

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEREMIAH B SCHWAKE
Claimant

APPEAL NO: 09A-UI-18310-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

USA STAFFING INC
Employer

OC: 07/27/08
Claimant: Appellant (2)

Section 96.19-38-b – Partially Unemployed
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant appealed a representative's October 8, 2009 decision (reference 06) that concluded he was not eligible to receive benefits for the week ending July 25, 2009, because he was not partially unemployed. A telephone hearing was held on January 15, 2010. The claimant participated in the hearing. The employer did not respond to the hearing notice or participate in the hearing.

After the January 15 hearing had been closed, the administrative law judge recognized that the claimant had not appealed the October 8 decision until December 7, 2009. A supplemental hearing was held on February 6, 2010 to address the timeliness of the claimant's appeal. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

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

Is the claimant eligible to receive partial benefits for the week ending July 25, 2009?

FINDINGS OF FACT:

The employer started assigning the claimant to jobs in April 2009. The employer assigned the claimant to work as a flagger.

As a result of weather or other factors, the claimant was only assigned to work two hours the week ending July 25, 2009. He had established a claim for benefits during the week of July 27, 2008. He reopened his claim for benefits during the week of July 19, 2009, because his hours had been substantially reduced. The claimant only filed a claim for the week ending July 25, 2009, when he only had two hours of work. The claimant worked full time work the next week.

The claimant established a new benefit year during the week of July 26, 2009, or the following week. Department representatives issued two decisions on October 8, 2009. One decision,

reference 06, held the claimant was not eligible to receive benefits as of July 19, 2009, because he was not considered unemployed. The other decision, reference 05, held he was eligible to receive benefits because he had completed a job assignment. The claimant does not know if he received either one or both of these decisions. If the claimant received the decision, reference 06, he was confused because the other decision held him eligible to receive benefits. The claimant did not realize or understand there was a problem with his benefits for the week ending July 25, 2009, until he received a December 1, 2009 decision that held he had been overpaid \$86.00 in benefits this week. The claimant filed an appeal on December 7, 2009.

REASONING AND CONCLUSIONS OF LAW:

Unless the claimant or other interested party, after notification or within ten calendar days after a representative's decision is mailed to the parties' last-known address, files an appeal from the decision, the decision is final. Benefits shall then be paid or denied in accordance with the representative's decision. Iowa Code section 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 decisions must be filed within the time limit set by statute and the administrative law judge has no authority to review a decision 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 was filed after the October 19, 2009 deadline for appealing expired. Since October 18 was a Sunday, the deadline to appeal was extended to Monday, October 19, 2009.

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 does not establish that the claimant had a reasonable opportunity to file a timely appeal because he did not know if or when he received the October 8 decision.

The claimant's failure to file a timely appeal appears to be the result of confusion created by sending two decisions the same day. The claimant failed to file a timely appeal either because he did not receive the decision for reference 06 or receiving two decisions at one time created confusion since one of the decisions held him eligible to receive benefits. As a result of the possible misinformation regarding the two decisions, the claimant established a legal excuse for filing a late appeal. 871 IAC 24.35(2). The Appeals Section has jurisdiction to make a decision on the merits of the appeal.

A claimant is deemed partially unemployed in any week in which, while employed at his then regular job, the claimant works less than the regular full-time week and earns less than his weekly benefit amount. Iowa Code section 96.19-38-b. During the week ending July 25, 2009, the claimant was scheduled to work two hours, not 40 hours as he had been working. The claimant established he was partially unemployed the week ending July 25, 2009. Therefore, he is eligible to receive benefits for this week.

DECISION:

The representative's October 8, 2009 decision (reference 06) is reversed. The claimant did not file a timely appeal, but he established a legal excuse for filing a late appeal. The Appeals Section has jurisdiction to address the merits of his appeal. The claimant established he was partially unemployed the week ending July 25, 2009. Therefore, he is eligible to receive partial benefits for this week.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs