was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, including Department Exhibit One, the administrative law judge finds: The claimant filed a claim for unemployment insurance benefits effective January 2, 2005. A notice of the claimant's claim was sent to the employer on January 10, 2005. The Notice of Claim was received by the employer. The deadline for a protest, if any, was January 20, 2005. However, the only protest received by Iowa Workforce Development was a protest faxed by the employer on November 29, 2005 as shown at Department Exhibit One. This protest was ten months late. The protest was dated January 13, 2005. The employer's witness, Lynn Carlson, President, testified that the employer had sent or faxed an original protest on January 13, 2005 but the employer heard nothing thereafter. The employer learned, on or about November 22, 2005, when it received its annual tax rate notice, of the charges and protested at that time. However, the employer had received the quarterly statement of charges for the second quarter of 2005, which was mailed on August 9, 2005. The employer received this in August. This quarterly statement of charges showed benefits paid to the claimant in the second quarter of 2005. Mr. Carlson had no explanation as to why the employer did not take action on the quarterly statement of charges for the second quarter of 2005 when it received it in August of 2005. Initially Mr. Carlson testified that the employer learned of the charges against its account for the claimant's unemployment insurance benefits from the quarterly statement of charges for the second quarter of 2005 but then later stated he learned about it from the annual tax rate notice. The administrative law judge further notes that a quarterly statement of charges for the first quarter of 2005 would have been sent to the employer in May of 2005 and this statement of charges would also have shown benefits paid to the claimant. The claimant received benefits in the first and second quarters of 2005.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the employer filed a timely protest of the claimant's claim or, if not, whether the employer established good cause for such failure. The administrative law judge concludes that the employer did not file a timely protest of the claimant's claim and has not demonstrated good cause for the delay in the filing of the protest. Therefore, the administrative law judge concludes that the employer's protest should not be accepted.

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.

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 96.7-2-a(6) provides:

2. Contribution rates based on benefit experience.

a. (6) 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.

The administrative law judge concludes that the employer has the burden to prove that its protest was timely or that it had good cause for delay in the filing of its protest. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that its protest was timely or that it had good cause for the delay in the filing of its protest. The employer's protest at Department Exhibit One clearly indicates that the protest was faxed to Iowa Workforce Development on November 29,

2005 making the protest almost ten months late as set out in the Findings of Fact. It is true that the employer's witness, Lynn Carlson, President, credibly testified that the employer had faxed or sent the protest initially on January 13, 2005, which would have made the protest timely. Iowa Workforce Development never received that protest. It may well be that the initial delay in filing of the protest was as a result of Iowa Workforce Development Department error or misinformation or to delay or other action by the U.S. Postal Service. However, quarterly statements of charges were sent to the employer for the first quarter of 2005 in May of 2005 and for the second quarter of 2005 on August 9, 2005. These two quarterly statements of charges would have reflected unemployment insurance benefits paid to the claimant and the employer's ultimate charge for such benefits. Mr. Carlson even conceded that he had received the quarterly statement of charges for the second quarter of 2005 in August of 2005 and noted that it had been mailed to the employer on August 9, 2005. Mr. Carlson had no explanation or reason as to why the employer did not act on the quarterly statement of charges at that time. Rather, the employer waited three months to take action and did not take action until it received the annual tax rate notice mailed on November 22, 2005. The delay from August to November was due to the fault of the employer. Had the employer read the quarterly statement of charges for the second quarter of 2005 promptly it would have immediately seen the charges and could have appealed that quarterly statement of charges. In fact the employer could have appealed the quarterly statement of charges for the first quarter of 2005, which was sent sometime in May of 2005. The deadline for the filing of an appeal for the quarterly statement of charges is 30 days after the date of the mailing of the quarterly statement of charges. The deadline for appealing the quarterly statement of charges mailed August 9, 2005 would have been September 8, 2005, over two months before the employer finally did take action. If the employer had taken prompt action when it received the quarterly statement of charges for the second quarter of 2005 (assuming the employer did not receive the quarterly statement of charges for the first quarter of 2005), a different result may have been reached herein. However, the administrative law judge is constrained to conclude here that the employer's failure to take prompt action after receipt of the quarterly statement of charges for the second quarter of 2005 and waiting until it had received the annual tax rate notice, is not good cause for such delay. Accordingly, the administrative law judge is constrained to conclude that the employer failed to effect a timely protest within the time period prescribed by the Iowa Employment Security Law and further failed to establish or demonstrate good cause for such delay or continued delay. Therefore, the administrative law judge concludes that the employer's protest should not be accepted and that he lacks jurisdiction to determine any other issues present in this matter. Accordingly, it is not now necessary to reschedule a hearing on the separation of employment.

DECISION:

The representative's decision of December 2, 2005, reference 02, is affirmed. The employer, L. A. Carlson Contracting Company, Inc., has failed to file a timely protest and has not demonstrated good cause for delay or a continued delay in filing such protest or inquiring further of Iowa Workforce Development and therefore the employer's protest is not accepted. The decision of the representative shall stand and remain in full force and effect. The claimant, Mark D. Perera, is entitled to receive unemployment insurance benefits provided he is otherwise eligible.

kkf/kjw