

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**BEVERLY GIBSON**  
Claimant

**HY-VEE INC**  
Employer

**APPEAL 21A-UI-03878-AD-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 02/02/20**  
**Claimant: Appellant (4)**

Iowa Code § 96.19(38) – 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 Code § 96.6(2) – Filing – Timely Appeal  
Iowa Admin. Code r. 871-24.35 – Filing

**STATEMENT OF THE CASE:**

On January 26, 2021, Beverly Gibson (claimant/appellant) filed an appeal from the February 21, 2020 (reference 01) unemployment insurance decision that denied benefits as of February 2, 2020 based on a finding claimant was still employed for the same hours and wages and so not partially unemployed.

A telephone hearing was held on March 19, 2021. The parties were properly notified of the hearing. Claimant participated personally. Residential support supervisor Josie Krause and program manager Erik Gregersen participated as witnesses for claimant. Hy-Vee Inc (employer/respondent) did not register a number for the hearing and did not participate.

Claimant's exhibit 1 was admitted. Official notice was taken of the administrative record.

**ISSUE(S):**

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

## **FINDINGS OF FACT:**

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

Claimant began working for employer in September 2019. Claimant was employed as a part-time clerk. There was no guarantee of hours in this position, although she normally worked between 15 and 20 hours per week. Claimant last performed work for employer on June 28, 2020. On that date claimant suffered a stroke. Claimant was not able or available for work after that date.

Claimant also worked for another employer during this time, working approximately five hours per week. Claimant was employed full-time for another employer until August 2019, when the employment there ended. Claimant wished to work full-time and continued to search for full-time work. However, she was only able to find employment totaling approximately 20 hours per week.

Claimant filed a claim for benefits each week from the benefit week ending March 21, 2020 and continuing through the benefit week ending July 18, 2020. Claimant reported the wages earned each week. Her weekly benefit amount is \$388.00 she did not report earning wages in excess of her weekly benefit amount plus \$15.00 in any week filed.

The Unemployment Insurance Decision was mailed to claimant's correct address. Claimant does not specifically recall when she received the decision. Claimant received numerous seemingly contradictory decisions around the same time. She also continued to receive benefits after this time. As a result, she did not appeal until she received an overpayment decision in January 2021. It was not clear to claimant until that time that she had been denied benefits. Claimant appealed shortly after receiving that decision.

## **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant's appeal was timely. The February 21, 2020 (reference 01) unemployment insurance decision that denied benefits as of February 2, 2020 based on a finding claimant was still employed for the same hours and wages and so not partially unemployed is MODIFIED in favor of appellant. Benefits are allowed as set forth below.

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 Unemployment Insurance Decision was mailed to claimant's correct address. Claimant does not specifically recall when she received the decision. Claimant received numerous seemingly contradictory decisions around the same time. She also continued to receive benefits after this time. As a result, she did not appeal until she received an overpayment decision in January 2021. It was not clear to claimant until that time that she had been denied benefits. Claimant appealed shortly after receiving that decision.

The administrative law judge finds the delay in appealing was due to department error or misinformation. Specifically, claimant's continued receipt of benefits after receiving seemingly contradictory decisions led her to reasonably believe there was no need to appeal. She did appeal shortly after learning she had been denied benefits. The administrative law judge therefore finds the appeal is timely and he 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 Code section 96.7(2)a(2) provides:

2. Contribution rates based on benefit experience.

a. (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.

The administrative law judge finds claimant was partially unemployed from the benefit week ending March 21, 2020 through the benefit week ending June 27, 2020. This is because claimant was working less than the full-time hours she worked in the base period and was earning less than her weekly benefit amount plus \$15.00 in each of those weeks. Because claimant was receiving the same employment from each of her employers, they are not subject to charge.

Claimant is not eligible for benefits from the benefit week ending July 4, 2020, as she was not able to and available for work from that time.

**DECISION:**

The administrative law judge concludes the claimant's appeal was timely. The February 21, 2020 (reference 01) unemployment insurance decision that denied benefits as of February 2, 2020 based on a finding claimant was still employed for the same hours and wages and so not partially unemployed is MODIFIED in favor of appellant. Benefits are allowed as set forth above.



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

March 25, 2021  
Decision Dated and Mailed

abd/lj

**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 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>.