

BEFORE THE
STATE OF WISCONSIN

LABOR AND INDUSTRY REVIEW COMMISSION

In the matter of the
unemployment benefit claim of

ISRAEL F TALAMANTEZ, Claimant

Hearing No. 92002327FI.

Involving

SEE ENCLOSURE AS TO TIME
LIMIT ON FURTHER APPEAL.

EMERGENCY UNEMPLOYMENT COMPENSATION

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On March 24, 1992, the Department issued an Initial Determination regarding the claimant's failure to submit evidence regarding his work search for Emergency Unemployment Compensation. The last date to timely appeal was April 7, 1992. The claimant's appeal was postmarked April 8, 1992. Based upon the claimant's explanation to the Department, a hearing on the timeliness issue as well as provisionally on the merits was scheduled for June 22, 1992. At that time, the claimant timely appeared. However, because English is the claimant's second language, the claimant requested that an interpreter be present. The Administrative Law Judge rescheduled the hearing at which time an interpreter would be present.

The Department issued another Hearing Notice rescheduling the hearing for August 17, 1992 at which time an interpreter would be present. The hearing was scheduled at the UC Job Service Office in Fond du Lac. The claimant arrived approximately 30 minutes late for the hearing. Consequently, the claimant did not appear and an Appeal Tribunal Decision issued on August 31, 1992, dismissing the claimant's request for hearing.

The employee timely petitioned the Commission for review of the Appeal Tribunal Decision. On December 18, 1992 the Commission pursuant to section 108.09 (6)(d) of the Statutes ordered additional testimony be taken before an Administrative Law Judge, acting on behalf of the Commission, with respect to whether the claimant filed a timely request for hearing and, if not, whether the request was late for a reason beyond the claimant's control; whether the claimant had good cause for failing to appear at the hearing which was scheduled to be held on August 17, 1992; and, provisionally, with respect to the merits of the case. On January 26, 1993, a remand hearing was held before an Administrative Law Judge.

Based upon the applicable law, records and evidence in this case, the Commission makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Late Hearing Request

An Initial Determination issued on March 24, 1992 found the claimant failed to submit evidence regarding his work search for Emergency Unemployment Compensation. The last date to timely appeal was April 7, 1992. At that time, the claimant was living in Del Rio, Texas. The claimant's appeal was postmarked San Antonio, Texas, April 8, 1992. At the remand hearing, the claimant testified that he mailed the letter on April 7, 1992 in Del Rio, Texas which according to the claimant is approximately 175 miles from San Antonio, Texas. The claimant placed his appeal in the mail box between 2:30 and 3:00 p.m. believing that the mail carrier would pick it up after 3:00 p.m. The claimant is unaware if the mail is processed in San Antonio.

claimant asked somebody what he was to do but was told to wait in line until someone could assist him. The claimant took his turn in line and when he finally reached the counter he informed the woman why he was there. The individual took the claimant downstairs to the hearing room. By this time the claimant was approximately one-half hour late. The Administrative Law Judge indicated that the claimant was late and that he could not conduct the hearing. The Administrative Law Judge informed the claimant where the interpreter was located. The claimant met the interpreter and then prepared a letter for submission to the Administrative Law Judge. The claimant has no reading knowledge of English and understands a little spoken English. The claimant was born in Mexico and is 40 years old. The claimant has been in the United States since he was 16 years old but has not attended any schools in the United States.

Under the circumstances, the Administrative Law Judge found that the claimant failed to set forth any reasons which would establish probable good cause for his non-appearance and dismissed his hearing request. Based upon the remand testimony, the Commission concludes that the claimant has established good cause for his failure to appear in a timely fashion, pursuant to section 108.09 (4)(i) of the Statutes. When the claimant arrived at the correct location, he was only approximately ten minutes late. Because he took his turn in line like everyone else, the claimant was late for his hearing. Under the circumstances, the Commission believes that the claimant did everything within his control to rectify the situation. If he had not had to wait in line longer than five minutes, the claimant would have appeared in a timely fashion.

Therefore, the Commission concludes that pursuant to section 108.09 (4)(i), the claimant had good cause for failing to appear at the hearing. Accordingly, the Appeal Tribunal Decision issued on August 31, 1992 is reversed.

3. Merits - Emergency Unemployment Compensation Work Search

At the remand hearing, the claimant testified that he was instructed to look for work as of March 7, 1992 (week 10) and to mail in the Emergency Unemployment Compensation work search forms. The claimant testified that he submitted approximately three work search forms dating back to March 7, 1992. The claimant further testified that he did not mail the work search forms in until his niece, Elma Sanchez called the Wisconsin local office and was then instructed to send in the work search forms. The claimant testified that he sent the forms in after March 23, 1992 (week 13). The claimant testified that he made his work searches and sent in his additional work searches up until the day before he started working in Wisconsin. The claimant testified that he looked for work at the Amisted Meat Market in Del Rio, Texas on March 4 and 5 by applying in person. The claimant also went to the Carlos Muunoz Lumber Company on March 4 and 5. Although these job searches were conducted on two different days, there is no tangible evidence in the file or the record which indicates that the claimant prepared the work search forms and mailed them to Wisconsin.

Additionally, conflicting evidence was adduced at the remand hearing. Exhibit 3, an interstate benefit investigation report indicates that the claimant had not been making a work search because he did not understand that a work search was required under the unemployment compensation program. This

statement, Exhibit 3, was given by the claimant through his interpreter, his niece, via telephone. In summary, this statement indicates that when the claimant filed his claim at the local office in Del Rio, Texas he was not given any work search instructions. When the claimant received work search forms from Wisconsin, the claimant did not understand what he had to do with them. The claimant according to the statement requested assistance from his niece. The statement additionally indicates that the claimant had not been looking for work because he expected to be called back to work at the Leach Farms in April. The claimant agreed that he understood that in order to be eligible for unemployment compensation benefits he was to make at least two applications for work on two different days each week.

Because of the conflicting testimony between the claimant's testimony at the remand hearing and Exhibit 3, the Commission is faced with determining which set of facts it will accept when deciding whether the claimant submitted evidence that he made a systematic and sustained work search for week 10 of 1992. After weighing the competing evidence, the Commission finds Exhibit 3 more reliable given its proximity in time to the events at hand. Additionally, no tangible evidence in the file or record exists indicating that the claimant submitted evidence of his work searches. While this does not necessarily prove that the claimant did not do so, the presumption that the Department did not receive the work search forms still remains, especially in view of Exhibit 3.

The Commission therefore finds that the claimant failed to submit evidence that he made a systematic and sustained search for work during week 10 of 1992 pursuant to section 108.141 (3g)(c). Accordingly, Emergency Unemployment

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Compensation cannot be paid as of March 1, 1992 (week 10), and continuing thereafter until the claimant has worked at least four weeks and has earned wages equal to at least \$792.00.

DECISION

The claimant's failure to timely request a hearing was beyond his control. Consequently, the hearing request is timely pursuant to section 108.09 (4)(f) of the Statutes. Accordingly, the Appeal Tribunal Decision issued on August 31, 1992 is reversed. The claimant had good cause for failing to appear at the hearing scheduled for August 17, 1992, pursuant to section 108.09 (4)(i). As a result, the Commission reaches the merits of the case. The claimant is ineligible for benefits beginning in week 10 of 1992 and continuing thereafter until he has worked at least four weeks and has earned wages equal to at least \$792.00.

Dated and mailed

March 30, 1993

135-CD1051

Pamela I. Anderson, Chairman

/s/

Richard T. Kreul, Commissioner

/s/

James R. Meier, Commissioner

cc: JESUS ZAVALA