

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KWITA DIAYEN
Claimant

APPEAL NO. 15A-UI-06578-LDT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LUTHERAN HOMES SOCIETY
Employer

OC: 03/29/15

Claimant: Appellant (6)

Iowa Code § 17A.12(3) – Default Decision
871 IAC 26.14(7) – Dismissal of Appeal on Default
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

An appeal was filed from a representative's unemployment insurance decision dated April 16, 2015 (reference 01) that concluded Kwita Diayen (claimant/appellant) was not eligible for unemployment insurance benefits after a separation from employment from Lutheran Homes Society (employer/respondent). Notices of hearing were mailed to the parties' last-known addresses of record for a telephone hearing to be held at 2:00 p.m. on July 16, 2015. The claimant/appellant received the hearing notice and responded by calling the Appeals Bureau on July 13, 2015. She indicated that she would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, she did not participate in the hearing. The administrative law judge considered the record closed at 2:20 p.m. At 3:35 p.m. the claimant called the Appeals Bureau and requested that the record be reopened. Based on the appellant's failure to participate in the hearing and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law and decision.

ISSUE:

Should the appeal be dismissed based on the claimant/appellant not participating in the hearing?

FINDINGS OF FACT:

The claimant/appellant was properly notified of the scheduled hearing on this appeal. The claimant/appellant received the hearing notice prior to the July 16, 2015 hearing. The hearing notice instructions specifically advise parties, "If you do not participate in the hearing because you do not register for the hearing, register late, or cannot be reached at the number you provided when the judge calls for the hearing, the appeal may be dismissed or decided based on other available evidence." The claimant/appellant failed to be available at the scheduled day and time set for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. The reason the claimant was unavailable was

that even though she had confirmed her availability on Monday, July 13, for the Thursday, July 16 hearing, by Thursday she had forgotten that the hearing was scheduled. She had started a new job and did not have her phone on when the administrative law judge called for the hearing; she had a break at about 3:30 p.m., at which time she checked her messages and received the message left by the administrative law judge at 2:00 p.m.

The record was left open, as a courtesy to the appellant, in this case for 20 minutes after the hearing start time to give the claimant/appellant a reasonable opportunity to participate. This reasonable amount of time is appropriate because if a hearing were conducted with the non-appealing party alone it would have concluded in 20 minutes or less. Allowing additional time would prejudice the non-appealing party for appearing and being available in a timely manner. The 20-minute wait time is also a reasonable period to hold the record open as insufficient time would remain to conduct a quality due process hearing in the time allotted by the appeals bureau. Each two party hearing is allowed 60 minutes and a one party hearing allowed 30 minutes. Holding the appellant in default for failure to appear and participate during a 20-minute window after the hearing start time is entirely reasonable considering the time allocated for unemployment hearings.

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 rule at 871 IAC 26.14(7) provides:

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 section 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. Instead, the presiding officer shall inquire ex parte as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

Due process requires notice and an opportunity to be heard, both of which were provided to the parties. This rule does not provide exceptions for good intentions and/or a party contacting the Appeals Bureau within a "reasonable amount of time" after the hearing is scheduled. It could be assumed an appellant intends to participate in the hearing simply by the fact an appeal is filed, but their responsibility does not end there; all parties are required to follow the specific written instructions printed on the hearing notice. Due process does not require the non-appealing party and the Appeals Bureau to sit and wait for indefinite periods see if an appellant wants to prosecute the appeal. The appellant filed the appeal and is held solely responsible for going forward with the case in an expeditious manner. The rule holds the appellant in default if not present at the start of hearing. As a courtesy, the appellant was granted additional time not required by statute or rule. Here, notwithstanding the additional time, the notice and the opportunity to participate, the appellant failed to prosecute the case expeditiously.

The Iowa Supreme Court has opined 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 mandates with ample opportunity to abide. See *Houlihan v. Emp't Appeal Bd.*, 545 N.W.2d 863 (Iowa 1996). Here the plain and simple mandate is to read the hearing notice and register a telephone number into the conference call system so that the party can be reached. The second simple and obvious mandate is to be available at the number provided at the specified time for the hearing. Lastly, the reasonable expectation is that a party should call the Appeals Bureau within five minutes after the start time for the hearing if the party does not get a call. Here, the claimant/appellant did not call the Appeals Bureau until over an hour and a half after the scheduled start time for the hearing. This delay was not reasonable.

The claimant/appellant appealed the representative's decision but failed to participate in the hearing. The claimant/appellant has therefore defaulted on her appeal pursuant to Iowa Code § 17A.12(3) and Rule 871 IAC 24.14(7), and the representative's decision remains in force and effect.

If the claimant/appellant disagrees with this decision, the claimant/appellant may appeal the decision directly to the Employment Appeal Board, whose address is listed on the cover page of this decision.

DECISION:

The representative's decision (reference 01) dated April 16, 2015 is affirmed. The decision denying benefits remains in effect.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs