

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARTHA LAPSLEY**

Claimant

**APPEAL NO: 12A-UI-14050-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DAVE'S OLD FASHION MEATS INC**

Employer

**OC: 10/21/12**

**Claimant: Respondent (4/R)**

Iowa Code § 96.4-3 - Able and Available for Work

Iowa Code § 96.3-7 - Overpayment

871 IAC 26.14(7) - Late Call

Iowa Code § 17A.12-3 - Non-Appearence of Party

**STATEMENT OF THE CASE:**

Dave's Old Fashion Meats, Inc. (employer) appealed an unemployment insurance decision dated November 19, 2012, reference 01, which held that Martha Lapsley (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 3, 2013. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which she could be contacted, and therefore, did not participate. The employer participated through owner David Beelman. Based on the evidence, the arguments of the party, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

The issue is whether the claimant is working the same hours and wages as in her original contract of hire with this employer.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant received the hearing notice prior to the January 3, 2013 hearing. The instructions inform the parties that if the party does not contact the Appeals Section and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The first time the claimant directly contacted the Appeals Section was on January 3, 2013, 16 minutes after the scheduled start time for the hearing. She requested the hearing record be reopened.

The claimant was hired as a part-time meat clerk on September 29, 2010 with no guarantee of hours. She continued in that same capacity until she voluntarily quit on November 30, 2012. There has been no determination made regarding her final separation and the case will be remanded for further review.

Additionally, the claimant's hours were reduced for two weeks ending November 3, 2012 but she received vacation pay for those two weeks. However, she subsequently requested time off from November 15, 2012 through November 21, 2012.

The claimant filed a claim for unemployment insurance benefits effective October 21, 2012 and has received benefits after the separation from employment.

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

The first issue to be determined is whether the hearing record should be reopened and for the following reasons, the administrative law judge concludes it should not be reopened.

The Iowa Administrative Procedures Act § 17A.12-3 provides in pertinent part:

If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and make a decision in the absence of the party. If a decision is rendered against a party who failed to appear for the hearing and the presiding officer is timely requested by that party to vacate the decision for good cause, the time for initiating a further appeal is stayed pending a determination by the presiding officer to grant or deny the request. If adequate reasons are provided showing good cause for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If adequate reasons are not provided showing good cause for the party's failure to appear, the presiding officer shall deny the motion to vacate.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

At issue is a request to reopen the record made after the hearing had concluded. The request to reopen the record is denied because the party making the request failed to participate by reading and following the instructions on the hearing notice.

The substantive issue to be determined is whether the claimant is still employed with the employer for the same hours and wages as contemplated in the original contract of hire.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.23(26) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

The claimant was hired as a part-time meat clerk on September 29, 2010 and continued in that same capacity until she voluntarily quit on November 30, 2012. Prior to the final separation date, there had been no separation from her part-time employment and the claimant is disqualified from receiving benefits from this employer. This case will be remanded for further consideration.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

**DECISION:**

The unemployment insurance decision dated November 19, 2012, reference 01, is modified in favor of the appellant. The claimant did not meet the eligibility requirements of the law from October 21, 2012 through December 1, 2012 and benefits are denied for that time frame. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue, as well as an initial determination of the final separation issues.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

sda/pjs