

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFFREY T SMITH
Claimant

APPEAL NO: 07A-UI-05704-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BFS RETAIL & COMMERCIAL OPS LLC
Employer

**OC: 06/11/06 R: 02
Claimant: Respondent (1)**

§ 17A.12-3 – Non-appearance of Party
871 IAC 25.8(5) – Decision on the Record
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

An appeal was filed from an unemployment insurance decision dated May 21, 2007, reference 03, that concluded Jeffrey T. Smith (claimant/respondent) was eligible for unemployment insurance benefits after a separation from employment from BFS Retail & Commercial Ops, L.L.C. (employer/appellant). Notices of hearing were sent to both parties' last-known addresses of record for a telephone hearing to be held at 11:00 a.m. on June 25, 2007. The employer/appellant failed to respond to the hearing notice and provide a telephone number at which a witness or representative could be reached for the hearing and did not participate in the hearing. The claimant responded to the hearing notice and indicated that he would participate in the hearing. When the administrative law judge contacted the claimant for the hearing, he agreed that the administrative law judge should make a determination based upon a review of the information in the administrative file plus his informal statement. The administrative law judge considered the record closed at 11:10 a.m. At 11:11 a.m., the employer called the Appeals Section and requested that the record be reopened. Based on the appellant's failure to participate in the hearing, the administrative file, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law and decision.

ISSUE:

Should the representative's decision be affirmed on a basis of a review of the available information?

FINDINGS OF FACT:

The employer's representative received the hearing notice prior to the June 25, 2007 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 instructions further inform that if they do not respond to the hearing notice so as to participate in the hearing, the administrative law judge may proceed and make a decision on other available information.

When the employer's witness contacted the Appeals Section at 11:11 a.m. on June 25, he reported that he had provided his telephone number to his third party employer representative (TALX Employer Services) and understood that the representative would relay that information to the Appeals Section. However, the employer's witness 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, nor was he able to produce a control number even after contacting the third party representative. An entry of a call on behalf of the employer does not appear in the call-in logbooks maintained by the Appeals Section. The first time anyone directly contacted the Appeals Section was on behalf of the employer was after the scheduled start time for the hearing and after the administrative law judge considered the record closed.

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

REASONING AND CONCLUSIONS OF LAW:

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 after the record was closed. The employer's decision to utilize a third party intermediary in the unemployment insurance process is a business decision for which the employer, not the claimant, must bear the consequences; an error or omission made by the third party on behalf of the employer cannot operate to the disadvantage the claimant, who had properly complied with the instructions on the hearing notice. The employer's request to reopen the record is denied because the employer's representative failed to comply with the instructions on the hearing notice.

The administrative law judge has carefully reviewed evidence in the record and concludes that the unemployment insurance decision previously entered in this case is correct and should be affirmed. 871 IAC 25.8(5).

DECISION:

The unemployment insurance decision dated May 21, 2007 (reference 03) is affirmed. The decision holding the claimant qualified for benefits remains in effect.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs