

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**SHERRY D JEFFERSON**  
Claimant

**BERTCH CABINET MFG INC**  
Employer

**APPEAL 16A-UI-06954-JCT**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/22/16**  
**Claimant: Appellant (2)**

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Iowa Code § 96.6(2) – Timeliness of Appeal  
Iowa Code § 96.4(3) – Ability to and Availability for Work  
Iowa Admin. Code r. 871-24.22(1) – Able to Work - illness, injury or pregnancy  
Iowa Admin. Code r. 871-24.23(35) – Availability Disqualifications

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the June 7, 2016, (reference 02) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on July 12, 2016. The claimant participated personally. Gordon Jefferson, husband of the claimant, attended the hearing. Maxine Matlock, friend of the claimant and former employee for the employer testified. The employer participated through Mitzi Tann, human resources director. Shane Sawyer also testified for the employer. Claimant exhibits A and B, and Employer exhibits one through six were admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Is the appeal timely?  
Is the claimant able to and available for work?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The unemployment insurance decision was mailed to the appellant's address of record on June 7, 2016. Upon reviewing the decision, which stated "if you believe the disqualification can be removed, you should contact your local workforce development center", the claimant contacted the IWD customer service line for guidance on June 9, 2016. The claimant stated she read the decision to the IWD representative who advised the claimant to send her doctor's note to Deputy 46, and that the representative would then reverse the decision. The IWD representative did not advise her that she must file an appeal within 10 days. On June 10, 2016, the claimant submitted her doctor's note to Deputy 46 via fax (Claimant exhibit A). The claimant did not hear back and called IWD to inquire on June 22, 2016, nearly two weeks after submitting her doctor's note and receiving no updated decision. At that time, she was informed she needed to file her appeal.

The claimant was last employed for the employer in its production facility. The claimant last performed work November 12, 2015 and was discharged by the employer on May 12, 2016 when she had exhausted a leave of absence for personal reasons, and had not been released to work without restrictions. At the time of the claimant's separation, she furnished the employer a doctor's note (Claimant exhibit B-2) which indicated that due to her left shoulder's condition, she had work restrictions that prohibited any repetitive motion, lifting over her head, and no lifting over 20 lbs. Based on the nature of the production business, repetitive motion was unavoidable. The claimant's restrictions remain (Claimant exhibit B-1) and she does not anticipate the restriction prohibiting repetitive motion will be removed in the near future. Consequently, the claimant is searching for jobs primarily in the administrative and customer service fields, and has prior experience. She is also studying to obtain her commercial driver's license (CDL) and hopes to work as a driver in the future, which would be within her restrictions. The claimant has no other restrictions to her employment.

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

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.

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. *State v. Holtz*, 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. *State v. Holtz*, Id.

Based on the evidence presented, the administrative law judge concludes the claimant's failure to file an appeal within the appeal period was solely because of incorrect information received from an IWD customer service advisor. Based on the misinformation she received, the claimant immediately notified Deputy 46 upon receiving the June 7, 2016 decision and followed the directives of the IWD representative. On June 22, she followed up with IWD and found out about the misinformation, which she then immediately appealed. This delay was prompted by and perpetuated by the agency. See, Iowa Admin. Code r. 871-24.35(2). Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work effective May 22, 2016.

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 Admin. Code r. 871-24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Since the employment ended on May 12, 2016 the, claimant is no longer obligated to return to employer upon her medical release to offer her services. At that point, her ability to work is not measured by the job she held most recently, but by standards of her education, training, and work history. Since she has performed customer service/administrative jobs within the work history, she is considered able to work even if she cannot yet return to a job as most recently performed for the employer. Thus the claimant is considered as able to work as of May 22, 2016.

**DECISION:**

The June 7, 2016, (reference 02) unemployment insurance decision is reversed. The appeal is timely. The claimant is able to work and available for work effective May 22, 2016. Benefits are allowed, provided she is otherwise eligible.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

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