

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JERMAINE W BLACKWELL
Claimant

APPEAL NO. 14A-UI-12709-JTT

**AMENDED
ADMINISTRATIVE LAW JUDGE
DECISION**

BUILDER'S SAND & CEMENT CO INC
Employer

**OC: 10/19/14
Claimant: Appellant (4/R)**

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.4(3) – Still Employed Same Hours and Wages
Iowa Code Section 96.7(2) – Employer Liability
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Jermaine Blackwell filed an appeal from the November 6, 2014, reference 01, decision that denied benefits effective October 19, 2014, based on an Agency conclusion that he was not partially unemployed within the meaning of the law. After due notice was issued, a hearing was held on January 26, 2015. Mr. Blackwell participated. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Exhibits A and B were received into evidence. The administrative law judge took official notice of the agency's administrative record of wages reported by or for the claimant and the claimant's weekly claims reports (DBRO) and (KCCO).

This amended decision is being entered to reflect that the employer is a base-period employer for purposes of the claim that was effective October 19, 2014.

ISSUES:

Whether there is good cause to treat the late appeal as a timely appeal. There is.

Whether the claimant has been able to work and available for work since establishing his claim for benefits.

Whether the claimant has been partially unemployed since establishing his claim for benefits.

Whether the employer's account may be assessed for benefits paid to the claimant.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On November 6, 2014 Iowa Workforce Development had mailed a copy of a November 6, 2014, reference 01, decision to Jermaine Blackwell's last-known address of record: 3410 Heatherton Drive, Apartment 5, Davenport, Iowa 52804. The decision denied benefits effective October 19, 2014, based on an Agency conclusion that Mr. Blackwell was not *partially unemployed* within

the meaning of the law. Mr. Blackwell had provided the above address to Workforce Development when he established his original claim for benefits. On November 1, 2014 Mr. Blackwell moved into a new apartment at 3356 Heatherton Drive, Davenport, Iowa 52804-1217. Mr. Blackwell took appropriate steps to have the United States Postal Service forward his mail to the new address. Mr. Blackwell also updated his address of record with Iowa Workforce Development but not in time to prevent the November 6, 2014, reference 01, decision from being mailed to his old address. Mr. Blackwell did not receive a copy of the reference 01 decision. On December 10, 2014 Mr. Blackwell went to the Davenport Workforce Development Center and learned about the decision that had denied benefits. Mr. Blackwell completed an appeal form and delivered the completed appeal form the Workforce Development Center staff. The Appeals Section received the appeal by fax on December 10, 2014.

Mr. Blackwell's employment with Builder's Sand & Cement Company, Inc. is part of the construction industry and is weather-dependent. Mr. Blackwell's hourly wage is \$15.

Mr. Blackwell established a claim for benefits that was effective October 19, 2014 at the onset of cold weather. Workforce Development calculated Mr. Blackwell's weekly benefit amount at \$280. The employer protested the October 2014 claim for benefits and asserted at that time that Mr. Black was still employed full time with the same hours and wages. Mr. Blackwell has not received any benefits in connection with the original claim that was effective October 19, 2014. At the time Mr. Blackwell filed his claim, Workforce Development coded him as a Group 3 claimant, one who is attached to a job but laid off. Mr. Blackwell did not make a weekly claim for benefits for the four-week period of October 19, 2014 through November 15, 2014.

Mr. Blackwell established an *additional claim* for benefits that was effective November 16, 2014 in response to the employer not having any work for him that week. On November 21, 2014 Workforce Development mailed a new notice of claim to the employer that indicated Mr. Blackwell had filed a claim for benefits on a prior claim. The notice indicted that the additional claim was filed as a temporary lay-off, that Mr. Blackwell was deemed job attached and that work search requirement was waived. The employer responded on November 26, 2014 that it was not protesting the additional claim. Mr. Blackwell commenced making weekly claims for benefits and reporting his weekly wages, as follows:

<u>Benefit Week End Date</u>	<u>Wages</u>	<u>Holiday Pay</u>	<u>Total</u>
11/22/14	0.00		0.00
11/29/14	349.00	120.00	469.00
12/06/14	379.00		379.00
12/13/14	345.00		345.00
12/20/14	395.00		395.00
12/27/14	246.00	120.00	366.00
01/03/15	240.00	120.00	360.00
01/10/15	0.00		0.00
01/17/15	61.00		61.00
01/24/15	63.00		63.00

Mr. Blackwell has not reported any job contacts but has remained available for work with his regular, full-time employer.

Builder's Sand & Cement Company, Inc. is a base-period employer for purposes of the claimant year that started for Mr. Blackwell on October 19, 2014.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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, subsection 10, 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 871 AC 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 871 IAC 24.35(1)(b).

Mr. Blackwell's appeal was filed on December 10, 2014; when he delivered the completed appeal form to the Davenport Workforce Development Center and when the Appeals Section received the appeal.

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). 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).

The record shows that the appellant did not have a reasonable opportunity to file a timely appeal. Mr. Blackwell did not file an appeal by the appeal deadline because he had not received the decision, did not have the appeal instructions, and was unaware of the appeal deadline. Mr. Blackwell had taken appropriate steps to update his address of record with both the Postal Service and Workforce Development. The delay in filing the appeal was attributable to United States Postal Service and/or Workforce Development. See 871 IAC 24.35(2). There is good cause to treat the late appeal as a timely appeal. The administrative law judge had jurisdiction to rule on the merits of the appeal.

Iowa Code § 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.

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 \$15. Iowa Code Section 96.19(38)(b).

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 96.19(38)(c).

Iowa Code Section 96.7(1) and (2) provides, in relevant part, as follows; employer contributions and reimbursements:

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.
2. Contribution rates based on benefit experience.
 - a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.
 - (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.

[Emphasis added.]

Mr. Blackwell is not eligible for benefits for the four-week period between October 19, 2014 and November 15, 2014. The weight of the evidence establishes that Mr. Blackwell was not partially unemployed during the four-week period of October 19, 2014 through November 15, 2014. The weight of the evidence indicates that during those weeks, Mr. Blackwell was still employed in his full-time employment under the same conditions that existed prior to the filing of the claim. A person who is working full time or near full time does not meet the work "availability" requirement because they are fully attached to a particular employment and not available for work referrals. See Iowa Admin. Code Section 871-IAC 24.23(23). The administrative law judge notes that Mr. Blackwell did not file a claim for benefits for any of those four weeks and for that reason also would not meet the "availability" requirement. See Iowa Administrative Code section 871 IAC 24.2(1)(e) & (g).

The weight of the evidence establishes that Mr. Blackwell was able to work, available for work, but temporarily laid off during the week that ended November 22, 2014. Mr. Blackwell is eligible for benefits for that week, provided he is otherwise eligible.

Mr. Blackwell was not eligible for benefits for the six-week period of November 23, 2014 through January 3, 2015. During those weeks Mr. Blackwell was able to and available for work and worked reduced hours, but his wages for the week exceeded his weekly benefit amount (\$280) by more than \$15. Holiday pay is treated as wages for unemployment insurance purposes and is deductible from benefits based on the same formula as other wages when determining whether a claimant is partially unemployed. See Iowa Admin. Code rule 871-24.13(2)(a).

The weight of the evidence indicates that Mr. Blackwell was able to and available for work but temporarily unemployed during the week that ended January 10, 2015. Mr. Blackwell is eligible for benefits for that week provided he is otherwise eligible.

The weight of the evidence indicates that Mr. Blackwell was able to and available work but partially unemployed during the weeks that ended January 17 and 24, 2014. During those weeks, his wages were well below his \$280 weekly benefit amount. Mr. Blackwell is eligible for benefits for those weeks, provided he is otherwise eligible.

Because Mr. Blackwell's claim continues and because his work situation is not constant, this matter will be remanded to the Benefits Bureau for determination of Mr. Blackwell's eligibility for benefits under the above requirements since January 25, 2015.

Because Builder's Sand & Cement Company, Inc. is a base-period employer for purposes of the claim year that started for Mr. Blackwell on October 19, 2014, that employer may be charged for benefits paid to Mr. Blackwell during of that claim year.

DECISION:

The November 6, 2014, reference 01, decision is modified as follows. The claimant did not meet the availability requirement, was not partially unemployed or temporarily unemployed during the four-week period between October 19, 2014 and November 15, 2014, and is not eligible for benefits for those weeks.

The claimant was able to and available for work, but temporarily laid off during the week that ended November 22, 2014. The claimant is eligible for benefits for that week, provided he is otherwise eligible.

During the six-week period of November 23, 2014 through January 3, 2015, the claimant was able to work and available for work and worked reduced hours, but was not partially unemployed within the meaning of the law due to his wages. The claimant is not eligible for benefits for that six-week period.

The claimant was able to and available for work, but temporarily unemployed during the week that ended January 10, 2015. The claimant is eligible for benefits for that week, provided he is otherwise eligible.

The claimant was able to and available work, but partially unemployed during the weeks that ended January 17 and 24, 2014. The claimant is eligible for benefits for those weeks, provided he is otherwise eligible.

The employer is a base-period employer for purposes of the claim year that started for the claimant on October 19, 2014. The employer's account may be charged for benefits paid to the claimant.

This matter is remanded to the Benefits Bureau for determination of the claimant's eligibility for benefits under the above requirements since January 25, 2015.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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