

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK A BATHAVIC
Claimant

APPEAL NO. 10A-UI-13881-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARTLAND EXPRESS INC OF IOWA
Employer

OC: 08/22/10

Claimant: Appellant (1)

Section 96.4-3 – Able and Available
871 IAC 24.22(2)j – Leave of Absence
Section 17A.12-3 – Non-appearance of Party
871 IAC 26.8(5) – Decision on the Record
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

An appeal was filed from a representative's unemployment insurance decision dated September 29, 2010 (reference 01) that concluded Mark A. Bathavic (claimant/appellant) was not eligible for unemployment insurance benefits in conjunction with his employment with Heartland Express, Inc. of Iowa (employer/respondent) because of a conclusion that he was on a leave of absence and therefore not able and available for work. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing to be held at 1:00 p.m. on November 18, 2010. The claimant/appellant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. The employer responded to the hearing notice and indicated that Lea Peters would participate as the employer's representative. When the administrative law judge contacted the employer for the hearing, Ms. Peters agreed that the administrative law judge should make a determination based upon a review of the available information, including her informal statement. The record was closed at 1:10 p.m. At 1:20 p.m., the claimant called the Appeals Section and requested that the record be reopened. He believed that he had spoken to someone in the Appeals Section to provide his number for the hearing; however, the claimant did not have a control number, which the Appeals Section issues to each party who calls in for a hearing to verify that they have called. An entry of a call from the claimant does not appear in the call-in logbooks maintained by the Appeals Section. Neither did the claimant recall to whom he had spoken, nor had he been given the instructions routinely given to parties who call in as to what they should do if they do not get a call at the designated hearing time. Based on the appellant's failure to participate in the hearing, the available information, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law and decision.

ISSUES:

Should the hearing record have been reopened?

Was the claimant eligible for unemployment insurance benefits by being able and available for work?

Was there period of voluntary unemployment through a leave of absence?

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing on this appeal. 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 appellant failed to provide a telephone number at which he could be reached for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. The first time the claimant directly contacted the Appeals Section was on November 18, 2010, twenty minutes after the scheduled start time for the hearing. The claimant had not read all the information on the hearing notice, and had assumed that the Appeals Section would initiate the telephone contact to him even without a response to the hearing notice.

The administrative law judge has conducted a careful review of the available information to determine whether the unemployment insurance decision should be affirmed.

The claimant began working for the employer in January 2005. His current last day of active work was August 25, 2010. The claimant underwent heart bypass surgery, and therefore would not be released for his regular job duties of driving for at least three months after the surgery. On August 26 the claimant requested FMLA (Family Medical Leave) paperwork from the employer, which was subsequently approved. As of November 18, the claimant has not yet been released by his doctor to return to his regular duties; his next regular medical appointment is set for about December 13, with a visit with a cardiologist scheduled for December 16, which is approximately three months after the surgery.

REASONING AND CONCLUSIONS OF LAW:

The Iowa Administrative Procedures Act at Iowa Code § 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 administrative law judge has carefully reviewed the available information and concludes that the unemployment insurance decision previously entered in this case is correct and should be affirmed. 871 IAC 26.8(5).

For each week for which a claimant seeks unemployment insurance benefits, the claimant must be able and available for work. Iowa Code § 96.4-3. In general, an employee who is only temporarily separated from his employment due to being on a leave of absence is not "able and available" for work during the period of the leave, as it is treated as a period of voluntary unemployment. 871 IAC 24.22(2)j; 871 IAC 24.23(10)

The claimant's current unemployment is due to his being on a leave of absence due to a non-work-related medical issue. As the condition causing his temporary unemployment was not related to the work environment, in order to be sufficiently well for the claimant to regain his eligibility status as being able and available for work, he must have a complete recovery to full work duties without restriction. Hedges v. Iowa Department of Job Service, 368 N.W.2d 862, 867 (Iowa App. 1985); Iowa Code § 96.5-1-d. Unemployment insurance benefits are not intended to substitute for health or disability benefits. White v. Employment Appeal Board, 487 N.W.2d 342 (Iowa 1992). For the period the claimant is currently seeking unemployment insurance benefits, he was under sufficient work restrictions as would preclude him from returning to his regular work duties. He is therefore not eligible to receive unemployment insurance benefits for this period.

DECISION:

The representative's unemployment insurance decision dated September 29, 2010 (reference 01) is affirmed. The claimant was not able and available for work effective August 22, 2010, and the period of temporary separation was a period of voluntary unemployment not attributable to the employer. The claimant is not qualified to receive unemployment insurance benefits for the period beginning August 22, 2010 until he is fully released and seeks to return to work, unless there is an intervening separation from employment, which would require further review to determine whether the separation was disqualifying.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw