

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NELSON E RODRIGUEZ
Claimant

E & K OF OMAHA INC
Employer

APPEAL 18A-UI-10921-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/29/18
Claimant: Appellant (4)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.19(38)a & b – Total and Partial Unemployment
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.23(26) – Availability Disqualifications Same Hours and Wages
Iowa Code § 96.7(2)a(2) – Same Base Period Employment

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 27, 2018 (reference 02) unemployment insurance decision that denied benefits based upon a determination that claimant was still employed at the same hours and wages as contemplated in the contract of hire. The parties were properly notified of the hearing. A telephonic hearing was held on November 26, 2018. The claimant, Nelson E. Rodriguez, participated. The employer, E & K of Omaha, Inc., did not register a telephone number at which to be reached and did not participate in the hearing. Spanish/English interpreter Abdul (ID number 11429) provided interpretation services for the hearing.

ISSUES:

Is the appeal timely?
Is the claimant totally unemployed effective July 29, 2018?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant is employed full-time as a carpenter with E & K of Omaha, Inc. Claimant began working for this employer on November 11, 2017. On August 1, 2018, claimant was laid off for nineteen days. Claimant returned to work on August 20, 2018. During the layoff, claimant filed one weekly continued claim for benefits for the week ending August 18, 2018.

The unemployment insurance decision was mailed to the appellant's address of record on August 27, 2018. The appellant did not receive the decision. The first notice of disqualification was communication with the agency when he was taking a class during late October. During this time, claimant learned that his claim was locked. He immediately went to his local office and filed an appeal.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant is partially unemployed for one week and totally unemployed for two weeks. Benefits are allowed, provided he is otherwise eligible.

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless 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. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The appellant did not have an opportunity to appeal the unemployment insurance decision because the decision was not received in a timely fashion. Without timely notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The appellant filed the appeal within one or two days of learning of the disqualification. Therefore, the appeal shall be accepted as timely.

The next issue is whether claimant is eligible for unemployment insurance benefits. Iowa Code § 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 Code § 96.19(38) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) While employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

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.

Under the Iowa Employment Security Law, an individual must be totally or partially unemployed to be eligible for benefits. Iowa Code § 96.19(38). Total unemployment is when someone has received no wages and performed no services during any given week. *Id.* In this case, the claimant did not perform any services or earn any wages for the two weeks ending August 18, 2018. He shall be considered to be totally unemployed for those two weeks.

The next question is whether he is partially unemployed. In order to be partially unemployed, an individual must be laid off from full-time employment or working less than his or her regular full-time work week. *Id.* If an individual is employed in a part-time position working the same hours and wages as contemplated at hire, he or she cannot be considered partially unemployed. Iowa Admin. Code r. 871-24.23(26). In this case, claimant worked less than his regular full-time work week during the one week ending August 4, 2018. He shall be considered to be partially unemployed for that one week.

The administrative law judge again notes that claimant only filed a weekly continued claim for benefits for the one week ending August 18, 2018. Therefore, this is currently the only week for which he can receive unemployment insurance benefits.

DECISION:

The August 27, 2018 (reference 02) unemployment insurance decision is modified in favor of claimant/appellant. Claimant was partially unemployed for the week ending August 4, and he was totally unemployed for the two weeks ending August 18. Benefits are allowed, provided he is otherwise eligible and has filed continued weekly claims.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn