

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARY ALLEN

Claimant

APPEAL 21A-UI-23967-AD-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 11/29/20

Claimant: Appellant (4R)

Iowa Code § 96.6(2) – Filing – Timely Appeal

Iowa Code § 96.1A(37) – Total, partial unemployment

Iowa Code § 96.4(3) – Eligibility – A&A – Able to, available for, work search

STATEMENT OF THE CASE:

On October 27, 2021, Mary Allen (claimant/appellant) filed an appeal from the decision dated January 27, 2021 (reference 01) that denied unemployment insurance benefits as of November 29, 2020 based on a finding that claimant was still employed for the same hours and wages as in the contract of hire.

A telephone hearing was held on December 20, 2021. The parties were properly notified of the hearing. Claimant participated personally. Swift Pork Company (employer/respondent) did not participate. Official notice was taken of the administrative record.

ISSUE(S):

- I. Is the appeal timely?
- II. Is the claimant totally, partially, or temporarily unemployed?
- III. Is the claimant able to and available for work?

FINDINGS OF FACT:

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

Claimant began working for employer on June 7, 2017. Claimant was held out of work for a majority of the work-week ending December 5, 2020. Employer had honored claimant's restrictions related to a workplace injury during the first two days that week but then held her out of work the rest of the week. Claimant was able to perform the work she was doing and employer returned her to that same work the following week and continuing thereafter. Claimant was available for work had she not been held out.

Claimant was again held out of work from September 16, 2021 until the week ending October 16, 2021. She was held out during this time due to her age and vaccination status. Claimant did not request to be off work and was able and available for work had she not been held out. She had

not previously been warned that she would be removed from work based on her age and vaccination status. Claimant was complying with employer's requirements related to testing, masking, and social distancing. She was allowed to return to work for a couple days in the week ending October 16, 2021.

Claimant resigned a couple days after returning to work. Claimant has been able to and available for work and searching for work since then. The issue of claimant's separation from employment has not yet been the subject of a fact-finding interview and determination.

Claimant filed a claim for benefits from the week ending December 5, 2020 through the week ending December 19, 2020 and again from the benefit week ending October 2, 2021 through the benefit week ending October 30, 2021. Claimant reported earning wages in the amount of \$257.00 in the week ending December 5, 2020 and \$274.00 in the week ending October 16, 2021. She reported earning wages in excess of her weekly benefit amount plus \$15.00 in the weeks ending December 12 and 19, 2020. Claimant's weekly benefit amount plus \$15.00 is \$508.00. She reported earning no wages in the other weeks filed.

The Unemployment Insurance Decision was mailed to claimant at the above address on January 27, 2021. That was claimant's correct address at that time. Claimant did not appeal at that time due to misinformation from the Department. Specifically, she called into the Department after receiving the decision and was advised to "not worry about it." Claimant appealed after receiving a subsequent decision finding she was overpaid benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal was timely. The decision dated January 27, 2021 (reference 01) that denied unemployment insurance benefits as of November 29, 2020 based on a finding that claimant was still employed for the same hours and wages as in the contract of hire is MODIFIED in favor of appellant. She is eligible for benefits as set forth below.

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 record in this case shows the delay in appealing was due to agency misinformation. Claimant filed the appeal shortly after it became clear there was an issue due to her receipt of an overpayment decision. This is a good cause reason for delay and the administrative law judge therefore concludes the appeal is timely. Because the appeal is timely, 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 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.

The administrative law judge finds claimant was partially unemployed and eligible for benefits in the weeks ending December 5, 2020 and October 16, 2021. This is because in those weeks she was still employed in her regular job, was working less than the full-time week, and earned less than her weekly benefit amount plus \$15.00.

The administrative law judge finds claimant was not totally, partially, or temporarily unemployed and therefore ineligible for benefits in the weeks ending December 12 and 19, 2020. This is because claimant was employed and working full-time in those weeks.

The administrative law judge finds claimant was totally unemployed and eligible for benefits in the weeks ending October 2, 9, 23, and 30, 2021. In the weeks ending October 2 and 9, 2021, this is because employer was holding claimant out of work in those weeks and claimant was able and available for work.

The administrative law judge finds claimant's age and vaccination status did not render her unable or unavailable for work in those weeks. Importantly, there is no evidence that employer had informed claimant that her vaccination status would result in her being held out of work. Absent any such warning or clear statement of expectation from employer to claimant regarding her vaccination status, it is difficult to find that claimant rendered herself unable to or unavailable for work by declining vaccination. Furthermore, the evidence indicates claimant was following employer's policies related to masking, testing, and social distancing. Under the circumstances the administrative law judge finds employer caused the unemployment during this period rather than the period of unemployment being caused by claimant being unable to or unavailable for work.

Claimant was totally unemployed and eligible for benefits in the weeks ending October 23 and 30, 2021, as she was separated from employment and was able to and available for work and searching for work.

The issue of claimant's separation from employer has not yet been the subject of a fact-finding interview and determination. This matter is REMANDED to the Department for a fact-finding interview and determination on that issue.

DECISION:

The administrative law judge concludes the claimant's appeal was timely. The decision dated January 27, 2021 (reference 01) that denied unemployment insurance benefits as of November 29, 2020 based on a finding that claimant was still employed for the same hours and wages as in the contract of hire is MODIFIED in favor of appellant. She is eligible for benefits as set forth above.

REMAND:

The separation issue is remanded to the Benefits Bureau of Iowa Workforce Development for a fact-finding interview and unemployment insurance decision.



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

January 24, 2022
Decision Dated and Mailed

abd/abd

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>.