

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CHRIS BREWER
Claimant

APPEAL NO. 21A-DUA-00504-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE DEVELOPMENT
DEPARTMENT**

OC: 04/05/20
Claimant: Appellant (1)

Iowa Code Section 96.6(2) – Timeliness of Appeal
PL 116-136 Section 2102 – Pandemic Unemployment Assistance

STATEMENT OF THE CASE:

The claimant filed a late appeal from the October 28, 2020 decision that denied Pandemic Unemployment Assistance (PUA) benefits, based on the deputy's conclusion that the claimant did not meet the eligibility requirements. After due notice was issued, a hearing was held on March 10, 2021. Claimant participated. Exhibits A, B and C were received into the hearing record.

The administrative law judge took official notice of Agency administrative records pertaining to the claimant's claim for benefits, including but not limited to DBRO, KCCO, KPYX, WAGE-A, NMRO, the monetary record, the application for PUA benefits, the Assessment for PUA Eligibility, the deputy's notes regarding the denial of PUA, and the administrative law judge decision in Appeal Number 20A-UI-06013-S1-T.

The administrative law judge left the hearing record open for the limited purpose of allowing the claimant the opportunity to submit a 2020 1099 MISC and commission statements. The claimant submitted commission statements, but did not submit the 1099 MISC. The commission statements were received into evidence as Exhibit D.

ISSUE:

Is the claimant eligible for PUA?

FINDINGS OF FACT:

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

The claimant established an original claim for regular benefits that was effective April 5, 2020. The applicable base period in connection with said claim consisted of the four quarters of 2019. The claimant's base period wages were as follows:

EMPLOYER	ACCT-LOC	2019/1	2019/2	2019/3	2019/4
DM SERVICES INC	xxxxxxx-000	4763	4178	4240	5024

DM Services, Inc. was the sole base period employer. The claimant worked for that employer as a part-time debt collector from 2017 until he voluntarily quit that employment effective February 20, 2020 to pursue a self-employment venture. DM Services had a policy that required former employees to be away from the employment for six months following his separation before they could return for further employment. The claimant had no subsequent insured employment.

On June 8, 2020, Iowa Workforce Development entered a reference 01 decision that disqualified the claimant for regular benefits, based on the deputy's conclusion that the claimant had voluntarily quit on February 20, 2020 without good cause attributable to the employer. The claimant appealed the reference 01 decision. On July 24, 2020, an administrative law judge entered a decision in Appeal Number 20A-UI-06013-S1-T that affirmed the disqualification. The claimant did not appeal the administrative law judge's decision and the disqualification decision became final.

In 2018, the claimant had commenced working as a self-employed real estate agent affiliated with Ruhl & Ruhl Realtors in Clinton. The work was 100 percent commission-based. The claimant paid a small monthly fee for use of the realty's office resources. The claimant has provided documentation that involves in an accepted offer to purchase real establish in January 2019. The claimant pursued the self-employment venture on a part-time basis while still employed at DM Services, Inc.

The claimant has provided Agent Commission records concerning 10 home sales in 2019 and 8 home sales in 2020. The claimant generated substantially more earnings from the self-employment during the 2020 COVID-19 pandemic year than he did in the 2019 pre-COVID-19 year. The Commission Detail documents reflect 2019 Gross Commission Income (GCI) of \$16,419.34 and \$8,638.73 in net commission. The Agency Commission record reflect 2020 GCI of \$20,289.08 and \$11,071.17 in net commission for 2020. The claimant did not have any cancelled listings due to COVID-19 and did not have any home sales fall through due to COVID-19. The claimant asserts that a couple of prospective buyers elected to defer their search for a new home due to the pandemic, but the claimant has provided no documentation to substantial the assertion. The claimant implausibly asserts that his \$8,639.00 (rounded) 2019 net commissions only amounted to an \$890.00 net profit. The claimant's Agent Commission Detail documents, and the nature of the business venture, suggest 2019 and 2020 net profits would be at or near the net earnings amounts. The claimant agreed to provide a 2019 Schedule C Profit or Loss for Business for the administrative law judge's consideration, but did not provide the requested tax document. The claimant agreed to provide a 1099 MISC tax for the administrative law judge's consideration, but did not provide the requested tax document.

The claimant's household includes the claimant, his significant other, her 11 year old and five year old children, and the couple's toddler and baby. The claimant's partner stayed home with the children from the time the COVID-19 pandemic arrived and schools closed in March 2020. The claimant's partner had worked for DM Services as a debt collector and was doing that work from home until she left the employment to avoid stress during a pregnancy. Once the schools closed to in-person classes, the 11 year old participated in full-time online learning through the end of the academic year, which ended at the end of May for beginning of June 2020. The claimant advises that he assists the 11 year old, a fourth grader, with her online curriculum. The preschool the five year old attended discontinued when the schools closed.

When the 2020-2021 school year began, the 11 year old participated in a hybrid curriculum wherein the child attended school two to three days a week and learned from home on the remaining school days. The couple initially sent the preschooler back to preschool for the day

or two per week when in-person preschool occurred, but then decided to remove the child from pre-school to reduce the risk of exposure to COVID-19. In January 2021, the 11 year old return to full-time, in-person classes.

No one in the household has contracted COVID-19. On or about September 2, 2020, the claimant notified the realty firm's human resources director that the 11 year old had potentially been exposed to COVID-19. On September 2, 2020, the realty's human resources directed notified the claimant that he would need to quarantine for 14 days unless the child was tested for COVID-19 and tested negative, in which case the claimant could return to work. On September 4, 2020, the claimant was tested for COVID-19. On September 5, 2020, the claimant received his negative test result and immediately returned to work.

On November 3, 2020, the realty's human resources director notified the claimant that he had been potentially exposed to COVID-19 on October 27, 2020 when he dined with a colleague who later tested positive for COVID-19. The human resources directed notified the claimant that he would need to quarantine and remain away from the workplace for 14 days from the date of exposure, even if he was tested for COVID-19 and tested negative. The claimant remained away from the workplace through November 10, 2020 and returned to work on November 11, 2020.

On December 31, 2020, the claimant underwent a COVID-19 test in response to a concern that he might have been exposed to the virus. On January 2, 2021, the claimant received his negative test result and immediately returned to work.

During the winter months the two middle children were sick four about a month. There is no reason to believe the children had COVID-19. At one point, the 11 year old's school sent her home from school because she had a sore throat. The school authorities required that the child remain home for 14 days before returning to school. The child was not evaluated for or tested for COVID-19. The claimant advises that his health conditions includes obesity and being a cigarette smoker, but that he has not consulted with a doctor in years.

The claimant applied for Pandemic Unemployment Assistance (PUA) on April 13, 2020, shortly after he established his original claim for benefits. The claimant providing minimal information in his PUA application. The claimant characterized himself as someone whose place of employment had closed as direct result of COVID-19, but the claimant's place of employment had not closed. The claimant stated, "I am a real estate agency and still trying to work but due to covid 19 it has put most business to a stand still." The claimant provided no other information in the application other than attaching a December 10, 2019 Agency Commission report that reflected a single home sale in December 2019, for which the claimant received \$678.64 in net commission. The claimant self-certified that he was able to work and available for work but for one of the COVID-19 based reasons set forth in section 2102 of the CARES Act. The claimant provided no other information in the application. A Workforce Development deputy investigated the claimant's circumstances and determined the claimant had begun the real estate work in April 2018, that the claimant had spent 20 hours a week working on the real estate venture prior to the COVID-19 pandemic, and that the claimant had at that time last worked in the venture on April 7, 2020. The deputy concluded that the claimant was impacted by an economic downturn, but was not off work directly due to COVID-19.

On October 28, 2020, Iowa Workforce Development mailed the October 28, 2020 Assessment for PUA Benefits decision to the claimant's Clinton, Iowa last-known address of record. The address of record is a house the claimant shares with his significant other and four children. The claimant and his significant other collect the mail from the mailbox and place it in a spot

inside the home designated for mail. The claimant does not think he received the PUA decision when it was mailed to him on October 28, 2020. However, IWD also mailed overpayment decisions to the claimant on October 27, 2020 and November 6, 2020 to which the claimant did not respond until he filed his appeal on January 5, 2021. The weight of the evidence establishes that the claimant received the PUA decision in a timely manner, but disregarded the document when it arrived. The Assessment for PUA decision denied Pandemic Unemployment Assistance (PUA), based on the deputy's conclusion that the claimant did not meet the eligibility requirements. The decision stated that the decision would become final unless an appeal was postmarked by November 8, 2020 or was received by the Appeals Section by that date. The decision also stated that if the appeal deadline fell on a Saturday, Sunday or legal holiday, the deadline would be extended to the next working day. November 8, 2020 was a Sunday and the next working day was Monday, November 9, 2020. The claimant did not file an appeal from the PUA decision by the November 9, 2020 extended deadline.

On January 5, 2021, the claimant filed an online appeal. The claimant stated in his appeal:

I'm not sure when the actual deadline is, claim date or decision date so I marked today's date. I did not receive a letter but found out that I needed to file an appeal today when I called and talked to someone at Iowa workforce development. They gave me instructions on how to appeal but I don't have the proper dates and I'm not sure how to obtain them, I'm sorry.

The claimant's late appeal on January 5, 2021 was also treated as a late appeal from the October 27, 2020, reference 02, overpayment decision and the November 6, 2020, reference 03, overpayment decision. See Appeal Numbers 21A-UI-02611-JT-T and 21A-UI-02612-JT-T.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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, subsections 10 and 11, 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 ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. *Gaskins v. Unempl. Comp. Bd. of Rev.*, 429 A.2d 138 (Pa. Comm. 1981); *Johnson v. Board of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

An appeal submitted by mail is deemed filed 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 was 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. See Iowa Administrative Code rule 871-24.35(1)(a). See also *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See Iowa Administrative Code rule 871-24.35(1)(b).

The evidence in the record establishes that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. 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). One question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert 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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence in the record establishes an untimely appeal from the October 28, 2020 Assessment for PUA Eligibility. The weight of the evidence establishes that the claimant did receive the October 28, 2020 decision in a timely manner, had a reasonable opportunity to file an appeal by the appeal deadline, but delayed filing the appeal to January 5, 2021. The claimant presented insufficient evidence to establish that he did not receive the October 28, 2020 decision in a timely manner, prior to the November 8, 2020 deadline for appeal. The decision was mailed to the claimant close in time to overpayment decisions that the claimant

also failed to respond to in a timely manner. The claimant presented no testimony from his significant other, the other person who collects the mail for the couple. The claimant provided other testimony that was less than candid, including a gross understatement of his earnings from the self-employment venture. The claimant also withheld evidence, the 2020 1099 MISC tax form. The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service. See Iowa Administrative Code rule 871-24.35(2). Because the appeal was not timely filed pursuant to Iowa Code section 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

However, in case there is a further appeal that reverses the timeliness determination, the administrative law judge offers the following analysis of the PUA eligibility issue.

Iowa Code section 96.4(4)a provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

4. a. The individual has been paid wages for insured work during the individual's base period in an amount at least one and one-quarter times the wages paid to the individual during that quarter of the individual's base period in which the individual's wages were highest; provided that the individual has been paid wages for insured work totaling at least three and five-tenths percent of the statewide average annual wage for insured work, computed for the preceding calendar year if the individual's benefit year begins on or after the first full week in July and computed for the second preceding calendar year if the individual's benefit year begins before the first full week in July, in that calendar quarter in the individual's base period in which the individual's wages were highest, and the individual has been paid wages for insured work totaling at least one-half of the amount of wages required under this paragraph in the calendar quarter of the base period in which the individual's wages were highest, in a calendar quarter in the individual's base period other than the calendar quarter in which the individual's wages were highest. The calendar quarter wage requirements shall be rounded to the nearest multiple of ten dollars.

The claimant was monetarily eligible for regular unemployment insurance benefits funded by the State of Iowa, but was disqualified for regular benefits based on the voluntary quit without good cause attributable to the employer.

Public Law 116-136, the CARES Act, at Section 2102, provides for unemployment benefit assistance to any covered individual for any weeks beginning on or after January 27, 2020 and ending on or before December 31, 2020, during which the individual is unemployed, partially unemployed, or unable to work due to COVID-19. Section 2012 provides Pandemic Unemployment Assistance PUA benefits to qualified individuals who were not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation. PL 116-136 Section 2102(a), (b) and (c), provide as follows:

SEC. 2102. PANDEMIC UNEMPLOYMENT ASSISTANCE.

(a) DEFINITIONS. — In this section:

(3) COVERED INDIVIDUAL. — The term “covered individual”—

(A) means an individual who—

(i) is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107, including an individual who has exhausted all rights to regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107; and

(ii) provides self-certification that the individual— (I) is otherwise able to work and available for work within the meaning of applicable State law, except the individual is unemployed, partially unemployed, or unable or unavailable to work because—

(aa) the individual has been diagnosed with COVID–19 or is experiencing symptoms of COVID–19 and seeking a medical diagnosis;

(bb) a member of the individual’s household has been diagnosed with COVID–19;

(cc) the individual is providing care for a family member or a member of the individual’s household who has been diagnosed with COVID–19;

(dd) a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID–19 public health emergency and such school or facility care is required for the individual to work;

(ee) the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID–19 public health emergency;

(ff) the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID–19;

(gg) the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID–19 public health emergency;

(hh) the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID–19;

(ii) the individual has to quit his or her job as a direct result of COVID–19;

(jj) the individual’s place of employment is closed as a direct result of the COVID– 19 public health emergency; or

(kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section; or

(II) is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107 and meets the requirements of subclause (I); and

(B) does not include—

(i) an individual who has the ability to telework with pay; or

(ii) an individual who is receiving paid sick leave or other paid leave benefits, regardless of whether the individual meets a qualification described in items (aa) through (kk) of subparagraph (A)(i)(I).

(b) ASSISTANCE FOR UNEMPLOYMENT AS A RESULT OF COVID– 19. —

Subject to subsection (c), the Secretary shall provide to any covered individual unemployment benefit assistance while such individual is unemployed, partially unemployed, or unable to work for the weeks of such unemployment with respect to which the individual is not entitled to any other unemployment compensation (as that term is defined in section 85(b) of title 26, United States Code) or waiting period credit.

(c) APPLICABILITY. —

(1) IN GENERAL. — Except as provided in paragraph (2), the assistance authorized under subsection (b) shall be available to a covered individual — (A) for weeks of unemployment, partial unemployment, or inability to work caused by COVID-19— (i) beginning on or after January 27, 2020; and (ii) ending on or before December 31, 2020; and (B) subject to subparagraph (A)(ii), as long as the covered individual's unemployment, partial unemployment, or inability to work caused by COVID-19 continues.

(2) LIMITATION ON DURATION OF ASSISTANCE.—The total number of weeks for which a covered individual may receive assistance under this section shall not exceed 39 weeks and such total shall include any week for which the covered individual received regular compensation or extended benefits under any Federal or State law, except that if after the date of enactment of this Act, the duration of extended benefits is extended, the 39-week period described in this paragraph shall be extended by the number of weeks that is equal to the number of weeks by which the extended benefits were extended.

The United States Department of Labor (USDOL) has provided guidance for interpreting and applying Section 2102 through a series of Unemployment Insurance Program Letters (UIPLs). Such guidance is helpful when a particular claimant does not on the surface fit neatly within one of the “covered individual” categories referenced above. Through the UIPLs referenced below, the USDOL introduced the notion of eligibility for PUA based on “significant diminution of work as a result of COVID-19” and tied this to Section 2102(a)(3)(A)(ii)(I)(kk), regarding “additional criteria established by the Secretary for unemployment assistance under this section.”

UIPL 16-20 (4/5/20), p. I-6, provides as follows:

k) The individual meets any additional criteria established by the Secretary for unemployment assistance under this section.

- The Secretary has determined that, in addition to individuals who qualify for benefits under the other criteria described above, an individual who works as an independent contractor with reportable income may also qualify for PUA benefits if he or she is unemployed, partially employed, or unable or unavailable to work because the COVID-19 public health emergency has severely limited his or her ability to continue performing his or her customary work activities, and has thereby forced the individual to suspend such activities. For example, a driver for a ridesharing service who receives an IRS Form 1099 from the ride sharing service may not be eligible for PUA benefits under the other criteria outlined above, because such an individual does not have a “place of employment,” and thus cannot claim that he or she is unable to work because his or her place of employment has closed. However, under the additional eligibility criterion established by the Secretary here, the driver may still qualify for PUA benefits if

he or she has been forced to suspend operations as a direct result of the COVID19 public health emergency, such as if an emergency state or municipal order restricting movement makes continued operations unsustainable.

UIPL 16-20, Change 1 (4/27/20), p. I-11, provides as follows:

42. Question: UIPL No. 16-20 provides an example of a driver for a ridesharing service who is forced to significantly limit his or her performance of customary work activities because of the COVID-19 public health emergency, such as if a state or municipal order restricting movement makes continued operations unsustainable, indicating that he or she may be eligible for PUA under section 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act. Does this apply to other types of independent contractors?

Answer: Yes. An independent contractor may be eligible for PUA if he or she is unemployed, partially unemployed, or unable or unavailable to work because of one of the COVID-19 related reasons listed in section 2102(a)(3)(A)(ii)(I) of the CARES Act. This includes an independent contractor who experiences a significant diminution of work as a result of COVID-19.

UIPL 16-20, Change 2 (7/21/20), p. I-4, provides as follows:

10. Question: Is a self-employed child care provider who is providing child care for fewer children as a result of the COVID-19 pandemic eligible for PUA?

Answer: If the self-employed child care provider can establish that he or she has experienced a significant diminution of his or her customary full-time services because of COVID-19, he or she may be eligible for PUA under the additional eligibility criterion established by the Secretary pursuant to Section 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act. This individual's benefit amount may be reduced because of income from continued partial employment.

If the evidence had established an timely appeal, the claimant's eligibility for PUA benefits would have been limited to the benefit week that ended September 5, 2020 and the benefit week that ended November 14, 2020, two weeks wherein the realty firm required the claimant to be away from the workplace for at least the majority of the week due to potential COVID-19 exposure. The evidence does not otherwise establish a substantial diminution of services provided by the claimant a direct result of COVID-19. Indeed the claimant generated more gross and net revenue in 2020, than in 2019. The claimant did not have primary responsibility for his partner's two eldest children. There was no need for the claimant to be home and to refrain from work due to a need to care for any of the four children, since his partner was already at home caring for the children.

DECISION:

The claimant's appeal from the October 28, 2020 Assessment for PUA Eligibility decision was untimely. The decision that denies PUA benefits remains in effect.

A handwritten signature in black ink that reads "James E. Timberland". The signature is written in a cursive, flowing style.

James E. Timberland
Administrative Law Judge

June 29, 2021
Decision Dated and Mailed

jet/kmj