

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JULIAN J PEREZ

Claimant

APPEAL NO: 10A-UI-02077-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DES STAFFING SERVICES INC

Employer

OC: 02/15/09

Claimant: Appellant (4/R)

Section 96.4-3 – Able to and Available for Work

Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant appealed a representative's December 1, 2009 decision (reference 08) that denied him benefits as of October 24, 2009, because he restricted the hours he was willing to work for the employer. A telephone hearing was held on March 25, 2010. The claimant participated in the hearing. Stacy Navarro appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

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

Is the claimant able to and available for work as of October 24, 2009?

FINDINGS OF FACT:

The claimant established a claim for benefits during the week of February 15, 2009. He reopened his claim the week of October 25, 2009. The claimant registered to work for the employer and called in every day to see if the employer could assign him to any job. On October 21, the claimant notified the employer he was ill and unable to work. On October 23, 2009, the claimant again contacted the employer to let the employer know he was again well and could work.

In November 2009, the employer assigned the claimant to a job at CBC Packaging. The claimant worked 32 hours at CBC Packaging the week ending November 7. He worked 3.5 hours at CBC Packaging the week ending November 14. He worked eight hours at CBC Packaging the week ending November 21, 2009. The employer did not assign the claimant to any work the week ending November 28, 2009. Around Thanksgiving, the claimant asked the employer if there were any other jobs that he could be assigned to. There were not and the claimant continued to work at CBC Packaging in December.

The claimant had dental work done in early February 2010. He gave the employer advance notice that he was having dental work done and would not be able to work the first two week in February. When the employer called him in late January to work in early February, the claimant became frustrated with the employer.

On December 1, 2009, a representative's decision was mailed to the claimant and employer. The decision held the claimant was denied benefits as of October 24, 2009; because he limited the hours he was available for work. The decision informed the parties the decision was final unless an appeal was filed on or before December 11, 2009.

The claimant did not receive the December 1 decision. The claimant first learned about the decision on February 9, 2010, when he went to his local Workforce office. The claimant filed an appeal on February 9, 2010.

REASONING AND CONCLUSIONS OF LAW:

Unless the claimant or other interested party, after notification or within ten calendar days after a representative's decision is mailed to the parties' last-known address, files an appeal from the decision, the decision is final. Benefits shall then be paid or denied in accordance with the representative's decision. Iowa Code section 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 decisions must be filed within the time limit set by statute and the administrative law judge has no authority to review a decision 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 December 11, 2010 deadline for appealing expired.

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 did not have a reasonable opportunity to file a timely appeal because he never received the December 1, 2009 decision.

The claimant's failure to file a timely appeal was due to the United States Postal Service, which under 871 IAC 24.35(2) excuses the delay in filing an appeal. As soon as the claimant learned about the December 1, 2009 decision he immediately appealed. The claimant established a legal excuse for filing a late appeal. Therefore, the Appeals Section has jurisdiction to make a decision on the merits of his appeal.

Each week a claimant files a clam for benefits, he must be able to and available for work. Iowa Code section 96.4-3. Since the claimant did not reopen his claim until he was well, the evidence does not establish that the claimant unduly limited the hours he was available for work. As of October 24, 2009, the claimant was able to and available for work. Therefore, he is eligible to receive benefits as of October 25, 2009.

When the claimant reopened his claim for benefits during the week of January 24, 2010, he was able to and available for work. The claimant is eligible to receive benefits as of January 24, 2010. The claimant was not able to or available for work for the weeks ending February 6 and 13, because he had dental work done during these weeks.

An issue of whether the claimant properly reported his wages for the weeks ending November 7, 14 and 21 will be remanded to the Claims Section to determine.

DECISION:

The representative's December 1, 2009 (reference 08) is modified in the claimant's favor. The claimant established a legal excuse for filing a late appeal. Therefore the Appeals Section has jurisdiction to address the merits of the claimant's appeal. As of October 24, 2009, the claimant is eligible to receive benefits because he established he was able to and available for work. When the claimant reopened his claim the week ending January 24, 2010, he was again eligible to receive benefits. For the week ending February 6 and 13, the claimant was not eligible to receive benefits because he was having dental work done and was not able to or available for work these two weeks. An issue of whether the claimant properly reported wages he earned for the weeks ending November 7 through 21 is Remanded to the Claims Section to determine.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs