

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

TIANNA SUMMAGE
Claimant

MARKETLINK INC
Employer

APPEAL NO: 20A-UI-06010-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/05/20
Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Tianna Summage filed a late appeal from the May 28, 2020, reference 05, decision that denied benefits effective April 5, 2020, based on the deputy's conclusion that the claimant could not be deemed partially unemployed within the meaning of the law. After due notice was issued, a hearing was held on July 16, 2020. Ms. Summage participated. The employer did not provide a telephone number for the hearing and did not participate. Exhibit A was received into evidence. The administrative law judge took official notice of the May 28, 2020, reference 05, decision and the following additional Agency administrative records: KCCO, DBRO, KPYX and WAGE-A.

ISSUES:

Whether the claimant's appeal was timely.
Whether the claimant has been able to work and available for work since April 5, 2020.
Whether the claimant has been partially unemployed since April 5, 2020.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tianna Summage established an original claim for benefits that was effective January 1, 2020. At that time, Iowa Workforce Development set her weekly benefit amount at \$116.00. The present matter concerns Ms. Summage's benefit eligibility for the period beginning April 5, 2020, which was effective the date of the second additional claim. By the time of the July 16, 2020 appeal hearing, Ms. Summage had made consecutive weekly claims for the period between February 2, 2020 through the benefit week that ended July 11, 2020.

In February 2020, Ms. Summage commenced full-time employment with MarketLink, Inc., where she worked as a sales agent. Ms. Summage's usual work days at MarketLink were Tuesday through Saturday. Her shifts at MarketLink were noon to 8:00 p.m., 11:00 a.m. to 8:00 p.m., and 8:00 a.m. to 5:00 p.m. Ms. Summage estimates her MarketLink wage to have been \$12.00 per hour. At the time Ms. Summage filed the additional claim for benefits that was effective April 5, 2020, she reported to Iowa Workforce Development that she had last performed work for MarketLink on March 23, 2020. At the time of the July 16, 2020 appeal hearing,

Ms. Summage advised that she continued to perform work for MarketLink through May 23, 2020. Ms. Summage reported wages for each week between April 5, 2020 and May 23, 2020 when she made her weekly claims for those weeks. In mid-June 2020, when Ms. Summage made her weekly claim for April 5, 2020 and May 23, 2020, she guessed her weekly wages based on the net amounts she thought were deposited in her bank account. Ms. Summage advises that the amounts she reported may not be an accurate report of her wages. Ms. Summage's weekly claim reports for the period of February 3, 2020 through July 15, 2020 were as follows:

WEEK	WK	AB	RF	ER	IN	PROCESSED				
ENDING	ST	AV	OF	CT	PR	WAGES	VACAT	HLDY	P	DATE
07/11/20	N	Y	N	0	N	0	0	0	N	07/15/20
07/04/20	N	Y	N	0	N	0	0	0	N	07/15/20
06/27/20	N	Y	N	0	N	0	0	0	N	07/15/20
06/20/20	N	Y	N	0	N	0	0	0	N	07/15/20
06/13/20	N	Y	N	0	N	0	0	0	N	06/18/20
06/06/20	N	Y	N	0	N	0	0	0	N	06/11/20
05/30/20	N	Y	N	0	N	0	0	0	N	06/11/20
05/23/20	S	Y	N	0	N	65	0	0	N	06/11/20
05/16/20	S	Y	N	0	N	65	0	0	N	06/11/20
05/09/20	S	Y	N	0	N	150	0	0	N	06/11/20
05/02/20	S	Y	N	0	N	180	0	0	N	06/11/20
04/25/20	S	Y	N	0	N	150	0	0	N	06/11/20
04/18/20	S	Y	N	0	N	60	0	0	N	06/11/20
04/11/20	S	Y	N	0	N	65	0	0	N	06/11/20
04/04/20	S	Y	N	0	N	150	0	0	N	06/18/20
03/28/20	S	Y	N	0	N	150	0	0	N	06/18/20
03/21/20	S	Y	N	0	N	105	0	0	N	06/18/20
03/14/20	S	Y	N	0	N	300	0	0	N	06/18/20
03/07/20	S	Y	N	0	N	300	0	0	N	06/18/20
02/29/20	N	Y	N	5	N	0	0	0	N	03/03/20
02/22/20	N	Y	N	5	N	0	0	0	N	02/23/20
02/15/20	N	Y	N	5	N	0	0	0	N	02/18/20
02/08/20	N	Y	N	5	N	0	0	0	N	02/13/20

Ms. Summage has received no unemployment insurance benefits since the week that ended February 22, 2020.

Ms. Summage advises that MarketLink closed the workplace to prevent community spread of COVID-19 and commenced having her work from home. Ms. Summage advises that the workplace closure preceded the April 5, 2020 additional claim for benefits. Ms. Summage decided that her roommates were too loud to allow her to perform her MarketLink duties from home and voluntarily reduced her available work hours. Ms. Summage later separated from MarketLink on or about May 20, 2020.

At the beginning of May 2020, Ms. Summage's daycare provider for her three-year-old child closed for two days so the provider could clean and sanitize its facility. The daycare reopened after the two-day closure, but Ms. Summage elected not to send her child back to the daycare. Ms. Summage elected instead to keep that child at home with her.

On May 28, 2020, Iowa Workforce Development mailed the May 28, 2020, reference 05, decision to Ms. Summage at her last-known address of record. The May 28, 2020,

reference 05, decision denied benefits effective April 5, 2020, based on the deputy's conclusion that Ms. Summage could not be deemed partially unemployed within the meaning of the law. The decision stated that an appeal from the decision must be postmarked by June 7, 2020 or be received by the Appeals Bureau by that date. The decision also stated that if the appeal deadline fell on a Saturday, Sunday or legal holiday, the appeal deadline would be extended to the next working day. June 7, 2020 was a Sunday and the next working day was Monday, June 8, 2020.

Ms. Summage had provided a Des Moines address when she established the original claim in January 2020. Until June 11, 2020, Ms. Summage had not provided Iowa Workforce Development with a different mailing address. Ms. Summage moved to Urbandale at the end of April 2020. At the time of the July 16, 2020 appeal hearing, Ms. Summage asserted that she had received no correspondence from Iowa Workforce Development other than the hearing notice the Appeals Bureau mailed to her Des Moines address of record on June 25, 2020 to let her know of the appeal hearing set for July 16, 2020. Ms. Summage advises that she learned of a May 27, 2020 fact-finding interview when she reviewed her phone messages on June 10, 2020 after her phone had been out of service for a few weeks. On June 10, Ms. Summage listened to the voicemail message the Benefits Bureau deputy left for her on May 27, 2020. Ms. Summage provided the Appeals Bureau with an Urbandale address when she filed her online appeal on June 11, 2020. In that same appeal, Ms. Summage indicated she had received the May 28, 2020 decision on May 27, 2020, which would not be possible.

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 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 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 section 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 Iowa Administrative Code rule 871-24.35(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 Iowa Administrative Code rule 871-24.35(1)(b).

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). One question in this case is whether Ms. Summage 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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact reflect that Ms. Summage is an unreliable witness. She writes in her June 11, 2020 late appeal that she received the May 28, 2020, reference 05, decision on May 27, 2020, one day before the decision was mailed. She moved at the end of April 2020, but did not update her mailing address with Iowa Workforce Development until June 11, 2020. She asserts, implausibly, that she has not received *any* correspondence from Iowa Workforce Development other than the June 25, 2020 hearing note that she somehow managed to receive in a timely manner. She missed a May 27, 2020 fact-finding interview telephone call because her phone was without service for a few weeks, including two weeks following the fact-finding interview. She readily concedes that she made up the weekly wages she certified as accurate when she made belated weekly claims for March, April and May 2020.

The weight of the evidence establishes an untimely appeal. A reasonable person would conclude that Ms. Summage's reference in the June 11, 2020 online appeal to receipt of the May 28, 2020, reference 05, decision on May 27, 2020 is acknowledgment of receipt of the decision close in time to the May 28, 2020 mailing date. Based on that evidence, the administrative law judge concludes that Ms. Summage had a reasonable opportunity to file a timely appeal by the extended June 8, 2020 deadline, but failed to do so. The weight of the evidence indicates the late filing of the appeal was attributable to Ms. Summage, and not attributable either to IWD or the United States Postal Service. Accordingly, there is not good cause to treat the late appeal as a timely appeal. See Iowa Administrative Code rule 871-24.35(2). The appeal was not timely filed pursuant to Iowa Code section 96.6(2), and the administrative law judge lacks jurisdiction to disturb the May 28, 2020, reference 05 decision that denied benefits beginning April 5, 2020. See *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

Even if the appeal had been timely, the weight of the evidence would indicate that Ms. Summage has not been available for work within the meaning of the law, and has not been partially unemployed within the meaning of the law since she established the additional claim for benefits that was effective April 5, 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 96.19, 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 Admin. Code r. 871-24.22(2) 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.

(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.

Iowa Admin. Code r. 871-24.23(8), (16) and (29) provides:

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

...

(8) Where availability for work is unduly limited because of not having made adequate arrangements for child care.

...

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

...

(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

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).

Iowa Code section 96.3(3) provides:

Partial unemployment. An individual who is partially unemployed in any week as defined in section 96.19, subsection 38, paragraph "b", and who meets the conditions of eligibility for benefits shall be paid with respect to that week an amount equal to the individual's weekly benefit amount less that part of wages payable to the individual with respect to that week in excess of one-fourth of the individual's weekly benefit amount. The benefits shall be rounded to the lower multiple of one dollar.

Ms. Summage has not been available for work within the meaning of the law, and has not been partially unemployed within the meaning of the law since she established the additional claim for benefits that was effective April 5, 2020. Ms. Summage voluntarily made herself unavailable for full-time work with the employer and voluntarily made herself unavailable for work as part of her decision not to send her three-year-old to daycare. In addition, the wages Ms. Summage guessed in June 2020 as her wages for the weeks that ended April 25, May 2, and May 9, 2020 exceeded her weekly benefit amount plus \$15.00.

DECISION:

The claimant's appeal was untimely. The May 28, 2020, reference 05, decision that denied benefits effective April 5, 2020, based on the deputy's conclusion that the claimant could not be deemed partially unemployed within the meaning of the law, remains in effect.

In the event the timeliness determination is overturned as part of a further appeal, the administrative law judge adds that the claimant has not been available for work and has not been partially unemployed within the meaning of the law since she established the additional claim for benefits that was effective April 5, 2020.

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision, you may file an appeal to the Employment

Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits due to disqualifying separations, 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 under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.



James E. Timberland
Administrative Law Judge

August 17, 2020
Decision Dated and Mailed

jet/sam