

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**PASSANG TAMANG**

Claimant

**APPEAL 21A-UI-18969-DZ-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**REES ASSOCIATES INC**

Employer

**OC: 05/16/21**

**Claimant: Appellant (1R)**

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Iowa Code § 96.4(3) – Able to and Available for Work  
Iowa Admin. Code r. 871-24.23(26) – Same Hours and Wages  
Iowa Code § 96.1A(37) – Total and Partial Unemployment  
Iowa Code § 96.7(2)a(2) – Same Base Period Employment  
Iowa Code § 96.6(2) – Timely Appeal

**STATEMENT OF THE CASE:**

Passang Tamang, the claimant/appellant, filed an appeal from the July 30, 2021, (reference 01) unemployment insurance (UI) decision that denied benefits as of May 16, 2021. The parties were properly notified of the hearing. A telephone hearing was held on October 19, 2021. Mr. Tamang participated and testified. Robert Jensen testified in favor of Mr. Tamang. The employer did not register for the hearing and did not participate. The administrative law judge took official notice of the administrative record.

**ISSUES:**

Is Mr. Tamang's appeal filed on time?  
Is Mr. Tamang able to and available for work?  
Is Mr. Tamang temporarily or partially unemployed?  
If so, is the employer's account subject to charge?

**FINDINGS OF FACT:**

Having reviewed the evidence in the record, the administrative law judge finds: The Unemployment Insurance Decision was mailed to Mr. Tamang at the correct address on July 30, 2021. The decision states that it becomes final unless an appeal is postmarked or received by Iowa Workforce Development (IWD) Appeals Section by August 9, 2021.

Mr. Tamang received the decision on Friday, August 13. Mr. Tamang contacted IWD that day and was on hold until the call was disconnected. By the time the call was disconnected IWD was closed for the day. Mr. Tamang called IWD several times the next week. He was able to reach an IWD representative sometime early in the week of August 22. The representative told Mr. Tamang he should file his appeal that week. Mr. Tamang filed an appeal online on August 27, 2021. The appeal was received by Iowa Workforce Development on August 27, 2021.

The administrative law judge further finds: Mr. Tamang began working for the employer in 2018. He works as a full-time worker in the employer's warehouse. The employer did not have work for Mr. Tamang from February 2021 through April 2021 so he did not work. Mr. Tamang returned to work in May 2021 at his same pay and same hours.

The original claim date on Mr. Tamang's was initially May 16, 2021. The administrative record (DBRO screen) shows the original claim date on Mr. Tamang's claim is now April 4, 2021. IWD had not issued a decision on Mr. Tamang's eligibility for benefits from April 4, 2021 through May 15, 2021.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes Mr. Tamang's appeal was filed on time.

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) 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 of 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) If transmitted via the State Identification Data Exchange System (SIDES), maintained by the United States Department of Labor, on the date it was submitted to SIDES.

(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.

The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. *Franklin v. IDJS*, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee v. IDJS*,

276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott* 319 N.W.2d 244, 247 (Iowa 1982).

Mr. Tamang received the decision in the mail after the deadline and, therefore, could not have filed an appeal prior to the appeal deadline. The notice provision of the decision was invalid. Mr. Tamang made several calls to IWD. When he finally was able to speak to a representative, he following the representative's instruction and he filed the week he spoke to the representative. Mr. Tamang's appeal was filed on time.

The administrative law judge further concludes: Mr. Tamang is still employed in his job as of May 16, 2021.

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 96.1A, subsection 37, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, 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 § 96.1A(37) 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.

Iowa Code section 96.7(2)a(2)(a) 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.

(a) 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.

Mr. Tamang is still employed with the employer as of May 16, 2021. The employer has continuously offered Mr. Tamang the same employment as contemplated at hire as of May 16, 2021. Benefits are denied as of May 16, 2021.

**DECISION:**

Mr. Tamang's appeal was filed on time. The July 30, 2021, (reference 01) unemployment insurance decision denying benefits as of May 16, 2021 is affirmed. Mr. Tamang was still employed for the same hours and wage as contemplated at hire as of May 16, 2021. Benefits are denied as of May 16, 2021.

**REMAND:**

The issue of Mr. Tamang's availability for and ability to work from April 4, 2021, the original claim date of his claim, through May 15, 2021 is remanded (sent back) to the Benefits Bureau of Iowa Workforce Development for investigation and a decision.



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Daniel Zeno  
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October 27, 2021  
Decision Dated and Mailed

dz/kmj