

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

DIANNE M JENSEN
1419 – 4TH AVE N
FORT DODGE IA 50501

VERASUN ENERGY CORP
100 – 22ND AVE STE 103
BROOKINGS SD 57006 2425

Appeal Number: 05A-UI-12207-DWT
OC: 09/25/05 R: 01
Claimant: Appellant (4)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-7 – Vacation Pay
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Dianne M. Jensen (claimant) appealed a representative's October 18, 2005 decision (reference 02) that concluded she was not eligible to receive benefits until October 9, 2005 because she received or was entitled to receive vacation pay that was attributed to the weeks ending October 1 and 8, 2005. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 19, 2005. The claimant participated in the hearing. Ginger Scalet, the director of human resources, appeared on behalf of Verasun Energy Corporation (employer). Based on the evidence, the arguments of the parties, 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 does the claimant have a legal excuse for filing a late appeal?

Did the claimant receive vacation pay that should be attributed to the weeks ending October 1 and 8, 2005?

FINDINGS OF FACT:

The claimant's last day of work for the employer was September 23, 2005. She established a claim for unemployment insurance benefits during the week of September 25, 2005. When the claimant began working, the employer informed her about vacation pay she would accumulate. When the claimant's employment ended, she did not think she would receive any vacation pay because she was a temporary employee. The employer, however, paid the claimant for 80.78 hours of vacation pay or \$949.17.

The claimant filed claims for the weeks ending October 1, 8 and 15, 2005. The claimant received \$292.00 in benefits for the week ending October 1. The claimant did not receive any benefits for the week ending October 8, 2005. For the week ending October 15, the claimant reported she had received vacation pay of \$949.00. Since the claimant's vacation pay exceeded her weekly benefit amount, the claimant did not receive any benefits for the week ending October 15, 2005.

On October 18, 2005, a representative's decision was mailed to the claimant and employer indicating the claimant was not eligible to receive benefits for the weeks ending October 1 and 8, 2005 because vacation pay was attributed to these weeks.

The claimant never received the representative's October 18 decision. On December 1, 2005, the claimant received a bill stating she owed the Department \$292.00 in benefits she received for the week ending October 1, 2005. The claimant contacted her local Workforce office to find out why she received the bill. The claimant then learned about the October 18 decision and that she needed to appeal the decision. The claimant appealed the October 18 decision on December 5, 2005.

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 §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 28, 2005 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 did not have a reasonable opportunity to file a timely appeal because she did not receive the October 18, 2005 decision.

The claimant's failure to file a timely appeal was due to a delay or other action of the United States Postal Service, which under 871 IAC 24.35(2) excuses the delay in filing an appeal. Since 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.

When an employer makes a payment for vacation pay, this payment constitutes wages. When the wages equal or exceed a claimant's maximum weekly benefit amount, the claimant is not eligible to receive benefits for that week. Iowa Code §96.5-7. If the employer fails to properly notify the Department that an amount of vacation paid is to be applied to a specific vacation period, the entire amount of the vacation pay shall be applied to the one-week period starting on the first workday following the last day worked. 871 IAC 24.16(3).

The evidence indicates the employer did not designate a specific period in which the vacation pay should be attributed. In accordance with 871 IAC 24.16(3), the vacation pay should be attributed only to the week ending October 1, 2005. This means the claimant is not eligible to receive benefits for the week ending October 1, but is eligible to receive benefits as of October 2, 2005. The evidence further shows the claimant reported receiving vacation pay when she received it or during the week ending October 15. Based on the claimant's report of vacation pay the Department did not pay her any benefits for the week ending October 15, 2005. Since the Department did not pay the claimant any benefits for the week ending October 15 and she was legally entitled to receive benefits this week, this week can be used as the "offset" week for the benefits the claimant was not entitled to receive for the week ending October 1, 2005. In short, the Department owes the claimant \$292.00 in benefits for the week ending October 8, 2005.

DECISION:

The claimant established a legal excuse for filing a late appeal from a representative's October 18, 2005 decision (reference 01). Therefore, the Appeals Section has legal jurisdiction to address the merits of the claimant's appeal. The representative's October 18, 2005 decision (reference 02) is modified in the claimant's favor. The vacation pay the claimant received is only attributed to the week ending October 1, 2005, because the employer did not specify the time period in which the payment should be attributed. Since the claimant actually reported the vacation pay she received for the week ending October 15, 2005, and she did not receive any benefits this week, this week can be used as the offset week because the claimant was legally entitled to receive benefits this week. The Department owes the claimant \$292.00 in benefits for the week ending October 8, 2005.

dlw/kjf