

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LUIS PANDURO
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL 18A-UI-08281-NM

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/01/18
Claimant: Appellant (2)

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(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 10, 2018, (reference 03) unemployment insurance decision that denied benefits based upon based on his inability to work following an injury. The parties were properly notified about the hearing. An in-person hearing was held in Des Moines, Iowa, on August 29, 2018. Claimant participated and was represented by attorney Marlon Mormann. Employer did not participate. Claimant's Exhibits A through C and Department's Exhibits D-1 were received into evidence.

ISSUES:

Is the appeal timely?

Is the claimant able to work and available for work?

FINDINGS OF FACT:

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

Claimant began working for employer on June 13, 2016. Claimant last worked as a full-time general maintenance employee. Claimant suffered a work-related injury on October 11, 2017 and was taken off work. Claimant was separated from employment in December 2017. On March 2, 2018, claimant was released to return to work with a 35 pound lifting restriction. (Exhibit A). That restriction is still in place. Claimant has nevertheless been applying for jobs, for which he is qualified, since filing his original claim for benefits. (Exhibits B and C). Claimant did take a trip to California in mid-July 2018 to visit his mother, who was sick, but otherwise has been able to and available for work within his restrictions. Claimant could not recall the exact dates of his trip at the time of the hearing, but has not filed a claim for benefits since the week ending July 7, 2018.

An unemployment insurance decision denying benefits was mailed to the claimant's last known address of record on July 10, 2018. Claimant was not sure when he received the decision, but noted he was out of town for approximately 12 days in the month of July visiting his mother in California. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by July 20, 2018. Claimant's primary language is Spanish, though he is able to speak and understand spoken English. Claimant finds written English difficult to understand and comprehend. Immediately upon receiving the letter claimant spoke with his attorney, who advised him to file an appeal. Claimant filed his appeal the next day, August 3, 2018.

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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 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. Bd. 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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

Claimant was out of town attending to a sick family member at the time the letter was initially sent. Claimant received the letter the evening he return to Iowa, but his lack of proficiency in English created a language barrier, which hindered his ability to file his appeal by the prescribed deadline. Claimant immediately contacted his attorney who explained what he needed to do. His inability to personally understand the fact finding decision affected his ability to timely appeal the adverse decision through no fault of his own. Due process principles apply in the context of appeal hearings for persons seeking unemployment benefits. *Silva v. Employment Appeal Board*, 547 N.W.2d 232 (Iowa App. 1996). Two of the benchmarks of due process are adequate notice and meaningful opportunity to be heard. The claimant was not afforded due process rights. While the claimant was literally provided the decision, he could not timely comply with the appeal instructions, as he required additional time to fully understand the decision, along with his corresponding appeal rights and instructions. Once claimant was able to seek and receive assistance in understanding the decision and his appeal rights, he immediately filed an appeal. Accordingly, the claimant's appeal is accepted as timely.

The next issue to be decided is whether claimant is able to and available for work. For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work effective April 1, 2018.

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. 871-24.23(35) provides:

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

(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.

To be able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723. The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

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The medical condition was work-related and the treating physician has released the claimant to return to work, with a 35 pound lifting restriction, effective March 2, 2018. Since the employment ended in December 2017, claimant is no longer obligated to return to employer to offer his services. At that point, his ability to work is not measured by the job he held most recently, but by standards of his education, training, and work history. Claimant has provided sufficient evidence that he is applying for jobs within his qualifications that will also honor his lifting restrictions. Therefore, he is considered able to work even if he cannot yet return to a job

as most recently performed for the employer. Thus the claimant is considered as able to work as of April 1, 2018.

Claimant is on notice that he must continue to conduct at least two work searches per week and file weekly claims in order to retain eligibility for benefits.

DECISION:

The July 10, 2018, (reference 03) unemployment insurance decision is reversed. The appeal is timely. The claimant is able to work and available for work effective April 1, 2018. Benefits are allowed, provided he is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs