

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

VERONICA K STOREY
Claimant

APPEAL 17A-UI-06985-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMERY PLACE LLC
Employer

**OC: 06/11/17
Claimant: Respondent (6)**

Iowa Code §96.6(2) – Untimely Protest
Iowa Code § 17A.12(3) – Default Decision
Iowa Admin. Code r. 871-26.14(7) – Dismissal of Appeal on Default

STATEMENT OF THE CASE:

The employer/appellant, Emery Place LLC, filed an appeal from the unemployment insurance decision issued on July 6, 2017, reference 03. This decision concluded that the employer's protest was untimely. On July 14, 2017, a Notice of Hearing was mailed to each of the parties' last known addresses of record for a telephone hearing scheduled on July 27, 2017 at 11:00 a.m. A review of the Appeals Bureau's conference call system indicates that the appellant employer registered to participate in the hearing, but did not answer the call to participate in the hearing. The claimant did not register a telephone number for the scheduled hearing. Because the appellant employer did not answer the call and was not available to participate in the hearing, no hearing was held.

ISSUE:

Should the appeal be dismissed based on the appellant's failure to appear and participate?

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing for this appeal. The appellant employer registered a name and telephone number to participate in the scheduled hearing. The employer representative did not answer the administrative law judge's call at the time set for this hearing. The judge made three unsuccessful attempts to call the employer representative at the telephone number provided. Because the appellant was not available to participate, no hearing was held. Official notice of the Clear2there hearing screen and the hearing recording is taken to establish that the employer appellant was not available to participate in the hearing.

The hearing notice instruction specifically advises parties:

Date: THU JUL 27, 2017
Iowa Time: 11:00 AM

You must register for the hearing immediately!

You must register your phone number and the name(s) and phone number(s) of any witness(es) with the appeal bureau. If you do not register, the judge will not be able to call you or your witnesses for the hearing.

The back page of the hearing notice provides further instruction and warning:

Failure to Participate

If you do not participate in the hearing, the judge may dismiss the appeal or issue a decision without considering your evidence or witnesses.

As a *courtesy* to the appellant the administrative law judge called the number provided three times, leaving a detailed voice mail message each time. He made the third and final call 38 minutes after the hearing was scheduled to begin. Under these circumstances, holding the appellant employer in default for failure to participate is reasonable. The unemployment insurance decision had concluded that the employer's protest was untimely.

REASONING AND CONCLUSIONS OF LAW:

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 rules at Iowa Admin. Code r. 26.14(7) provide:

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.
- c. **Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.** (Emphasis added.)

The Iowa Supreme Court stated that a default should not be set aside for ordinary negligence or want of ordinary care. Defaults should not be set aside where the movant ignores plain instruction with ample opportunity to comply. See *Houlihan v. Emp't Appeal Bd.*, 545 N.W.2d

863 (Iowa 1996). Here the clear directive is to read the hearing notice and register a telephone number where the party can be reached for the hearing. The party must be available at the number provided at the date and time of the hearing. If the party misses or the call, he or she may call the telephone numbers on the hearing notice to receive further instructions.

Due process requires notice and an opportunity to be heard, both of which were provided to each party. *The rule does not provide exceptions for good intentions and/or a party contacting the Appeals Bureau within a 'reasonable' or certain amount of time after the hearing is scheduled.* It is assumed an appellant intends to participate in the hearing simply by the fact that an appeal is filed, but the appellant's responsibility does not end there. Each party is required to follow the prominent specific written instructions printed on the hearing notice.

The employer filed the appeal and is held solely responsible for going forward with the case in a prompt and deliberate manner. The rule holds an appellant in default if not present *at the start* of hearing. As a courtesy, the appellant was granted an additional 40-minute grace period not required by statute or rule. Here, notwithstanding notice, opportunity and additional time, the appellant failed to pursue its appeal at the appointed date and time without providing a good-cause reason for the delay or failure to do so. Accordingly the appellant is in default and the appeal shall be dismissed. Iowa Code § 17A.12(3) and Iowa Admin. Code r. 26.14(7). The unemployment insurance decision remains in force and effect.

If the appellant does not want to pursue this appeal, it need not take any further action. If the appellant/employer wishes to do so, it must comply with the following deadlines. The appellant may appeal the decision directly to the Employment Appeal Board at the address listed in the caption appeal rights information on the front page of this decision within 15 days after the mailing date of this decision. Or, the appellant employer may make a written request to the administrative law judge that the hearing be reopened within 15 days after the mailing date of this decision. The written request must explain the emergency or other good cause that prevented the appellant from participating in the hearing at its scheduled time.

DECISION:

The unemployment insurance decision issued on July 6, 2017, reference 03, allowing benefits remains in effect as the appellant employer is in default. The appeal is dismissed.

Terence P. Nice
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

Decision Dated and Mailed

tn/ec/rvs