

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FRANCISCO J ARCE DIAZ

Claimant

APPEAL NO. 09A-UI-01318-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CAMBRIDGE TEMPOSITIONS INC

Employer

OC: 11/23/08

Claimant: Appellant (5)

Iowa Code section 96.4(3) - Able & Available
Iowa Code section 96.5-3(a) - Refusal of Suitable Work
Iowa Code section 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

Francisco Arce Diaz filed an appeal from the January 9, 2009, reference 01, decision that denied benefits and that concluded he had refused an offer of suitable work on December 17, 2008. After due notice was issued, a hearing was held by telephone conference call on March 30, 2009. Claimant participated. Ana Martinez, represented the employer. Spanish-English interpreter Ike Rocha assisted with the hearing. Department Exhibits D-1 and D-2 were received into evidence.

ISSUES:

Whether there is good cause to deem the Mr. Arce Diaz's late appeal timely. There is.

Whether Mr. Arce Diaz refused to accept an offer of suitable work.

Whether Mr. Arce Diaz had been able and available for work since December 17, 2008.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On January 9, 2009, Workforce Development mailed a copy of the reference 01, decision to Francisco Arce Diaz at 307 N. Corn Street, Apt. 2, West Liberty, IA 52776-1449. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by January 19, 2009. Mr. Arce Diaz is a Spanish-speaking person and is from Puerto Rico. Mr. Arce Diaz had left for Puerto Rico on January 7, 2009 in response to learning that his father was seriously ill. Before Mr. Arce Diaz left for Puerto Rico, he provided a Spanish speaking Workforce Development representative the address in Puerto Rico to which Workforce Development should direct his mail. Mr. Arce Diaz did not receive the reference 01, decision before the January 19, 2009, deadline for appeal. On January 27, Mr. Arce Diaz made contact with the same Spanish speaking Workforce Development representative, obtained an appeal form, and faxed an appeal back to the Workforce Development. The Workforce Development

representative translated the appeal into English and forwarded it to the Appeals Section, which received the appeal on January 29, 2009.

Mr. Arce Diaz established his employment relationship with Cambridge Tempositions on September 19, 2008. The employer is a temporary employment agency. Mr. Arce Diaz performed work in four temporary employment assignments. Mr. Arce Diaz completed his most recent assignment on December 10, 2008. Mr. Arce Diaz's work assignments had been located in Lone Tree, Columbus Junction, Iowa City, and Coralville. Mr. Arce Diaz resided in West Liberty during all relevant times before his January 7, 2009 departure for Puerto Rico. Mr. Arce Diaz commuted to the assignments. The commuting distances ranged from 16 miles to 25 miles one way.

On December 16, 2008, Account Manager Will Ortega contacted Mr. Arce Diaz for the purpose of offering him a new work assignment. The work assignment was to be a full-time janitorial assignment in Coralville. The assignment was to pay \$9.00 per hour. The work hours were to be Monday through Friday, 8:00 a.m. to 4:30 p.m. The assignment was to start on December 17. Mr. Arce Diaz told Mr. Ortega that he would accept the assignment. However, on December 17, Mr. Arce Diaz failed to appear for the assignment or notify anything that he would not be there. That afternoon, the client business notified Cambridge Tempositions that Mr. Arce Diaz had not appeared for the assignment. Mr. Ortega contacted Mr. Arce Diaz, who advised that his car had broken down and he lacked any other means of transportation to the assignment. Mr. Arce Diaz never did get his car fixed and never did return to the assignment. Mr. Arce Diaz still lacked transportation when he left for Puerto Rico on January 7, 2009. Mr. Arce Diaz ended up selling the broken car to pay for his ticket to Puerto Rico.

Mr. Arce Diaz's next and most recent contact with Cambridge Tempositions was on January 7, when Mr. Arce Diaz notified Cambridge Tempositions that he had an emergency in Puerto Rico, that his father was seriously ill, and that he did not know if he would get to see his father alive. Soon after arriving in Puerto Rico, Mr. Arce Diaz learned that his father had passed away. Mr. Arce Diaz plans to stay in Puerto Rico to sell his father's belongings. Beyond that, Mr. Arce Diaz does not have any set plans. Mr. Arce Diaz asserts that he has looked for work in Puerto Rico and has kept a log of contacts. However, Mr. Arce Diaz did not have his log of job contacts at the time of the hearing.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant

to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). See also Pepsi-Cola Bottling Company of Cedar Rapids v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

In this case, the appeal was filed on January 27, 2009, the day Mr. Arce Diaz delivered the completed appeal to the Workforce Development Center staff.

The evidence in the record establishes that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. Beardslee v. IDJS, 276 N.W.2d 373, 377 (Iowa 1979); see also In re Appeal of Elliott, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. Hendren v. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC, 212 N.W.2d 471, 472 (Iowa 1973).

The administrative law judge was unable to make complete sense of Mr. Arce Diaz's testimony regarding the steps he took to notify Iowa Workforce Development of his Puerto Rico address and when he took those steps. Likewise, the administrative law judge was unable to make complete sense of Mr. Arce Diaz's testimony regarding when and how he learned of the decision denying benefits. The evidence, as convoluted as it was, indicates that a Workforce Development representative may have contributed to the confusion and may have contributed to the delay in the filing of the appeal. For this reason, the administrative law judge concludes

there is good cause to deem the appeal timely and that the administrative law judge has jurisdiction to rule on the merits on the appeal. See 871 IAC 24.35(2).

The administrative law judge will now turn to the questions of whether there was a refusal of suitable work and whether Mr. Arce Diaz has been able to work and available for work since December 17, 2008.

A person who refuses an offer of suitable work without good cause is disqualified for benefits until he has earned ten times his weekly benefit amount provided he is otherwise eligible. See Iowa Code section 96.5(3)(a).

Workforce Development rule 871 IAC 24.24(4) provides as follows:

Work refused when the claimant fails to meet the benefit eligibility conditions of Iowa Code section 96.4(3). Before a disqualification for failure to accept work may be imposed, an individual must first satisfy the benefit eligibility conditions of being able to work and available for work and not unemployed for failing to bump a fellow employee with less seniority. If the facts indicate that the claimant was or is not available for work, and this resulted in the failure to accept work or apply for work, such claimant shall not be disqualified for refusal since the claimant is not available for work. In such a case it is the availability of the claimant that is to be tested. Lack of transportation, illness or health conditions, illness in family, and child care problems are generally considered to be good cause for refusing work or refusing to apply for work. However, the claimant's availability would be the issue to be determined in these types of cases.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual

offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

The evidence indicates that the offered assignment was suitable work and was within the geographically area that Mr. Arce Diaz generally worked. The evidence in the record indicates that Mr. Arce Diaz accepted the assignment with the knowledge that he lacked transportation to the assignment. The lack of transportation would have provided good cause for refusing the assignment. See 871 IAC 24.24(4), above. Thus, there was no disqualifying refusal of work. However, Mr. Arce Diaz's availability must be determined.

If a person loses his means of transportation to the area of the person's usual employment, the person will be deemed not to have met the availability requirements of the law. See 871 IAC 24.23(4).

The evidence in the record establishes that Mr. Arce Diaz was not available for work from December 17, 2008, the first day of the offered assignment, through January 7, 2009, when he left for Puerto Rico. The lack of availability was due to a lack of transportation to the usual work area. Mr. Arce Diaz was not eligible for benefits for this period.

The evidence in the record establishes that Mr. Arce Diaz has not met the work availability requirements of Iowa Code section 96.4(3) since he traveled to Puerto Rico. Mr. Arce Diaz did present sufficient evidence to meet his burden of establishing that he was available for work and was actively and earnestly seeking employment. The evidence indicates that Mr. Arce Diaz traveled out of Iowa on personal business on January 7, 2009. The evidence indicates that Mr. Arce Diaz notified Cambridge Associates on January 7 essentially that he was commencing a leave of absence to attend to a serious family matter. The evidence indicates that Mr. Arce Diaz's primary purpose since he has been in Puerto Rico has been to resolve his father's estate. The weight of the evidence indicates that Mr. Arce Diaz has not been engaged in an active and earnest search for work since he traveled to Puerto Rico.

Based on the evidence in the record an application of the appropriate law, the administrative law judge concludes that Mr. Arce Diaz has not been available for work since December 17, 2008 and has been ineligible for benefits since that date.

DECISION:

The appeal will be deemed timely. The Agency representative's January 9, 2009, reference 0, decision is modified as follows. The claimant did not refuse a suitable offer of employment. Since December 17, 2008, the claimant has not been available for work. Benefits are denied

effective December 17, 2008. Mr. Arce Diaz will continue to be ineligible for benefits until he provides sufficient evidence to demonstrate his availability for work.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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