

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JEFFREY M O'HARA**  
Claimant

**APPEAL NO. 11A-UI-03588-DWT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ROQUETTE AMERICA INC**  
Employer

**OC: 09/26/10**  
**Claimant: Appellant (4)**

Iowa Code § 96.5(7) – Vacation Pay  
Iowa Code § 96.6(2) – Timeliness of Appeal

**PROCEDURAL STATEMENT OF THE CASE:**

The claimant appealed a representative's March 3, 2011 determination (reference 02) that held him ineligible to receive benefits for the weeks ending November 20 through December 4, 2010, because he received vacation pay that should be attributed to these weeks. The claimant participated in the hearing. Hillary Carter, a human resource staffing specialist, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the claimant's vacation pay is attributed to only one week.

**ISSUES:**

Did the claimant file a timely appeal or establish a legal excuse for filing a late appeal?

Did the claimant receive vacation pay, and if he did to what week or weeks should it be attributed?

**FINDINGS OF FACT:**

As the result of a labor dispute, the claimant became unemployed when he was locked out of work on September 28, 2010. He established a claim for benefits during the week of September 26, 2010. In accordance with the union contract, the claimant receives holiday pay even when he is locked out. In the contract, Veterans Day and Thanksgiving Day are noted as holidays.

On November 19, 2010, the employer issued the claimant a check for a gross payment of \$166.56. This check paid the claimant for eight hours of holiday pay for Veterans Day. The employer also issued the claimant a check on November 26 for 120 hours of vacation pay. The employer paid the claimant a gross payment of \$2,498.40 on November 26. The claimant did not know he received this vacation payment until the week of December 25. The check was sent to the union and the claimant did not know he had actually received any money for vacation pay until this week. The claimant does not have his checks directly deposited into his bank account. The claimant reported the vacation payment during the week ending December 25. For the week ending November 20, the claimant reported \$667 in wages

because he cashed in 3 day by days. The employer issued a check on December 3 to pay him eight hours of holiday pay for Thanksgiving. The gross payment was \$166.56. When the claimant filed his weekly claim, he reported the December 3 check payment during the week ending December 4.

Since there was a labor dispute, the claimant had to submit paperwork by November 15 to the employer to let the employer know if he wanted to sell back any of his accumulated vacation hours and when he wanted to receive this payment. If the claimant did not use his vacation hours by the end of the year, he would lose them. The claimant submitted the necessary paperwork by November 15 for the vacation payment he reported during the week ending December 25, 2010.

On March 3, a representative's determination was mailed to the claimant and employer indicating the claimant was not eligible to receive benefits from November 14 through December 4, 2010, because he received vacation pay that should be attributed to these weeks. The claimant received the representative's determination on by March 11, 2011. He went to his local Workforce office on March 11. He understood the representative was going to take care of this matter and file an appeal on his behalf because he knew the deadline to appeal was Monday, March 13. More than a week passed before the claimant received information that he had to personally write an appeal for the Appeals Section. As soon as the claimant received this information, he filed his written appeal on March 22, 2011.

#### **REASONING AND CONCLUSIONS OF LAW:**

Unless the claimant or other interested party, after notification or within ten calendar days after a representative's determination is mailed to the parties' last-known address, files an appeal from the determination; it is final. Benefits shall then be paid or denied in accordance with the representative's determination. Iowa Code § 96.6(2). Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983).

The Iowa Supreme Court has ruled that appeals from unemployment insurance determinations must be filed within the time limit set by statute and the administrative law judge has no authority to review a determination if a timely appeal is not filed. *Franklin v. IDJS*, 277 N.W.2d 877, 881 (Iowa 1979); *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979). In this case, the claimant's appeal that he personally completed was filed after the March 13 deadline for appealing expired.

The next question is whether the claimant had a reasonable opportunity to file 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 evidence establishes the claimant had a reasonable opportunity to file a timely appeal. He understood he had filed an appeal on March 11 when he went to his local Workforce office and understood the representative filed an appeal on his behalf.

Later, the claimant learned he was required to make a written appeal. He did this as soon as he received this information. The claimant's failure to file a timely appeal was due to an Agency error or misinformation, which under 871 IAC 24.35(2) excuses the delay in filing an appeal. The claimant established a legal excuse for filing a late appeal. The Appeals Section has jurisdiction to make a decision on the merits of the appeal.

The easy question to address in this case is when holiday pay should be reported or attributed to. 871 IAC 24.13(2)a provides that holiday pay is considered a wage and is deductible from a

claimant's weekly benefit amount just as wages are in 871 IAC 24.18. Since the union contract specifically states employees receive holiday pay for Veterans Day and Thanksgiving Day and various other days, the claimant knew or should have known he would receive this holiday payment. Therefore, he is required to report holiday pay during the week in which the holiday occurred, not when paid. Holiday pay is treated no differently than wages. Wages are to be reported during the week earned, not paid. If holiday pay is not paid by the employer, the claimant may request an underpayment adjustment from the department. 871 IAC 24.13(2).

The harder question to answer is what week or weeks should a vacation payment be attributed when the employer has not timely notified the Department when there is a labor dispute that the employer may be obligated to make a vacation payment. The vacation payment law is confusing and in this case does not address the situation presented. To illustrate how confusing the vacation pay law and regulations are, the employer submits weekly reports as to what weeks the employer wanted a vacation payment of more than 40 hours attributed to. The employer, however, knew as of November 15 how many hours of vacation the claimant had cashed in and would be paid. The claimant, however, understood he was to report money paid by the employer during the week in which he actually received the payment. As indicated already, the law does not address this specific situation. The law presumes the employer knows what vacation pay would be paid or owed at the time the employer receives the notice of claim. Iowa Code § 96.5(7) and 871 IAC 24.16(1).

The employer receives a notice of claim shortly after the claimant establishes a claim for benefits. When an employer notifies the department within ten days of receiving a notice of claim that an amount of vacation pay, either paid or owed, is to be applied to a specific period, a sum equal to the wage of the individual for a normal workday shall be applied to the first and each subsequent workday of the designated vacation until the amount of the vacation pay is exhausted. 871 IAC 16(1). If the employer makes the original designation of the vacation period in a timely manner, the employer may extend the vacation period by designating the period of extension before the extension period begins. 871 IAC 24.16(2).

The law that is most on point for this case is Iowa Code § 96.5(7)d. This statute states that if the employer has not timely designated the vacation period after receiving the notice of claim, the payment made by the employer to the claimant or an obligation to make a payment shall not be deemed wages for any period in excess of one week and such payment shall not be deducted from unemployment benefits for more than one week.

So, in plain English, what does this mean? When an employer does not timely indicate on a notice of claim potential vacation pay obligations, the fact the employer pays the claimant more than 40 hours of vacation pay can only be attributed to one week. Since the employer has no control on when a claimant receives a vacation pay when the payment is not directly deposited into a bank account, the week the claimant requested the vacation hours should be paid is the the week the vacation pay should be attributed. Just as wages are to be reported when they are earned, vacation pay should be reported for the time period the employer becomes obligated to pay out the vacation pay.

The administrative law judge recognizes that the labor dispute put the employer in a difficult situation, in this case as a result of the lockout, but the employer knew as of November 15 that the claimant cashed in some vacation hours. In completing the notice of claim, the employer could have timely reported vacation pay the employer could be obligated to pay if the claimant previously requested vacation for a certain time or would make a request to cash in vacation hours.

The claimant should have reported his Veterans Day holiday pay during the week ending November 13 and his Thanksgiving Day holiday pay during the week ending November 27, 2010. The vacation payment the claimant received are reported in one week. While this payment should have been reported during the week ending November 27, the claimant has already reported them during the week ending December 25. It is senseless to change the week in which the vacation pay is attributed since the vacation hours have been reported for one week. The two weeks in question, November 27 and December 25, basically cancel out one another. Iowa Code § 96.5(7)d.

**DECISION:**

The representative's March 3, 2011 (reference 02) is modified in the claimant's favor. The claimant filed a late appeal, but established a legal excuse for filing a late appeal. Therefore, the Appeals Section has jurisdiction to address the merits of the claimant's appeal. The claimant should have reported the Veterans Day holiday pay during the week ending November 13 and his Thanksgiving holiday pay during the week ending November 27, 2010. The vacation payment issued on November 26 must all be attributed to one week. Even though the claimant did not report it during the correct week, he reported it all in one week. Since he reported in one week, it is not necessary to change the week the vacation pay is applied in this case.

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Debra L. Wise  
Administrative Law Judge

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Decision Dated and Mailed

dlw/kjw