

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DIANA T TARWOE
Claimant

SCOTTISH RITE PARK INC
Employer

APPEAL 21A-UI-00277-AD-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 09/06/20
Claimant: Appellant (3)

Iowa Code § 96.4(3) – Eligibility – Able to and Available for Work
Iowa Code § 96.6(2) – Filing – Timely Appeal
Iowa Admin. Code r. 871-24.35 – Filing

STATEMENT OF THE CASE:

On December 5, 2020, Diana Tarwoe (claimant/appellant) filed an appeal from the November 18, 2020 (reference 01) unemployment insurance decision that denied benefits from September 6 through September 26, 2020 based on a finding claimant failed to report after the Department mailed a notice to her.

A telephone hearing was initially set for February 4, 2021. The parties were properly notified of the hearing. At that time, it appeared claimant may need the assistance of an interpreter in order to fully participate in the hearing. An interpreter could not be immediately obtained, and so the hearing was rescheduled.

A telephone hearing was held on March 23, 2021. The parties were properly notified of the hearing. Claimant participated personally. Scottish Rite Park Inc. (employer/respondent) participated by Director of HR Teresa Phillips. A Krahn language interpreter also participated. However, the parties agreed the interpreter was not effective and claimant opted to proceed with the hearing without the interpreter's assistance. At that time it appeared an interpreter was not necessary after all, as claimant and Phillips agreed they were able to understand each other and the administrative law judge did not have difficulty understanding claimant and visa versa.

Claimant's Exhibit 1 was admitted. Employer's exhibits A, B, and D were admitted. Official notice was taken of the administrative record.

ISSUE(S):

- I. Is the appeal timely?
- II. Is the claimant able to and available for work?
- III. Did claimant failure to report as directed by a department representative?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds:

Claimant began working for employer on November 19, 2015. The last day claimant performed work for employer was on August 22, 2020. Claimant was in an on-call position at that time: employer would reach out to claimant when shifts were available, and she was free to accept or reject those shifts. Claimant separated from employer effective October 22, 2020. Whether claimant's separation from employer was disqualifying is not before the administrative law judge and has not been the subject of a fact-finding investigation and decision.

Claimant's ability to and availability for work after the date of separation was limited due to lifting restrictions and childcare issues. The administrative record indicates claimant was not searching for work during the weeks she filed for regular state benefits.

Claimant filed a claim for benefits each week from the benefit week ending September 12, 2020 and continuing through the benefit week ending November 14, 2020. Claimant did not receive a notice to report from the Department. The administrative record does not contain evidence that a notice to report was mailed to claimant.

The Unemployment Insurance Decision was mailed to claimant at the above address on November 18, 2020. That was claimant's correct address at that time. Claimant got it around that time and was able to read and understand the decision. Claimant believed she had filed an appeal online around that time. However, when she called a few days later to verify the Department had received the online appeal, she learned that it had not been received. She then filed an appeal by mail at that time. The deadline to appeal was November 28, 2020; however, because that was a weekend, the deadline to appeal was extended to November 30, 2020. Claimant appealed the decision via mail on December 5, 2020.

The administrative law judge notes claimant has been allowed federal Pandemic Unemployment Assistance (PUA) effective August 23, 2020 and continuing to present. Claimant's weekly PUA benefit amount is \$360.00. Claimant continues to receive PUA. Claimant cannot receive both PUA and regular state benefits at the same time. This decision does not impact claimant's continued eligibility for PUA. Employer is not charged for PUA.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal was timely. The November 18, 2020 (reference 01) unemployment insurance decision that denied benefits from September 6 through September 26, 2020 based on a finding claimant failed to report after the Department mailed a notice to her is MODIFIED in favor of respondent.

Iowa Code § 96.6(2) provides, in pertinent part: "[u]nless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision."

Iowa Admin. Code r. 871-24.35(1)(a) provides:

1. Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:

- (a) If transmitted via the United States Postal Service on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark on the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
- (b)
- (c) If transmitted by any means other than [United States Postal Service or the State Identification Data Exchange System (SIDES)], on the date it is received by the division.

Iowa Admin. Code r. 871-24.35(2) provides:

- 2. The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.

There is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and the Administrative Law Judge has no authority to change the decision of representative if a timely appeal is not filed. *Franklin v. Iowa Dept. Job Service*, 277 N.W.2d 877, 881 (Iowa 1979). The ten-day period for appealing an initial determination concerning a claim for benefits has been described as jurisdictional. *Messina v. Iowa Dept. of Job Service*, 341 N.W.2d 52, 55 (Iowa 1983); *Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373 (Iowa 1979). The only basis for changing the ten-day period would be where notice to the appealing party was constitutionally invalid. *E.g. Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373, 377 (Iowa 1979). The question in such cases becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Employment Sec. Commission*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Employment Sec. Commission*, 212 N.W.2d 471 (Iowa 1973). The question of whether the Claimant has been denied a reasonable opportunity to assert an appeal is also informed by rule 871-24.35(2) which states that "the submission of any ...appeal...not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service."

The administrative law judge finds there is good cause for the late appeal. Claimant believed she had appealed online, followed up to ensure she had, and then filed an appeal by mail when she learned there was an issue with the online appeal she believed she had filed. Claimant's appeal is therefore timely, and the administrative law judge has jurisdiction to address the underlying issues.

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".

Iowa Admin. Code r. 871-24.23(26) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

Iowa Admin. Code r. 871-24.22(2)f provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Claimant filed a claim for benefits each week from the benefit week ending September 12, 2020 and continuing through the benefit week ending November 14, 2020. Claimant did not receive a notice to report from the Department. The administrative record does not contain evidence that a notice to report was mailed to claimant. Claimant is therefore not disqualified based on a failure to report for work.

However, the administrative law judge finds claimant did not meet the availability requirements to be eligible for benefits during the above weeks filed. Claimant was still employed by employer in an on-call position until October 22, 2020. Because claimant was still employed by employer in the same way during this period, she does not meet the availability requirements to be eligible for regular, state benefits.

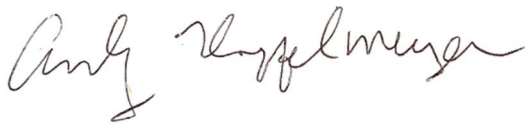
Claimant is not eligible for regular, state benefits after that period and continuing through the last week filed, the week ending November 14, 2020. This is because claimant's ability to and availability for work after the date of separation is limited due to lifting restrictions and childcare issues. The administrative record also indicates claimant was not searching for work during the weeks she filed for regular state benefits. Benefits are therefore denied during this period as well.

The administrative law judge notes claimant has been allowed federal Pandemic Unemployment Assistance (PUA) effective August 23, 2020 and continuing to present. Claimant's weekly PUA

benefit amount is \$360.00. Claimant continues to receive PUA. Claimant cannot receive both PUA and regular state benefits at the same time. While this decision denies regular state benefits, it does not impact her continued eligibility for PUA. Employer is not charged for PUA.

DECISION:

The administrative law judge concludes the claimant's appeal was timely. The November 18, 2020 (reference 01) unemployment insurance decision that denied benefits from September 6 through September 26, 2020 based on a finding claimant failed to report after the Department mailed a notice to her is MODIFIED in favor of respondent. Claimant did not fail to report when directed to by the Department. However, she is not eligible for regular, state benefits during the period filed. Benefits are therefore denied.



Andrew B. Duffelmeyer
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 478-3528

March 30, 2021
Decision Dated and Mailed

abd/kmj

Note to Claimant:

If you disagree with this decision, you may file an appeal with the Employment Appeal Board by following the instructions on the first page of this decision. If this decision denies benefits, you may be responsible for paying back benefits already received.

Individuals who are disqualified from or are otherwise ineligible for **regular** unemployment insurance benefits but who are unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.