

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

COLLIN M MACK
Claimant

APPEAL 22A-UI-02352-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

M2X ENERGY INCORPORATED
Employer

OC: 03/22/20
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

On January 7, 2022, Collin Mack, the claimant/appellant, appealed the March 8, 2021, (reference 02) unemployment insurance decision that denied unemployment insurance benefits as of 05/10/2020, as they were still employed in their job for the same hours and wages. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled for February 18, 2022, at 8:00AM, and the cases were consolidated. The claimant participated, along with his spouse, Jessica Mack, who was his party representative and a witness. The employer, M2X Energy Inc., participated through Viridiana Chavez, human resources manager. There were no exhibits. Judicial notice was taken of the administrative file.

ISSUES:

Is the appeal timely?
Is the claimant able to and available for work?
Is the claimant still employed at the same hours and wages?
Is the claimant totally, partially, or temporarily unemployed?
Is the employer's account subject to charge?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the undersigned finds:

To be timely, claimant's appeal needed to be filed by March 18, 2020. The appeal was filed on January 7, 2022. Claimant never received this decision. When claimant received the first overpayment decision, he submitted his appeal the same date.

Claimant works full time, with a set schedule, as an insulation installer. His first day of work was May 22, 2019, and he currently remains employed there. Neither party had much detail in their dates. Claimant was laid off work for approximately one week in March 2020 for lack of work,

recalled and when his supervisor learned he had a newborn child with a health condition, laid him off again, citing CDC protocols regarding newborns with health conditions and COVID-19. This lasted through sometime in May 2020.

The record reflects that claimant's weekly benefit amount is \$518 and weekly wages and benefits are reflected in the table below.

Benefit Week Ending Date	Amount Reported (wages)	Issue Date	Amount (benefit paid)
03/28/20	\$90.00	03/30/20	\$518.00
04/04/20		04/06/20	\$518.00
04/11/20		04/13/20	\$518.00
04/18/20		04/20/20	\$518.00
04/25/20		04/27/20	\$518.00
05/02/20		05/04/20	\$518.00
05/09/20		05/11/20	\$518.00
05/16/20		05/18/20	\$518.00
05/23/20	\$210.00	05/26/20	\$437.00
05/30/20	\$217.00	06/20/20	\$430.00
06/06/20	\$176.00	06/15/20	\$153.14
06/13/20	\$172.00	06/15/20	\$0.00

Claimant's quarterly wages reported by employer are reflected in the table below, establishing second quarter 2020 wages (March 2020) were slightly less than the fourth quarter of 2019 and third quarter 2020 wages (April and May 2020) are significantly less than fourth quarter of 2019. Claimant testified that when he returned, it was same wage rate, but for a brief period of time, fewer hours.

Quarter	2019/4	2020/1	2020/2	2020/3	2020/4	2021/1	2021/2	2021/3	2021/4
Wages	\$11,060	\$10,318	\$3,151	\$15,486	\$20,372	\$11,730	\$18,926	\$14,562	\$16,985

For the relevant timeframe, claimant was not sick, injured, hospitalized, on a trip such that he was not able to or not available for work. He missed work due to employer laying him off on two occasions, and but for that, he would have worked.

During Mr. Mack's testimony, when the undersigned was attempting to confirm testimony or clarify testimony that would become inconsistent, claimant began stating he did not understand, or words were being put in his mouth and did not want to participate further. In an effort to learn what might be hindering communication, claimant became more frustrated and refused to further continue with questioning nor to be cross examined.

REASONING AND CONCLUSIONS OF LAW:

The decision in this case rests, at least in part, on the credibility of the witnesses. 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 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.*

After assessing the credibility of the witnesses who testified during the hearing and considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds that while both the employer and the claimant himself had major inconsistencies in their testimony and both were less than credible, the claimant's version of events tend to be more credible than the employer's side and recollection of those events when held to the data reflected in the record. For example, employer's version had no record of any layoff, but could not account for the wage reports, until admitting no record meant their data did not cover this time frame.

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

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).

Claimant only received the overpayment decisions and never received the decision denying benefits, the subject of this appeal. The appellant did not receive the decision denying benefits via the United States Postal Service. The untimeliness was not the fault of claimant/appellant. Upon receipt of the overpayment decision, claimant filed an appeal the same day. A good cause reason for the delay has been established. The appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes that the claimant is able to and available to work. Claimant is still employed at the same wage rate, but not the same hours (shutdown), and as such, claimant is temporarily unemployed, but the employer's account is not subject to charge.

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.

Claimant is a fulltime employee whose employer had an approximate one week plus layoff for claimant, where claimant was not allowed to work for about more than one week but less than two in March 2020, but otherwise still employed. Claimant returned to work when recalled. He was immediately laid off again, as outlined above and not recalled until sometime in May 2020.

Iowa Code section 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 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.

Because the claimant falls under Iowa Code section 96.7(2)a(2)(a) above, benefits paid shall not be charged against the account of the employer.

DECISION:

The March 8, 2021, (reference 02) unemployment insurance decision is **REVERSED**. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. Employer shall not be liable for benefit charges.



Darrin T. Hamilton
Administrative Law Judge

March 9, 2022
Decision Dated and Mailed

dh/mh