

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MIGUEL A MENDEZ

Claimant

APPEAL NO: 10A-UI-04502-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADVANCE SERVICES INC

Employer

OC: 11/22/09

Claimant: Respondent (1/R)

Section 96.19-38-b – Eligibility for Partial Unemployment Insurance Benefits
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

Advance Services, Inc. (employer) appealed a representative's March 15, 2010 decision (reference 02) that concluded Miguel A. Mendez (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 6, 2010. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Holly Carter appeared on the employer's behalf. The record was closed at 12:15 p.m. At 12:20 p.m., the claimant called the Appeals Section and indicated he was in need of a Spanish interpreter; he further indicated that he had been unable to fully read or understand the instructions on the hearing notice requiring that he needed to call into the Appeals Section prior to the hearing to provide his telephone number in order for him to be called by the administrative law judge for the hearing. Since the record was already closed and the administrative law judge had already determined that a decision in his favor would be issued, there is no need to reopen the record in the current appeal. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is the claimant employed by the employer for less than his usual hours and wages and eligible for full or partial unemployment insurance benefits? Was the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant began taking assignments with the employer out of its Slater, Iowa office on January 9, 2006. As of the date of the hearing, all of the claimant's various assignments had been with a specific Slater, Iowa business client, where he worked full-time hours on a day shift, with a most recent rate of pay of \$12.25.

The claimant established an unemployment insurance benefit year effective November 22, 2009. He received unemployment insurance benefits for the weeks ending December 5, 2009 through January 9, 2010. This was because there had been an ending of an assignment with the business client on or about November 29. He returned to a new assignment with that same business client on January 10, 2010. The work on that assignment ended February 5, 2010. The claimant was advised by both the business client and the employer of the ending of the assignment on February 5.

As a result of the ending of that assignment, the claimant reopened his unemployment insurance claim by filing an additional claim effective February 7, 2010. He filed weekly claims and received unemployment insurance benefits for the weeks ending February 13 through March 13. On March 16 the claimant returned to a new assignment with the same business client; the claimant remains on that assignment as of the date of the hearing.

The employer is contesting the claimant's eligibility for unemployment insurance benefits for the five weeks between February 7 and March 13. The basis for the employer's challenge is that the employer asserts that he claimant did not seek reassignment with the employer within three business days after the ending of the assignment on March 7, and further, that if he had sought reassignment, other work was available to him. Under the employer's policies, an employee who does not seek reassignment within three business days of the ending of an assignment is deemed to have voluntarily quit. The issue of whether there had been an at least temporary separation from employment is not the same issue as that determined by the claims representative or as stated on the notice of hearing, so the administrative law judge cannot address that issue in this decision.

The employer is alternatively asserting that because the claimant did not check in and seek reassignment with the employer after February 5, that he should not be eligible for unemployment insurance benefits as he was not "able and available for work," particularly as the employer asserts other work was available for him. The employer indicates that there was some type of position with some other business client that could have been offered to the claimant on February 8, 2010. However, no details were provided as to what the position might have been, such as with what business client, for what job, at what rate of pay, so as to be able to determine whether it was a suitable position.

REASONING AND CONCLUSIONS OF LAW:

The only issue the administrative law judge can address in this decision is whether the claimant was still employed in his same hours and wages and was able and available for work during the period he was receiving unemployment insurance benefits. The unemployment insurance law provides that a claimant is deemed partially unemployment insurance benefits if he is not employed at his usual hours and wages and earns less than his weekly benefit amount plus \$15.00 in other employment. Iowa Code § 96.19-38-b.

Beginning on or about February 8, 2010, the employer was not providing the claimant with substantially the same employment as it provided during his base period. While work on some other assignment might have been available to the claimant, this position was not affirmatively offered to the claimant so as to determine whether any refusal might have been disqualifying. Consequently, the claimant is qualified to receive partial unemployment insurance benefits upon the filing of his additional claim effective February 7, 2010, provided he was otherwise eligible.

With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3. However, where it is known that it is likely that the claimant might soon be recalled for work so that he is only temporarily unemployed, the law provides that the requirement that the claimant actively seek work is waived. Id. While there is a provision under which an employee of a temporary employment firm who has received proper notice of the requirement to report to the employer within three business days of the ending of the assignment can be deemed to have voluntarily quit (Iowa Code § 96.5-1-j; 871 IAC 24.26(15)), this is not part of the law regarding the determination of whether the claimant is “able and available” for work – there is no requirement under the applicable legal provisions regarding availability for work that an employee of a temporary employment firm check in with his employer for possible other work in order to meet the “able and available” criteria of the law.

The issue of a possible separation from employment (at least temporarily), such as might fall under the provisions addressing a potential voluntary quit from a temporary employment firm for failing to seek reassignment within three days of the ending of an assignment, was not included in the notice of hearing for this case, nor has there been a prior representative’s determination issued on that issue. The case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The unemployment insurance decision dated March 15, 2010 (reference 02) is affirmed. The claimant was eligible for partial unemployment insurance benefits as being not employed under his same hours and wages and as being able and available for work for the period of February 7 through March 13, 2010. The matter is remanded to the Claims Section for investigation and determination of the separation issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs