

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JASNA COVIC
Claimant

APPEAL NO. 07A-UI-06131-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARGILL MEAT SOLUTIONS CORP
Employer

OC: 05/06/07 R: 03
Claimant: Appellant (2)

Section 96.6-2 – Timeliness of Appeal
Section 96.4-3 – Able to and Available for Work

STATEMENT OF THE CASE:

Jasna Covic (claimant) appealed a representative's June 4, 2007 decision (reference 01) that concluded the claimant was not eligible to receive unemployment insurance benefits because she was not able to work as of April 27, 2007. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 19, 2007. The claimant participated in the hearing with her attorney, Phillip Miller. Melissa Skinner and Heather Hendrickson appeared on behalf of Cargill Meat Solutions Corporation (employer.) Zijo Sucasca translated the hearing. During the hearing, Claimant Exhibits A through D and Employer Exhibit One were offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Did the claimant file a timely appeal or establish a legal excuse for filing a late appeal?

Is the claimant able to and available for work as of April 27, 2007?

FINDINGS OF FACT:

Since June 2004, the claimant has been working for Cargill Meat Solutions (employer). The claimant received a work-related injury. After recovering from shoulder surgery, on April 10, 2007, the claimant completed a functional capacity evaluation. (Claimant Exhibit D.) On April 10, 2007, the claimant's treating physician assigned the claimant the following permanent restrictions: 33 percent of the time the claimant can perform two-handed lifts up to 30 pounds - floor to waist; one-handed (right hand) lifts up to 17 (pounds – floor to waist; two-handed lifts up to 72 pounds up to shoulder and 15 pounds overhead; right hand lift 12 pounds up to shoulder and 8 pounds overhead. (Claimant Exhibit A.) The claimant's treating physician also gave the claimant an impairment rating of five percent of the whole person because she had reached maximal medical improvement.

On April 27, 2007, when the claimant asked to return to work with her work restrictions, she toured the plant with the employer. The jobs the claimant indicated she was interested in doing either were not open or the employer determined were not within her permanent work restrictions. The employer did not have any work available for the claimant to do based on her permanent work restrictions. Since the employer did not have any job opening that met the claimant's work restrictions, the employer put the claimant on an 18-month walk through list. (Employer Exhibit One.)

The claimant established a claim for unemployment insurance benefits during the week of May 6, 2007. Since the claimant established her claim, she has filed some weekly claims and has been looking for work. The claimant has cooking experience and has applied at pizza restaurants and as a dishwasher or kitchen helper. The claimant has also applied for stocking jobs at Wal-Mart, K-Mart, Dollar Store and Menards. The claimant has also applied to work in the flower department at Wal-Mart. The claimant wants to continue her employment with the employer and called the employer about job openings until the employer told her to stop.

After the claimant established her claim for unemployment insurance benefits, the claimant and her attorney participated in a fact-finding interview through an interpreter. Miller asked the claims representative to send him a copy of the decision because the claimant does not read English.

On June 4, 2007, a representative's decision was mailed to the claimant and employer, but not Miller. The June 4 decision held the claimant was not eligible to receive unemployment insurance benefits as of April 27, 2007, because her work restrictions made her unable to work. The claimant contacted Miller on June 18 and told him she had just received the decision. Miller understood the decision held the claimant ineligible to receive benefits. He told the claimant to immediately go to her local Workforce office and file an appeal in this matter. The claimant followed Miller's instructions and filed an appeal on June 18 at her local Workforce Center.

REASONING AND CONCLUSIONS OF LAW:

Unless the claimant or other interested party, after notification or within ten calendar days after a representative's decision is mailed to the parties' last-known address, files an appeal from the decision, the decision is final. Benefits shall then be paid or denied in accordance with the representative's decision. Iowa Code § 96.6-2. Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983).

The Iowa Supreme Court has ruled that appeals from unemployment insurance decisions must be filed within the time limit set by statute and the administrative law judge has no authority to review a decision if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979); Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979). In this case, the claimant's appeal was filed after the June 14, 2007, deadline for appealing expired.

The next question is whether the claimant had a reasonable opportunity to file 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 establishes the claimant did not have a reasonable opportunity to file a timely appeal. The claimant testified she did not receive the decision until June 18. More importantly, the claimant, a person who does not read or speak English, had her attorney present at the fact-finding interview. Miller requested that the decision be mailed to him, but it was not. Under these facts, the claimant's failure to file a timely appeal was due to any Agency error, which under 871 IAC 24.35(2) excuses the delay in filing an appeal. Even

though the claimant's appeal was not timely, she established a legal excuse for filing a late appeal. Therefore, the Appeals Section has legal jurisdiction to address the merits of the claimant's appeal.

Each week a claimant files a claim for benefits, she must be able to and available for work. Iowa Code § 96.4-3. The claimant filed claims for the weeks ending May 12 through June 2, 2007. Even though the employer does not have work for the claimant with her permanent work restrictions, the claimant established she is looking for full-time work that she is capable of doing with her work restrictions. The claimant established that she is able to and available for work. The claimant is eligible to receive unemployment insurance benefits as of May 6, 2007.

DECISION:

The representative's June 4, 2007 decision (reference 01) is reversed. Even though the claimant did not file a timely appeal, she established a legal excuse for filing a late appeal. Therefore, the Appeals Section has jurisdiction to address the merits of her appeal. Even though the employer does not have work available for the claimant with her permanent work restrictions, she established she is able to and available for work in which she has experience. Therefore, the claimant is eligible to receive unemployment insurance benefits as of May 6, 2007, provided she meets all other eligibility requirements.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css