

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JONATHAN W FUNCKE
Claimant

30 YARD LINE LLC
Employer

APPEAL 20A-UI-13344-AD-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/28/20
Claimant: Appellant (4R)

Iowa Code section 96.4(3) – Eligibility – Able to and Available for Work
Iowa Code § 96.6(2) – Filing – Timely Appeal
Iowa Admin. Code r. 871-24.35 – Filing

STATEMENT OF THE CASE:

On October 26, 2020, Jonathan Funcke (claimant/appellant) filed an appeal from the October 7, 2020 (reference 01) unemployment insurance decision that denied benefits as of June 28, 2020 based on a finding he was still employed for the same hours and wages as in the contract of hire and was therefore not partially unemployed.

A telephone hearing was held on December 18, 2020. The parties were properly notified of the hearing. Claimant participated personally. 30 Yard Line LLC (employer/respondent) participated by co-owner Jeni Ross. Owner Tracey Beger participated as a witness for employer.

Official notice was taken of the administrative record.

ISSUE(S):

- I. Is the appeal timely?
- II. Is the claimant totally, partially, or temporarily unemployed?
- III. Is the claimant still employed at the same hours and wages?
- IV. Is the claimant able to and available for work?
- V. Is the employer's account subject to charge?

FINDINGS OF FACT:

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

Claimant began working for employer in early January 2020. Claimant was hired as a part-time cook. Claimant's schedule varied in this position, although he typically worked around 30 hours

per week. There was no guarantee of certain hours. The last day claimant worked was July 13, 2020. Claimant resigned at that time because he did not feel he was getting enough hours to justify his travel to and from work.

Claimant was laid off on March 16, 2020, due to lack of work. Specifically, the restaurant largely closed due to the pandemic. Claimant was called back to work on June 7, 2020. Claimant worked approximately 28 hours the first week back; approximately 54 hours the following two weeks, from June 14 through 26, 2020; and approximately 23 hours during the two weeks from June 30 through July 11, 2020. In these last two weeks, claimant's hours decreased in part because of a lack of work and in part because of attendance issues. Claimant was earning the same hourly wage when he was called back to work.

Claimant has been able to and available for work since the date of separation. He has been performing work searches as required. The issue of claimant's separation from employment has not been the subject of a fact-finding decision.

Claimant did not receive the decision denying benefits. Claimant was therefore unaware of the denial until he contacted the Department and learned of the denial. He filed the appeal online shortly thereafter.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the claimant's appeal was timely. For the reasons that follow, the October 7, 2020 (reference 01) unemployment insurance decision that denied benefits as of June 28, 2020 based on a finding claimant was still employed for the same hours and wages as in the contract of hire and was therefore not partially unemployed is MODIFIED in favor of appellant.

Iowa Code § 96.6(2) provides, in pertinent part: "[u]nless 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."

Iowa Admin. Code r. 871-24.35(1)(a) provides:

1. Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:
 - (a) If transmitted via the United States Postal Service on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark on the envelope in which it is 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.
 - (b)
 - (c) If transmitted by any means other than [United States Postal Service or the State Identification Data Exchange System (SIDES)], on the date it is received by the division.

Iowa Admin. Code r. 871-24.35(2) provides:

2. The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the

division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.

There is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and the Administrative Law Judge has no authority to change the decision of representative if a timely appeal is not filed. *Franklin v. Iowa Dept. Job Service*, 277 N.W.2d 877, 881 (Iowa 1979). The ten-day period for appealing an initial determination concerning a claim for benefits has been described as jurisdictional. *Messina v. Iowa Dept. of Job Service*, 341 N.W.2d 52, 55 (Iowa 1983); *Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373 (Iowa 1979). The only basis for changing the ten-day period would be where notice to the appealing party was constitutionally invalid. *E.g. Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373, 377 (Iowa 1979). The question in such cases becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Employment Sec. Commission*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Employment Sec. Commission*, 212 N.W.2d 471 (Iowa 1973). The question of whether the Claimant has been denied a reasonable opportunity to assert an appeal is also informed by rule 871-24.35(2) which states that "the submission of any ...appeal...not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service."

The record in this case shows that claimant never received the decision. Therefore, the appeal notice provisions were invalid. Claimant did not have a reasonable opportunity to file a timely appeal. Claimant filed his appeal shortly after he learned of the decision denying benefits. Claimant's appeal is therefore timely, and the administrative law judge has jurisdiction to address the underlying issues.

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 Code section 96.19(38) 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.

Iowa Admin. Code r. 871-24.23(26) provides:

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

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

The administrative law judge finds claimant was not totally, partially, or temporarily unemployed from June 28, 2020 and continuing until the date of separation, July 13, 2020. This is because claimant was still employed part-time as he had been during the base period. While there was some fluctuation in hours, this was part of the nature of the position and was due in part to claimant's attendance issues.

The administrative law judge further finds claimant was totally unemployed and able to and available for work from the date of separation. He has been performing work searches as required. Claimant is therefore eligible for benefits from that date.


However, the issue of claimant's separation from employment has not been the subject of a fact-finding decision. That issue must be resolved to determine whether claimant's separation from employment was disqualifying.

DECISION:

The administrative law judge finds the claimant's appeal was timely. For the reasons set forth above, the October 7, 2020 (reference 01) unemployment insurance decision that denied benefits as of June 28, 2020 based on a finding claimant was still employed for the same hours and wages as in the contract of hire and was therefore not partially unemployed is MODIFIED in favor of appellant. Claimant is not totally, partially or temporarily employed from June 28, 2020 and continuing until July 13, 2020. Claimant was totally unemployed and able to and available for work from that date.

REMAND:

The separation issue is remanded to the Benefits Bureau of Iowa Workforce Development for a fact-finding interview and unemployment insurance decision.



Andrew B. Duffelmeyer
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 478-3528

January 4, 2021
Decision Dated and Mailed

abd/scn

Note to Claimant:

If you disagree with this decision, you may file an appeal with the Employment Appeal Board by following the instructions on the first page of this decision. If this decision denies benefits, you may be responsible for paying back benefits already received.

Individuals who are disqualified from or are otherwise ineligible 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.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.