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

KIMBERLY J BECKER
120 - 32ND ST NE APT 4
CEDAR RAPIDS IA 52404

STAFF SOURCE INC
7445 UNIVERSITY AVE
DES MOINES IA 50325-1335

Appeal Number: 04A-UI-03351-RT
OC: 02-15-04 R: 03
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 96.5-3 – Failure to Accept Work
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Staff Source, Inc., filed a timely appeal from an unemployment insurance decision dated March 18, 2004, reference 02, allowing unemployment insurance benefits to the claimant, Kimberly J. Becker, because, although the claimant did refuse to accept an offer of work, she did not have a valid unemployment insurance claim for benefits at the time. After due notice was issued, a telephone hearing was held on April 14, 2004, with the claimant not participating. Although the claimant had called in a telephone number where she purportedly could be reached for the hearing, when the administrative law judge three times tried to call that number at 3:01 p.m., 3:02 p.m. and 3:03 p.m., the line was busy. Kenneth Peterson, Manager, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

The hearing began when the record was opened at 3:04 p.m. and ended when the record was at 3:12 p.m. The claimant had not called during that period of time. The administrative law judge spoke to the claimant at 3:14 p.m. The administrative law judge explained that he had three times tried to call the claimant. The claimant said that she had been on the phone during that time. She also told the staff person with whom she first spoke, that she was informed of the need to call the administrative law judge five minutes after the time for the hearing but she decided to wait a little longer. The claimant waited too long. The administrative law judge informed the claimant that he would treat her telephone call as a request to reopen the record and reschedule the hearing made after the hearing had been held and the record was closed. The administrative law judge believes that 871 IAC 26.14 (7)(b) is applicable here even though that rule applies to a party who responds to a notice of appeal and telephone hearing after the record has been closed. Here the claimant had responded to the notice but was not available at the number that she had provided. In any event, that rule states that for good cause shown, the administrative law judge 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 administrative law judge does not find good cause to do so. The administrative law judge concludes that the claimant has failed to demonstrate good cause for reopening the record. The claimant was, at all material times hereto, aware of the time for the hearing but, nevertheless, was on the telephone for over three minutes immediately at the time that the hearing was to start. Further, the claimant waited to call the administrative law judge until well after the five minutes that she had been instructed to wait by the Appeals Section. The claimant's request to reopen the record and reschedule the hearing is denied.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed off and on by the employer. The claimant's last day of work was January 18, 2004 at Methwick Community, which was a day-to-day job. She worked the day of her assignment and fulfilled that day's assignment. The next offer of an assignment made to the claimant was on January 24, 2004, a day job with Living Center West, paying $14.00 per hour for an eight-hour day. This position or assignment could have lasted more than one day. This assignment, then, would have paid the claimant $560.00 for a week, or a gross weekly wage of $560.00. The claimant's average weekly wage for unemployment insurance benefit purposes is $320.75. The claimant did not accept the offer made on January 24, 2004, but the employer did not know why. No other offers of work were made to the claimant between January 18, 2004, and January 24, 2004 and none thereafter. At the time the offer was made the claimant did not have a valid unemployment insurance claim for unemployment insurance benefits.

The claimant opened her claim for unemployment insurance benefits for a benefit year beginning February 15, 2004. Pursuant to that claim the claimant has received unemployment insurance benefits in the amount of $865.00 for eight weeks from benefit week ending February 21, 2004 to benefit week ending April 10, 2004. During most of those weeks the claimant reported earnings and in some weeks the earnings were sufficient to cancel benefits. The claimant had a claim in a prior benefit year from March 2, 2002 to March 2, 2003.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is disqualified to receive unemployment insurance benefits because she refused to accept suitable work. She is not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

Iowa Code Section 96.5-3-a provides:

> An individual shall be disqualified for benefits:
>
> 3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.
>
> a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:
>
> (1) One hundred percent, if the work is offered during the first five weeks of unemployment.
>
> (2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.
>
> (3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.
>
> (4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.
>
> However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

871 IAC 24.24(8) provides:

> (8) Refusal disqualification jurisdiction. Both the offer of work or the order to apply for work and the claimant's accompanying refusal must occur within the individual's benefit year, as defined in subrule 24.1(21), before the Iowa code subsection 96.5(3) disqualification can be imposed. It is not necessary that the offer, the order, or the refusal occur in a week in which the claimant filed a weekly claim for benefits before the disqualification can be imposed.

The administrative law judge concludes that the employer has the burden to prove that the claimant has refused to accept suitable work. Norland v. IDJS, 412 N.W.2d 904, 910 (Iowa 1987). The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant refused to accept suitable work. The employer's witness, Kenneth Peterson, Manager, credibly testified that on January 24, 2004, the claimant was offered a position with Living Center West paying $14.00 an hour for an eight-hour day. Mr. Peterson further testified that there was a potential that this assignment would last more than one day. The gross weekly wage for that assignment would be $560.00 per week, which is substantially more than even 100 percent of the claimant's average weekly wage of $320.75. Accordingly, the offer of work is suitable concerning pay. Mr. Peterson credibly testified that the claimant's other assignments had all been either at Living Center West or Methwick Community, which the claimant had accepted. Therefore, the administrative law judge concludes that the offer of work made on January 24, 2004 was suitable, inasmuch as it had been work that the claimant had previously accepted and performed. The claimant did not participate in the hearing to provide evidence to the contrary.

However, the administrative law judge is constrained to conclude that the employer's offer of work on January 24, 2004 and the claimant's refusal did not occur within the claimant's benefit year as defined at 871 IAC 24.1(21). Accordingly, a disqualification for a violation of Iowa Code Section 96.5(3), for a refusal to accept suitable work, cannot be imposed. Therefore, the administrative law judge concludes that the employer's offer of work and the claimant's refusal did not occur within the claimant's benefit year or any benefit year and, as a consequence, the claimant cannot be disqualified to receive unemployment insurance benefits as a result of a refusal to accept suitable work. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code Section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
>
> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $865.00 since filing for such benefits effective February 15, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits, insofar as the employer's offer of work to the claimant is concerned, and she is therefore not overpaid such benefits.

DECISION:

The representative's decision of March 18, 2004, reference 02, is affirmed. The claimant, Kimberly J. Becker, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because the offer of suitable work and her refusal did not occur within the claimant's benefit year. As a result of this decision the claimant is not overpaid any unemployment insurance benefits.

dj/b