

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL D O'HARA
Claimant

APPEAL NO: 15A-UI-03739-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CONTINENTAL AIRLINES INC
d/b/a UNITED AIRLINES
Employer

OC: 10/05/14
Claimant: Appellant (1)

Section 96.3-5 – Benefit Calculation Related to Business Closure
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

Michael D. O'Hara (claimant) appealed a representative's March 17, 2015 decision (reference 01) that denied his request to have his unemployment insurance benefit eligibility recalculated as due to a business closure. Hearing notices were mailed to the parties' last-known addresses of record for a telephone hearing to be held at 10:30 a.m. on April 29, 2015. The claimant/appellant received the hearing notice and responded by calling the Appeals Bureau on March 31, 2015; he indicated that he would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant/appellant was not available; therefore, the claimant/appellant did not participate in the hearing. The administrative law judge considered the record closed at 10:50 am. At 11:31 a.m., the claimant called the Appeals Bureau and requested that the record be reopened. Based on a review of the available information and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Is the claimant eligible for benefits calculated on the basis of a business closing?

FINDINGS OF FACT:

The claimant/appellant received the hearing notice prior to the April 29, 2015 hearing. The instructions inform the parties that they are to be available at the specified time for the hearing, and that if they cannot be reached at the time of the hearing at the number they provided, the judge may decide the case on the basis of other available evidence. The claimant/appellant was also instructed when he contacted the Appeals Bureau on March 31 that if he did not hear from the judge within five minutes after the scheduled time for the hearing that he should call the Appeals Bureau back to inquire about the delay.

The record was left open, as a courtesy to the appellant, in this case for 20 minutes after the hearing start time to give the claimant/appellant a reasonable opportunity to participate. This

reasonable amount of time is appropriate because if a hearing were conducted with the non-appealing party alone it would have concluded in 20 minutes or less. The 20 minute wait time is a reasonable period to hold the record open as insufficient time would remain to conduct a quality due process hearing in the time allotted by the Appeals Bureau. Each two-party hearing is allowed 60 minutes and a one-party hearing allowed 30 minutes.

The reason the claimant/appellant was not available when the administrative law judge called at the scheduled time for the hearing was that he had lost track of time and was occupied for a period of time with feeding his two-year-old and putting him down for a nap, and then became occupied with other duties until about 11:30 a.m. when he noticed that he had missed the call.

The claimant started working for the employer on or about October 5, 1988. His last day of work was on or about September 29, 2014. He was laid off as of that date because the employer outsourced approximately 50 jobs, consisting of airline check-in, baggage handling, and customer service positions, including the claimant's job, from its Des Moines facility to another company, which continued to provide those functions in the Des Moines facility. After the outsourcing the employer continued to employ a smaller number of employees at the Des Moines facility.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied.

The Iowa Administrative Procedure 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.

Agency rule at 871 IAC 26.14(7) provides:

If a party has not responded to a notice of telephone hearing by providing the appeals bureau with the names and telephone numbers of the persons who are participating in the hearing by the scheduled starting time of the hearing or is not available at the telephone number provided, the presiding officer may proceed with the hearing. If the appealing party fails to provide a telephone number or is unavailable for the hearing, the presiding officer may decide the appealing party is in default and dismiss the appeal as provided in Iowa Code § 17A.12(3). The record may be reopened if the absent party makes a request to reopen the hearing under subrule 26.8(3) and shows good cause for reopening 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 ex parte 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.

After a hearing record has been closed the administrative law judge may not take evidence from a non-participating party but can only reopen the record and issue a new notice of hearing if the non-participating party has demonstrated good cause for the party's failure to participate. Rule 871 IAC 26.14(7)b. The record shall not be reopened if the administrative law judge does not find good cause for the party's late contact. *Id.* Failing to read or follow the instructions on the notice of hearing to be available at the scheduled time for the hearing is not good cause for reopening the record. Rule 871 IAC 26.14(7)c.

The claimant was not available for the hearing until over an hour after the scheduled time for the hearing, well after the record had been closed. Although the claimant intended to participate in the hearing, the claimant failed to be available as required. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

Normally, the maximum total amount of benefits payable to an eligible individual during a benefit year is the lesser of twenty-six times the individual's weekly benefit amount or the total of the claimant's base period wage credits. However, under usual circumstances, if the claimant is laid off due to the claimant's employer going out of business at the factory, establishment, or other premises at which the claimant was last employed, the maximum benefits payable are extended to the lesser of thirty-nine times the claimant weekly benefit amount or the total of the claimant's wage credits. Iowa Code § 96.3-5.

Rule 871 IAC 24.29(2) provides:

- (2) Going out of business means any factory, establishment, or other premises of an employer which closes its door and ceases to function as a business; however, an employer is not considered to have gone out of business at the factory, establishment, or other premises in any case in which the employer sells or otherwise transfers the business to another employer, and the successor employer continues to operate the business.

The claimant was laid off for lack of work due to his job being outsourced to an outside provider. The work was effectively transferred to another business which continued to provide the functions of the business. Further, the employer itself continues to operate at the Des Moines location, albeit without the positions which were effectively eliminated through outsourcing.

Therefore, while the claimant is entitled to regular separation benefits, he is not entitled to a recalculation of benefits as due to a business closure.

DECISION:

The representative's March 17, 2015 (reference 01) decision is affirmed. The claimant was laid off, but not due to a business closure. Recalculation of benefits is denied.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css