

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TED K GULDBERG
Claimant

APPEAL NO. 08A-UI-08649-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HAMPTON HEATING & AIR CONDITIONING
Employer

**OC: 03/16/08 R: 02
Claimant: Respondent (1)**

Section 96.6-2 – Timeliness of Appeal from Initial Determination
Section 96.7-2 – Timeliness of Appeal from Quarterly Statement of Charges
Section 96.6-2 – Timeliness of Protest to Statement of Charges

STATEMENT OF THE CASE:

Hampton Heating Company (predecessor owner), now known as Hampton Heating & Air Conditioning, Inc. (employer or successor owner), appealed a quarterly statement of charges issued on August 8, 2008 and a representative's April 15, 2008 decision (reference 01) that concluded Ted K. Guldberg (claimant) was qualified to receive unemployment insurance benefits and the employer's account was subject to charge 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 September 29, 2008. This appeal was consolidated for hearing with one related appeal on another claimant, James P. Kent, 08A-UI-08173-DT. Mr. Guldberg and Mr. Kent participated in the hearing. Becky Gustin appeared on the employer's behalf. During the hearing, Exhibits A-1, A-2, A-3, and A-4 were entered into evidence. 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.

ISSUES:

Was the employer's appeal timely or should it be treated as timely?

Was the employer's protest timely or should it be treated as timely?

Was the employer's challenge to the notice of charges timely?

FINDINGS OF FACT:

Mr. Guldberg was an employee of Hampton Heating Company, which as of March 1, 2008 was sold to Hampton Heating & Air Conditioning, Inc. Mr. Guldberg's employment ended as of February 29, 2008, upon the sale. The working address for Hampton Heating Company had been 7 – 2nd Ave. NE, Hampton, IA 50441; this became the working address for Hampton Heating & Air Conditioning as of March 1, 2008.

The two entities had different employer account numbers. An application was made for the successor employer (Hampton Heating & Air Conditioning) to receive a transfer of unemployment insurance experience from Hampton Heating Company so it would be charged at a lower rate for unemployment insurance taxes. The Iowa Workforce Development Tax Bureau made a determination on March 27, 2008 to grant that transfer of experience; the determination further noticed that "your liability includes all monies that the former owner may owe to Iowa Workforce Development."

Mr. Guldberg established a claim for unemployment insurance benefits effective March 16, 2008. A notice of claim was mailed to the working address of 7 – 2nd Ave. NE, Hampton, IA 50441 on March 21, 2008. The successor owner received the notice within a few days thereafter. The notice contained a warning that a protest must be postmarked or received by the Agency by March 31, 2008. The protest was not filed until it was signed and faxed to the Claims Section on April 14, 2008, which is after the date noticed on the notice of claim. The reason for the delay was that after Ms. Gustin, office manager and part owner, received the notice, she gave it to her husband, manager and part owner, who then set it aside until Ms. Gustin remembered it and inquired about it of her husband just prior to April 14.

At some point after the transfer of experience had been approved on March 27 but before April 15, the former predecessor owner, Hampton Heating Company, determined that for the remaining shell of its business entity the mailing address for that employer account should be changed from the working address, and filed a change of address for its account number. The new address for the predecessor owner's account number became P.O. Box 177, Hampton, Iowa 50441.

When the successor owner filed its protest on April 14 to the notice of Mr. Guldberg's claim, a representative's decision was issued on April 15 indicating that the protest could not be accepted, because it was untimely. However, that representative's decision was sent to the revised address for the predecessor owner because the charge would apply to that account. The representative's decision was received at the predecessor owner's new address, but the predecessor did not realize that it should be forwarded on to the successor owners, so it was not.

The successor owner was not aware that its protest had not been accepted until it received a quarterly statement of charges issued on August 8, 2008 for benefits paid to Mr. Guldberg in the second quarter of 2008 (April 1 through June 30). The successor owner then filed its appeal of those charges and, in effect, of the April 15, 2008 (reference 01) decision by its appeal signed on September 11 and postmarked on September 12, 2008.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the employer) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by the decision.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983).

The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. Beardslee v. IDJS, 276 N.W.2d 373, 377 (Iowa 1979); see also In re Appeal of Elliott, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal 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 appellant did not have a reasonable opportunity to file a timely appeal within ten days after April 15, 2008, as it did not receive the decision.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to a factor outside of the employer's control. The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See Beardslee, supra; Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

As to the timeliness of the protest, 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 § 96.6-2. The portion of Iowa Code § 96.6-2 discussed above 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. As noted above, 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, supra.

The administrative law judge considers the reasoning and holding of the Beardslee court controlling on the portion of Iowa Code § 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. A delay in filing caused by the setting aside of the protest until after the deadline for filing is not a cause outside the control of the employer or due to Agency 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 § 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).

In so far as the employer did not file an appeal until after it received the notice of charges sent to it on August 8, this does not create a new opportunity to challenge its chargeability for the benefits paid to the claimant. First, if the successor employer had not received the notice of claim mailed on March 19, Iowa Code § 96.7-2-a(6) does allow employers who receive a quarterly statement of charges for a claimant for which it had not had a prior opportunity to protest charges to "appeal to the department for a hearing to determine the eligibility of the individual to receive benefits" but that appeal must be made "thirty days after the date of mailing of the notification (of the amount of benefits charged to the employer's account during that quarter)." Here, the employer did not effectively appeal that quarterly statement of charges until September 11, 2008, more than 30 days after the mailing of the August 8, 2008 statement. Further, a post-statement of charges review of eligibility and resulting chargeability is only for employers who did not originally receive a notice of claim for the individual; here, the employer did receive the notice of the claim, but as discussed above, simply failed to file its protest within the time provided in March 2008.

DECISION:

The April 15, 2008 (reference 01) decision is affirmed. While the employer's late appeal of the decision is treated as timely due to non-receipt by the employer, the employer's 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw