

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

ROBERT J POTTS
1306 JERICO AVE
CORNING IA 50841

ADVANCE SERVICES INC
c/o TALX UCM SERVICES INC
PO BOX 66864
ST LOUIS MO 63166-6864

Appeal Number: 04A-UI-01208-RT
OC: 12-21-03 R: 01
Claimant: Respondent (5)

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 96.4-3 – Required Findings (Able and Available for Work)

Section 96.7-2-a(2) – Employer Contributions and Reimbursements (Same Employment – Benefits Not Charged)

Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Advance Services, Inc., filed a timely appeal from an unemployment insurance decision dated January 26, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Robert J. Potts. After due notice was issued, a telephone hearing was held on February 25, 2004, with the claimant not participating. Although the claimant had called in a telephone number where he purportedly could be reached for the hearing, when the administrative law judge called that number at 9:02 a.m., he reached a voice mail which identified that telephone number as the source of the voice mail and indicated that no one was

at the telephone number. The administrative law judge left a message that he was going to proceed with the hearing and if the claimant wanted to participate in the hearing, he needed to call before the hearing was over and the record was closed. The hearing began when the record was opened at 9:04 a.m. and ended when the record was closed at 9:15 a.m. and the claimant had not called during that time. Mandy Henderson, Human Resources Coordinator, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

The claimant called the Appeals Section at 11:17 a.m. and indicated that he had forgotten he had a hearing. The administrative law judge attempted to call the claimant back at 3:29 p.m. The claimant was not there so the administrative law judge left a message for the claimant on his voice mail indicating that the administrative law judge had attempted to call the claimant at 9:02 a.m. for the hearing but had reached the claimant's voice mail. The administrative law judge further stated in the message for the claimant that there was no need to reschedule the hearing because the decision was not adverse to the claimant. The administrative law judge now concludes that any request by the claimant to reschedule a hearing is without good cause because forgetting a hearing is not good cause for rescheduling a hearing. Further, there is no need to reschedule a hearing because the decision is not adverse to the claimant. If the claimant wishes to appeal the decision, he may do so.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was and still is employed by the employer since March 17, 2003. The employer is an employment agency and the most recent assignment was on April 12, 2003 to NSK-AKS. This was a temp-to-hire position full time and the claimant is, and at all material times has been, still working at that assignment. His work is satisfactory. NSK-AKS had a holiday shutdown from December 24, 2003 to January 1, 2004. The claimant went back to work on January 2, 2004. On December 29, 2003, the employer called the claimant and offered some potential work over the holiday shutdown period but the claimant refused saying he needed the break. The employer made no specific offers of employment. Pursuant to his claim for unemployment insurance benefits filed effective December 21, 2003, the claimant has received unemployment insurance benefits in the amount of \$84.00 for benefit week ending December 27, 2003 (earnings \$128.00).

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is ineligible to receive unemployment insurance benefits because he is and was at all material times hereto not able, available, and earnestly and actively seeking work. The administrative law judge concludes that the claimant is not disqualified to receive unemployment insurance benefits for this reason.
2. Whether the employer should be charged for any unemployment insurance benefits to which the claimant is entitled. The employer should not be charged for any unemployment insurance benefits to which the claimant is entitled.
3. Whether the claimant is overpaid unemployment insurance benefits. He is not.

Iowa Code Section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982) Although the claimant did not participate in the hearing, the administrative law judge nevertheless concludes that there is a preponderance of the evidence that the claimant is excused from the provisions requiring that he be able, available, and earnestly and actively seeking work. The evidence establishes that at all material times hereto the claimant was employed by the employer assigned to NSK-AKS. However, NSK-AKS had a holiday shutdown from December 24, 2003 to January 1, 2004. The claimant again began work again for NSK-AKS on January 2, 2004. The administrative law judge concludes that the claimant was employed during the holiday shutdown due to a plant shutdown and this was his regular job in which he worked full time prior to the shutdown and will and did again work full time after the shutdown. Because the claimant is temporarily unemployed, he is excused from the provisions that he be available for work. The administrative law judge would also conclude that refusing to accept an offer for just a short period of time during the holiday shutdown would also not make the claimant unavailable for work. In any event, the administrative law judge concludes that the claimant was excused from the provisions requiring that he be available for work, and, as a consequence, he is not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code Section 96.7-2-a(2) provides:

2. Contribution rates based on benefit experience.

a. (2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The administrative law judge concludes that the employer has the burden to prove that the claimant is receiving the same employment from the employer that he received during his base period and, therefore, the benefits should not be charged against the account of the employer. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was receiving the same employment he had received during his base period and the employer should not be charged for such benefits. The employer is Advance Services, Inc., an employment agency. At all material times hereto the claimant had employment from Advance Services, Inc. The evidence establishes that during the holiday shutdown the employer had additional work for the claimant as it had in the past but the claimant refused this work. Accordingly, the administrative law judge concludes that the claimant did receive the same employment from the employer that he received during the base period and any unemployment insurance benefits to which the claimant is entitled shall not be charged against the account of the employer herein.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$84.00 since filing for unemployment insurance benefits effective December 21, 2003 during the holiday shutdown. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of January 26, 2004, reference 01, is modified. The claimant, Robert J. Potts, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible because he is excused from the provisions requiring that he be available for work because he was temporarily unemployed. Any unemployment insurance benefits to which the claimant is entitled shall not be charged to the account of the employer herein because he was receiving the same employment as he did during the base period. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits for benefit week ending December 27, 2003.

pjs/b