

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

VIET NGUYEN
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL 21R-UI-23092-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/19/20
Claimant: Appellant (1)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22 – Able & Available - Benefits Eligibility Conditions
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant, Viet Nguyen, filed an appeal from the January 26, 2021, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion he was not able to and available for work for the week ending April 19, 2020. After due notice was issued, a telephone conference hearing was scheduled to be held on July 14, 2021. Administrative Law Judge Dawn Boucher issued a default decision, 21A-UI-11660-DB-T, because the claimant did not register a phone number for the hearing.

The claimant appealed 21A-UI-11660-DB-T. The Employment Appeal Bureau issued a remand decision, 21B-UI-11660, in response to the claimant's appeal. After due notice was issued, a telephone conference hearing was scheduled to be held on December 9, 2021. The claimant is deceased and was represented in the hearing by his wife, Ha Doung. The claimant provided copies of the claimant's certificate of death and certificate of marriage. These documents were received into the record as Exhibit A. The hearing was conducted with the assistance of a Vietnamese interpreter.

ISSUES:

Whether the claimant's appeal was timely? Whether the claimant's appeal has reasonable grounds to be considered otherwise timely?

Was the claimant able to work, available for work, and actively and earnestly seeking work the week ending April 19, 2020?

FINDINGS OF FACT:

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

The claimant started working for the employer as a full-time sausage maker in August 2009. His rate of pay was \$17.20 per hour. The claimant last worked in February 2020 he requested and was granted a leave of absence. He requested a leave of absence because he had high blood pressure and kidney problems that put him at greater risk of injury or death from a Covid19

infection. He was concerned that the employer had quite a few outbreaks occur in the wake of the Covid19 pandemic. After requesting the leave of absence, the claimant and Ha Doung moved to Des Moines. The claimant was looking for jobs when he passed away in

A disqualification decision was mailed to claimant's last known address of record on January 26, 2021. The claimant did receive the decision within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 5, 2021. (Exhibit D-1) The appeal was not filed until May 3, 2021, which is after the date noticed on the disqualification decision. (Exhibit D-2)

Ms. Doung could not say if when they received the underlying decision. Ms. Doung explained that she and the claimant do not speak English. However, when they spoke with Iowa Workforce Development on May 3, 2021, they were assisted in filing an appeal by the representative and a Vietnamese interpreter.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge finds the Ms. Doung's appeal is untimely. He further concludes that assuming *arguendo* the claimant's appeal is timely, the claimant was not able and available for work effective April 19, 2020.

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 issuing the notice of the filing of the claim to protest payment of benefits to the claimant. All interested parties shall select a format as specified by the department to receive such notifications. 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 section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 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 section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 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 issued, 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 section 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. Board 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. 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).

While the administrative law judge is sympathetic to the claimant and Ms. Doung needing language assistance, it is impossible for him to determine this delayed the claimant's appeal for a reasonable amount of time without knowing when he received the decision. Furthermore, Ms. Doung undermined the impact of language assistance by essentially testifying that it was really only a matter of contacting Iowa Workforce Development by phone. The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

Assuming *arguendo* the Ms. Doung's appeal is timely, the administrative law judge concludes that the claimant was not able to work and available for work effective April 19, 2020.

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 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, 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. 871-24.22(2) provides:

Benefit 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.

(2) *Available for work.* The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

j. *Leave of absence.* A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

Iowa Admin. Code r. 871-24.23 provides:

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

(1) An individual who is ill and presently not able to perform work due to illness.

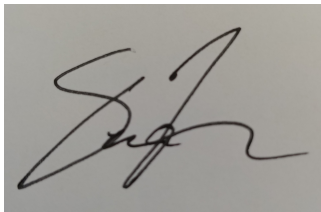
(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

An individual claiming benefits has the burden of proof that he was able to work, available for work, and earnestly and actively seeking work. Iowa Admin. Code r. 871-24.22.

The claimant was on a leave of absence and never returned. Accordingly, he is not eligible for unemployment insurance benefits effective April 19, 2020, according to Iowa Admin. Code r. 871-24.23 (10).

DECISION:

The January 26, 2021, (reference 01) unemployment insurance decision is affirmed. The claimant's appeal is not timely. Assuming arguendo it is timely, the claimant was not able to work and available for work effective April 19, 2020. Benefits are denied.



Sean M. Nelson
Administrative Law Judge
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January 19, 2022
Decision Dated and Mailed

smn/kmj