

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ERNEST HARMS

Claimant

APPEAL 21A-UI-15790-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACCESS INCORPORATED

Employer

OC: 04/05/20

Claimant: Appellant (1R)

Iowa Code § 96.6(2) – Timeliness of Appeal

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

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

Iowa Code § 96.7(2)A(2) – Charges – Same base period employment

Iowa Admin. Code r. 871-24.23(26) – Eligibility – A&A – Part-time same hours, wages

Iowa Code § 96.4(3) – Ability to and Availability for Work

Iowa Admin. Code r. 871-24.22 – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant, Ernest Harms, filed an appeal from the July 10, 2020, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion he was not able to and available for work effective April 5, 2020. After due notice was issued, a telephone conference hearing was scheduled to be held on September 8, 2021. This hearing was heard jointly with 21A-UI-15791-SN-T and 21A-UI-15792-SN-T. The claimant participated. The claimant's wife, Theresa Harms, provided testimony in support of the claimant. The employer participated through Human Resources Director Mary Knutson. Exhibit D-1 and D-1 were received into the record.

ISSUES:

Whether the claimant's appeal is timely?

Whether the claimant was partially unemployed?

Whether the claimant was able and available for work?

Is the employer subject to charge?

FINDINGS OF FACT:

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

The claimant began working for the employer, Access Incorporated, as a full-time transit bus driver on March 31, 2010. He last worked on April 4, 2020. His salary at the time was \$13.42. Prior to April 4, 2020, the claimant worked a set schedule from 8:00 a.m. to 5:00 p.m. Monday through Friday.

The claimant made a claim effective April 5, 2020. His weekly benefit amount is \$320.00.

On April 4, 2020, the claimant was laid off because the employer did not need to run his routes anymore due to the Covid19 pandemic. However, the employer paid him his normal ways while he was away.

For the week ending April 11, 2020, the employer paid the claimant \$423.68.

For the week ending April 18 2020, the employer paid the claimant \$529.60.

For the week ending April 25 2020, the employer paid the claimant \$529.60.

For the week ending May 2 2020, the employer paid the claimant \$529.60.

For the week ending May 9 2020, the employer paid the claimant \$529.60.

For the week ending May 16 2020, the employer paid the claimant \$529.60.

For the week ending May 23 2020, the employer paid the claimant \$529.60.

For the week ending May 30, 2020, the employer paid the claimant \$423.68.

For the week ending June 6, 2020, the employer paid the claimant \$529.60.

For the week ending June 13, 2020, the employer paid the claimant \$529.60.

For the week ending June 20, 2020, the employer paid the claimant \$529.60.

For the week ending June 27, 2020, the employer paid the claimant \$529.60.

For the week ending July 4, 2020, the employer paid the claimant \$423.68.

The administrative record shows the claimant did not report any of this income he received from his employer when he made his weekly claims. He testified he was not aware he was supposed to report income from his employer when making his weekly claims.

In July 2020, the claimant became ill. He requested a leave of absence under the Family Medical Leave Act and never returned to work because he is unable to work.

A disqualification decision was mailed to claimant's last known address of record on July 10, 2020. The claimant did receive the decision within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by July 20, 2021. (Exhibit D-1) The appeal was not filed until July 14, 2021, which is after the date noticed on the disqualification decision. (Exhibit D-2)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant's appeal is not timely. Assuming arguendo his appeal is timely, the claimant is not eligible for benefits because he was either not unemployed or was not able and available for work.

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 issuing the notice of the filing of the claim to protest payment of benefits to the claimant. All interested parties shall select a format as specified by the department to receive such notifications. 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 issued, 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 calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the 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).

The record in this case shows 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 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.*

The administrative law judge does not believe the claimant and Ms. Harm's allegation that he never received the decision. During the hearing, the claimant said a number of times he could not be sure when the decision was received. Ms. Harms then testified they never received the underlying decision. After this point in the hearing, the claimant, at times, stated they never received the underlying decision. At other times, the claimant excused the delay in his filing an appeal on him being in the hospital at the time. He explained that his wife does not open any legal correspondence that has his name on it. The claimant and Ms. Harms have not provided credible testimony that the delay in filing the appeal was due to Iowa Workforce Development or the US Postal Service, which is their burden. The record shows that the appellant did have a reasonable opportunity to file a timely appeal. The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

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 pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 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).

Assuming arguendo the his appeal in this case is timely, the claimant is ineligible for benefits because he was either receiving full wages or was on a leave of absence.

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(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.

Iowa Admin. Code r. 871-24.22(2) provides:

Benefit 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(1)(10) and (35) provide:

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

(1) An individual who is ill and presently not able to perform work due to illness.

(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.

(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

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.

To be partially unemployed for any given week, claimant must work less than 40 hours per week (claimant's regular full-time schedule) and earn less than \$335.00 (claimant's weekly benefit plus \$15.00). Because claimant has earned more than his weekly benefit amount plus \$15.00 each week since April 4, 2020, claimant has not been partially unemployed. Benefits are denied.

An individual claiming benefits has the burden of proof that he is be able to work, available for work, and earnestly and actively seeking work. Iowa Admin. Code r. 871-24.22.

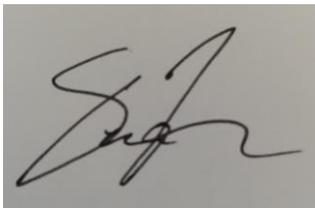
For weeks occurring after July 4, 2020, the claimant is disqualified from receiving benefits because he was ill, restricted from returning to work and on a leave of absence and is disqualified under Accordingly, he is not eligible for unemployment insurance benefits.

DECISION:

The July 10, 2020, (reference 01) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect. The claimant was not able to work and available for work effective April 5, 2020. Benefits are denied.

REMAND:

The administrative law judge is remanding to the Benefits Integrity Bureau an initial investigation regarding the issue of the claimant reporting zero for the entire claim period despite receiving his full salary.



Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

September 16, 2021
Decision Dated and Mailed

smn/mh