

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EDGAR L RAMIREZ CORONA
Claimant

APPEAL NO: 11A-UCX-00026-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NEW HOPE VILLAGE INC
Employer

OC: 08/28/11
Claimant: Appellant (2)

Iowa Code § 96.4(3) – Availability for Work when Working Part time
Iowa Code § 96.6(2) – Timeliness of Appeal

PROCEDURAL STATEMENT OF THE CASE:

The claimant appealed a representative's September 6, 2011 determination (reference 02) that held him ineligible to receive benefits because he still works for the employer at the same hours and wages that he had been hired to work. The claimant participated in the hearing. Sarah Miller and Sonya Stearnes appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge finds the claimant eligible to receive benefits.

ISSUES:

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

Is the claimant eligible to receive benefits when he works as a substitute employee?

FINDINGS OF FACT:

The claimant was working for the employer in 2010 as a full-time client support employee. The claimant is in the National Guard and was deployed to go overseas in late July 2010. As a result of being deployed, the claimant resigned in July 2010.

The claimant served his tour of duty, returned to Iowa and contacted the employer about working again in early August 2011. The claimant was going back to school and asked to be rehired or scheduled as a substitute employee, which the employer did.

The claimant established a claim for benefits during the week of August 28, 2011. On September 6, 2011, a representative's determination was mailed to the claimant and employer. The determination held the claimant ineligible to receive benefits as of August 28, 2011. The determination informed the parties an appeal had to be filed or postmarked on or before September 16, 2011.

The claimant received reference 02 and reference 01 that was also mailed on September 6. Reference 01 held him eligible to receive benefits based on his employment separation from the

employer. The claimant went to his local Workforce office on September 14 with both determinations because he was confused. The claimant showed a representative the determinations he received. He asked what they meant and what he needed to do. The representative he talked to on September 14 thought someone had inadvertently locked his claim. Since the claimant had been working with a representative who was not in the office on September 14, he was asked to come back on September 16. The claimant went back to the office on September 16. The representative he had worked with before was not there. The same representative the claimant had talked to on September 14 was there and did not understand why the claimant had been determined ineligible on reference 02. The claimant was asked to come back to the office again so he could talk to the representative he had been working with before.

The claimant went back to his local Workforce office on September 28 and talked to the representative who had initially helped him. This representative told the claimant he needed to appeal the decision and explained why the decision had been issued. The representative wrote a letter stating the claimant had been at the office on September 16 to file his appeal. The claimant filed his appeal on September 28 at his local Workforce office.

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 was filed after the September 16, 2011 deadline for appealing expired. He filed a late appeal.

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, but did not.

The evidence establishes the claimant failure to file a timely appeal was due to Agency error or misinformation, which under 871 IAC 24.35(2) excuses the delay in filing an appeal. The claimant took the two determinations to his local Workforce office on September 14 and 16. Even though the claimant was unable to speak to the representative who initially helped him, the representative he talked to both days should have told him to file an appeal instead of telling him to wait until he talked to another representative. The claimant established a legal excuse for filing a late appeal. The Appeals Section has jurisdiction to make a decision on the merits of his appeal.

The determination that was issued on September 6 (reference 01) held the employer's exempt from charge. This determination was based on the claimant's employment separation in July 2010 and the wages he earned while deployed. Therefore, during this benefit year, the employer's account will not be charged.

After the claimant returned from his tour of duty with the National Guard in early August 2011, he was not working and was unemployed. The employer agreed he could work as a substitute employee. Working as a substitute employee, the claimant is eligible to receive partial benefits since his wage credits are based on full-time, not part-time employment. The representative who issued the reference 02 determination apparent reliance on 871 IAC 24.23(26) is misplaced. This regulation applies to claimants who have been working part time, have these part-time wage credits in the base period and then file a claim for benefits when they continue to work part time. This regulation does not apply to claimants who have become unemployed and were working full time. These claimants have wage credits from the full-time employer in the base period employer. The fact a claimant accepts part-time employment before or after establishing a claim is not the fact pattern addressed in 871 IAC 24.23(26). The fact the claimant works as a substitute employee as of August 2011 does not make him ineligible to receive benefits.

Also, the record indicates the claimant has received Department Approved Training so his availability to work is not an issue.

DECISION:

The representative's September 6, 2011 determination (reference 02) is reversed. The claimant did not file a timely appeal, but he established a legal excuse for filing a late appeal. Therefore, the Appeals Section has jurisdiction to address the merits of his appeal. The claimant is eligible to receive benefits as of August 28, 2011, because working as a substitute employee for the employer does not make him ineligible to receive benefits. As of August 28, 2011, the claimant is eligible, is able to and available for work. The employer's account will not be charged during the claimant's current benefit year. The claimant's availability is not an issue while he has Department Approved Training status.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css