

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

KHAING A TUN
Claimant

APPEAL NO. 20A-UI-08164-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 04/12/20
Claimant: Appellant (1)

Iowa Code Section 95.4(3) – Able & Available
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Khaing Tun filed a late appeal from the June 18, 2020, reference 01, decision that denied benefits for the period beginning April 12, 2020, based on the deputy's conclusion that Mr. Tun requested and was approved for a leave of absence, was voluntarily unemployed, and was not available for work. After due notice was issued, a hearing was held on August 24, 2020. Mr. Tun participated. The employer did not provide a telephone number for the appeal hearing and did not participate. Burmese-English interpreter Phyo Tun of CTS Language Link assisted with the appeal hearing. Exhibit A, Mr. Tun's appeal letter, was received into evidence. The administrative law judge took official notice of the following Agency administrative records: the June 18, 2020, reference 01, decision, KCCO, DBRO, and WAGE-A.

ISSUES:

Whether the appeal was timely. Whether there is good cause to treat the appeal as timely.
Whether Mr. Tun was able to work and available for work during the period of April 12, 2020 through July 18, 2020.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On June 18, 2020, Iowa Workforce Development mailed the June 18, 2020, reference 01, decision to claimant Khaing Tun at his last-known address of record. Mr. Tun received the decision on June 19, 2020. The decision denied benefits for the period beginning April 12, 2020, based on the deputy's conclusion that Mr. Tun requested and was approved for a leave of absence, was voluntarily unemployed, and was not available for work. The decision stated that an appeal from the decision must be postmarked by June 28, 2020 or be 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 appeal deadline would be extended to the next working day. June 28, 2020 was a Sunday and the next working day was Monday, June 29, 2020. Mr. Tun did not file an appeal by the June 29, 2020 extended appeal deadline. Mr. Tun is an immigrant from Myanmar/Burma. Mr. Tun does not read or speak English. Mr. Tun's spouse has very limited English Language skills. Based on the language barrier, Mr. Tun was incapable of

understanding the June 18, 2020, reference 01, decision without further assistance. Mr. Tun sought assistance in understanding the decision and on July 11, 2020 spoke with a representative of Ethnic Minorities of Burma Advocacy and Resource Center (EMBARC). On July 11, 2020, Amanda Ndemo, a non-attorney representative affiliated with EMBARC filed an online appeal on Mr. Tun's behalf.

Mr. Tun established an original claim for benefits that was effective April 12, 2020. Iowa Workforce Development set his weekly benefit amount for regular benefits at \$518.00. Mr. Tun made weekly claims for the 14 consecutive weeks between April 12, 2020 and July 18, 2020. For each of the weeks between April 12, 2020 and June 13, 2020, Mr. Tun reported that he had zero wages and received \$518.00 in regular benefits and \$600.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits. For the week that ended June 20, 2020, Mr. Tun reported zero wages and received zero benefits. For each of the four weeks between June 21, 2020 and July 18, 2020, Mr. Tun reported wages that exceeded his weekly benefit amount by more than \$15.00 and received no benefits. Mr. Tun then discontinued his claim for benefits. JBS/Swift is the sole base period employer in connection with the claim.

During the first week of April 2020, Mr. Tun became ill. Mr. Tun was evaluated by a doctor on April 4, 2020. The doctor advised Mr. Tun to remain off work in the short-term and to return for further tests if he still felt sick. Mr. Tun did not return to the doctor. The illness in question was not COVID-19. On April 6, Mr. Tun notified the employer that he had seen the doctor and was of the doctor's instructions. The employer's human resources representative told Mr. Tun that he was approved to take one day off and that he would have to call in daily absences if he needed to miss additional work. The weight of evidence indicates that Mr. Tun was not ill during the period of April 12, 2020 through July 18, 2020.

Mr. Tun returned to his full-time employment on June 18, 2020 in response to notice from the employer that he had to return to work no later than June 19, 2020. Between April 6, 2020 and June 17, 2020, Mr. Tun had continued to call in daily absences. Mr. Tun did not return to work any earlier because his wife was pregnant and he was concerned about being exposed to COVID-19 and passing the illness to his wife.

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). The 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).

The evidence in the record provides good cause to treat Mr. Tun's late appeal as a timely appeal. Mr. Tun received the decision in a timely manner, but was unable to comprehend the decision due to the language barrier. Mr. Tun was unable to access assistance in understanding the decision until July 11, 2020. On that same day, an EMBARC representative filed an appeal on Mr. Tun's behalf. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the division after considering the circumstances in the case. See Iowa Administrative Code rule 871-24.35(2)(c). Under the circumstances, the administrative law judge concludes that Mr. Tun did not unreasonably delay in filing the appeal. The administrative law judge concludes he has jurisdiction to consider the merits of the appeal.

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. 871-24.22(2) 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.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Admin. Code r. 871-24.23(10), (23) and (29) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

...

(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

...

(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

In connection with the Covid-19 pandemic and passage of the Public Law 116-136, the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), Iowa Workforce Development published on its website a list of Covid-19-related scenarios under which a

claimant would be eligible for unemployment insurance benefits. The scenarios create limited and temporary exceptions to the able and available requirements set forth at Iowa Code section 96.4(3). Mr. Tun's circumstances do not fall within in any of the COVID-19 related scenarios. See <https://www.iowaworkforcedevelopment.gov/COVID-19>, updated March 30, 2020.

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

The evidence establishes that Mr. Tun was not available for work within the meaning of the law between April 12, 2020 and July 18, 2020. Between April 12, 2020 and July 17, 2020, Mr. Tun was not ill and was able to perform work, but elected not to report for work with his regular employer out of concern that he might be exposed to COVID-19. During the period of June 18, 2020 through July 18, 2020, Mr. Tun was back at his full-time time, was not unemployed and therefore did not meet the "availability" requirement to be eligible for benefits. Mr. Tun is not eligible for benefits for the period of April 12, 2020 through July 18, 2020. The employer's account will not be charged for any benefits paid to Mr. Tun for that period.

This matter will be remanded to the Benefits Bureau for entry of overpayment decisions regarding the regular and FPUC benefits paid to Mr. Tun for the period of April 12, 2020 through June 13, 2020.

DECISION:

The June 18, 2020, reference 01, decision is affirmed. There is good cause deemed that claimant's late appeal is a timely appeal. The claimant was not available for work within the meaning of the law during the period of April 12, 2020 through July 18, 2020 and is not eligible for benefits for that period.

This matter is remanded to the Benefits Bureau for entry of overpayment decisions regarding the regular and FPUC benefits paid to the claimant for the period of April 12, 2020 through June 13, 2020.

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision, you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. *If this decision becomes final or if you are not eligible for Pandemic Unemployment Assistance (PUA), you will have an overpayment of benefits that you will be required to repay.* Individuals who do not qualify for regular unemployment insurance benefits, but who are currently 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 under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.

A handwritten signature in cursive script that reads "James E. Timberland". The signature is written in dark ink on a light-colored background.

James E. Timberland
Administrative Law Judge

August 27, 2020
Decision Dated and Mailed

jet/sam