

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

JACOB H FERCH

Claimant

APPEAL NO. 15A-UI-09015-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DEWAYNE FERCH

F & H ALUMINUM INC

Employer

OC: 07/12/15

Claimant: Respondent (4/R)

Iowa Code Section 96.4(3) – Able & Available

Iowa Code Section 96.19(38)(b) & (c) Partial Unemployment and Temporary Unemployment

Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer filed an appeal from the July 27, 2015, reference 01, decision that allowed benefits to the claimant effective July 12, 2015, provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant was able and available for work, but partially unemployed. After due notice was issued, a hearing was held on August 31, 2015. Claimant, Jacob Ferch, did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. DeWayne Ferch represented the employer. Exhibits One, Two, and Three and Department Exhibit D-1 were received into evidence. The administrative law judge took official notice of the Agency's administrative record of the claimant's weekly claims (KCCO) and the benefits disbursed to the claimant (DBRO).

ISSUES:

Whether the appeal was timely. Whether there is good cause to treat the appeal as timely.

Whether the claimant was partially unemployed or temporarily unemployed during the four-week period of July 12, 2015, through August 8, 2015, when his claim for benefits was active.

Whether the employer's account may be charged for benefits paid to the claimant.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer manufactures aluminum castings. The employer hired claimant Jacob Ferch in July 2014 to work full time. Jacob Ferch's primary duties involved operating a squeeze mold, but the employer had the claimant help with other duties such as grinding. When Jacob Ferch performed the squeeze molding duties, the employer paid him per piece, but when the claimant performed other duties, the employer paid him \$12.00 per hour. The employer had full-time work for the claimant through June 29, 2015, but then work slowed.

The claimant established a claim for benefits in response to the work slowdown and decrease in work the employer had available. The claim for benefits was effective July 12, 2015. During the benefit week of July 12-18, 2015, the employer only had 15 hours and 40 minutes of work for the claimant, for which the employer paid gross wages of \$220.40 to the claimant. The work was performed on Tuesday, July 14 and Wednesday, July 15. During the benefit week of July 19-25, 2015, the employer only had 15 hours and 22 minutes of work for the claimant, for which the employer paid the claimant \$184.40 in gross wages. The work was performed on Wednesday, July 22 and Thursday, July 23. On July 23, 2015, the claimant provided the employer with two-week' notice of his intention to quit the employment. The quit was to be effective August 11, 2015. During the benefit week of July 26 through August 1, the employer did not have any work for the claimant. During the benefit week of August 2-8, 2015, the employer had work for the claimant, but was unsuccessful in recalling the claimant to perform the work the employer had for him on August 4, 5 and 6, Tuesday through Thursday. On Monday, August 3, the employer sent a couple text messages to the claimant, indicating that the employer had work for the next day at the regular start time. The employer did not hear back from the claimant or have further contact with the claimant.

When the claimant established his claim for benefits, Workforce Development calculated his weekly benefit amount to be \$249.00. For the week ending July 18, 2015, the claimant underreported his gross wages as \$90.00 and received \$221.00 in benefits. For the week ending July 25, 2015, the claimant underreported his gross wages as \$96.00 and received \$215.00 in benefits. For the week ending August 1, 2015, the claimant correctly reported zero weekly wages and received \$249.00 in benefits. For the week ending August 8, 2015, the claimant reported zero wages despite the employer's messages to him on August 3, 2015 indicating that the employer had work for the claimant.

On July 27, 2015, Iowa Workforce Development mailed a copy of the July 27, 2015, reference 01, decision to the employer's address of record. The decision allowed benefits to the claimant effective July 12, 2015, provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant was able and available for work, but partially unemployed. The employer received the decision in a timely manner, prior to the deadline for appeal. The decision warned that an appeal from the decision must be postmarked by August 6, 2015 or received by the Appeals Section by that date. On August 4, 2015, the employer, DeWayne Ferch, telephoned the number provided on the decision and spoke to a Workforce Development representative. The employer was interested in knowing whether the claimant had claimed benefits for the week that ended August 8, 2015. The Workforce Representative told the employer that the Agency would not know whether the claimant made a claim for that week until the following week. The employer expressed concern that the appeal deadline was August 6, 2015. The Agency representative suggested that the employer call back the next week to see whether the claimant made a claim for the week ending August 8, 2015. On Tuesday, August 11, 2015, the employer faxed its appeal the Appeals Section and the Appeals Section received the appeal.

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 § 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-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 871 AC 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 871 IAC 24.35(1)(b).

The employer's appeal was filed on August 11, 2015, when the Appeals Section received the faxed appeal. 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 record shows that the appellant did have a reasonable opportunity to file a timely appeal. The weight of the evidence indicates that the Workforce Development representative contributed to the appeal being filed late by suggesting to the employer, after the employer explicitly referenced the August 6, 2015 appeal deadline, that the

employer contact the Agency the following week to see whether the claimant filed benefits for the week that ended August 8, 2015. Given the Agency's hand in the appeal being filed late, the administrative law judge concludes there is good cause to deem the employer's late appeal timely. See 871 IAC 24.35(2). The administrative law judge had authority to rule on 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 § 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

An individual shall be deemed *partially unemployed* in any week in which, 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. Iowa Code section 96.19(38)(b). 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. Iowa Code section 96.19(38)(c).

Iowa Admin. Code r. 871-24.23(41) provides:

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

(41) The claimant became temporarily unemployed, but was not available for work with the employer that temporarily laid the claimant off. The evidence must establish that the claimant had a choice to work, and that the willingness to work would have led to actual employment in suitable work during the weeks the employer temporarily suspended operations.

This rule is intended to implement Public Law 96-499, Iowa Code section 96.4(3), 96.5(1), 96.6(1), 96.19(38)"c" and 96.29.

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

Employer contributions and reimbursements.

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.
2. Contribution rates based on benefit experience.

a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.

(2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

(a) However, if the 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. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

[Emphasis added.]

The evidence in the record establishes that the claimant was able and available for work, but partially unemployed, during the weeks that ended July 18, 2015 and July 25, 2015. The claimant is eligible for benefits for those weeks, provided he meets all other eligibility requirements. However, this matter will be remanded to the Benefits Bureau for redetermination of the appropriate partial benefit amounts for those weeks based on the actual gross wages of \$220.40 for the week ending July 18, 2015 and \$184.40 for the week ending July 25, 2015. The evidence in the record establishes that the claimant was able and available for work, but temporarily unemployed during the week that ended, August 1, 2015. The claimant is eligible for benefits for that week, provided he meets all eligibility requirements. The evidence establishes that the employer had work available for the claimant during the week that ended August 8, 2015, but that the claimant was not available for that work. Accordingly, the claimant is not eligible for benefits for the week that ended August 8, 2015. The employer's account may be charged for benefits paid to the claim for the three-week period of July 12, 2015 through August 1, 2015. The employer's account will not be charged for benefits paid to the claimant for the week that ended August 8, 2015.

In addition to remanding this matter for redetermination of benefits for the weeks that ended July 18 and July 25, 2015, the Benefits Bureau should also upon remand enter an appropriate overpayment decision regarding those weeks and the week that ended August 8, 2015.

DECISION:

The July 27, 2015, reference 01, decision is modified as follows. The is good cause to deem the employer's late appeal timely. The claimant was able and available for work, but partially unemployed, during the weeks that ended July 18 and July 25, 2015. The claimant is eligible for benefits for those weeks, provided he was otherwise eligible. The claimant was able and available for work, but temporarily unemployed, during the week that ended August 1, 2015. The claimant is eligible for benefits for that week, provided he meets all other eligibility requirements. The claimant was not available for work within the meaning of the law during the week that ended August 8, 2015 and is not eligible for benefits for that week.

This matter is remanded to the Benefits Bureau for redetermination of benefits for the weeks that ended July 18 and July 25, 2015, and for entry of an appropriate overpayment decision regarding those weeks and the week that ended August 8, 2015.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css