

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MALIK SYKES
Claimant

MENARD INC
Employer

APPEAL 18A-UI-08839-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/15/18
Claimant: Appellant (6)**

Iowa Code § 96.5(2)(a) – Discharge for Misconduct
Iowa Code § 17A.12(3) – Default Decision
Iowa Admin. Code r. 871-26.14(7) – Dismissal of Appeal on Default

STATEMENT OF THE CASE:

Malik Sykes, Claimant, filed an appeal from the August 17, 2018, (reference 01) unemployment insurance decision that denied benefits because claimant was discharged from work with Menard Inc. for misconduct. Notices of hearing were mailed on August 24, 2018 to the parties' last known addresses of record for a telephone hearing scheduled for September 10, 2018 at 11:00 a.m. The claimant/appellant did not follow the instructions on the Notice of Hearing to register a telephone number where he could be reached at the time schedule for this hearing. The employer had registered for the hearing. The employer's counsel, Austin Stewart, was present and prepared to proceed with the telephone hearing. Because the claimant/appellant had not registered his telephone number as instructed, no hearing was held.

ISSUE:

Whether the appeal should be dismissed based on the appellant's failure to appear and participate in the hearing.

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing for this appeal. The claimant/appellant did not register a telephone number where he could be reached for this hearing. He did not follow the instructions on the Notice of Appeal and Telephone Hearing. Official notice of the Clear2There hearing control screen is taken to establish that the claimant/appellant did not register a telephone number for the hearing before the time set for the hearing. No hearing was held.

The hearing notice instruction specifically advises parties:

Date: MON SEP 10, 2018
Iowa Time: 11:00 AM

IMPORTANT NOTICE!

YOU MUST PROVIDE YOUR PHONE NUMBER TO THE APPEALS BUREAU AS SOON AS POSSIBLE. If you do not follow these instructions, the judge will not call you for the hearing. You must also provide the name(s) and phone number(s) of any witnesses to the Appeals Bureau.

The back page of the hearing notice provides further instruction and warning:

Failure to Participate or Register for Appeal Hearing

If you do not participate in the hearing, the judge may dismiss the appeal or issue a decision without considering your evidence. The Appeals Bureau does not have a phone number for this hearing unless you provide it to us by following the instructions on the other side of this page. If you do not follow those instructions, the judge will not call you for the hearing. 871 IAC 26.14(7).

As a *courtesy* to the appellant, the record was left open for a grace period of 30 minutes after the hearing start time to give the appellant a *reasonable* opportunity to participate. Allowing additional time would prejudice the non-appealing party for appearing in a timely manner. Holding the appellant in default for failure to appear and participate is reasonable considering the time allocated for each unemployment hearing. This additional time period is more than reasonable under the circumstances.

The representative's decision concluded the claimant was not eligible for unemployment insurance benefits.

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.** (Emphasis added).

Iowa Admin. Code r. 871-26.14(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 §17A.12(3). The record may be reopened if the absent party

makes a request in writing 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.

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

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 instruction with ample opportunity to comply. See *Houlihan v. Emp't Appeal Bd.*, 545 N.W.2d 863 (Iowa 1996). *The rule does not provide exceptions for good intentions and/or a party contacting the Appeals Bureau within a 'reasonable' or certain amount of time after the hearing is scheduled.*

Each party is required to follow the prominent specific written instructions printed on the hearing notice. The appellant was clearly directed to read the hearing notice and register a telephone number where he could be reached for the hearing. Due process requires notice and an opportunity to be heard, both of which were provided to each party. It is assumed an appellant intends to participate in the hearing simply by the fact that an appeal is filed, but his responsibility does not end there. The claimant filed the appeal and is held solely responsible for going forward with the case in a prompt and deliberate manner. The rule holds an appellant in default if he is not present *at the start* of hearing. As a courtesy, this appellant was granted an additional 30-minute grace period not required by statute or rule. Here, notwithstanding notice, opportunity and additional time, he failed to prosecute the case at the appointed date and time without providing a good-cause reason for the delay or failure to do so. Accordingly, the appellant is in default and the appeal shall be dismissed. Iowa Code § 17A.12(3) and Iowa Admin. Code r. 26.14(7).

If the appellant disagrees with this decision, he may appeal this decision directly to the Employment Appeal Board by following the instructions on the front page of this decision. Or, the appellant may make a written request to reopen the record to the administrative law judge within 15 days after the mailing date of this decision. The written request should be mailed to the administrative law judge at the address listed at the end of this decision and must explain the emergency or other good cause that prevented him from registering for the hearing or participating in the hearing at its scheduled time.

DECISION:

The claimant/appellant is in default. The appeal is dismissed. The August 17, 2018, (reference 01) decision denying benefits remains in effect.

Adrienne C. Williamson
Administrative Law Judge
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Iowa Workforce Development
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Des Moines, IA 50319-0209
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Decision Dated and Mailed

acw/rvs