

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NICHOLE J RUTAN
Claimant

SYSTEMS UNLIMITED INC
Employer

APPEAL 20A-UI-14159-AD-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/29/20
Claimant: Appellant (5)

Iowa Code § 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 November 2, 2020, Nichole Rutan (claimant/appellant) filed an appeal from the October 15, 2020 (reference 01) unemployment insurance decision that denied benefits as of March 29, 2020 based on a finding claimant requested and was granted a leave of absence.

A telephone hearing was held on January 7, 2021. The parties were properly notified of the hearing. Claimant participated personally. Employer participated by HR Generalist Jared Stevens. Supported Living Supervisor Melanie Cook 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 able to and available for work?

FINDINGS OF FACT:

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

The Unemployment Insurance Decision was mailed to claimant at 1970 York St., Lot 1A, Anamosa, IA 52205 on October 15, 2020. The decision states that it becomes final unless an appeal is postmarked or received by Iowa Workforce Development Appeals Section by October 25, 2020. However, if the due date falls on a Saturday, Sunday or legal holiday, the appeal period is extended to the next working day. Claimant's address changed around this time due to her moving. She did eventually receive the decision, but not until October 31, 2020. Claimant voluntarily quit at that time.

Claimant began working for employer on December 12, 2011. The most recent date claimant performed work for employer was March 16, 2020. Claimant was employed at that time as a full-time direct support professional. Claimant separated from employment on May 1, 2020. Claimant was discharged at that time.

Employer removed claimant from work on or about March 16, 2020 for a period of two weeks due to a concern that she may have been exposed to COVID-19. Claimant then notified employer on or about March 27, 2020 that she may have been exposed by a family member and did not feel safe returning to work.

Employer contacted claimant on April 8 to see if she could return to work. After receiving no response, employer contacted claimant again on April 9 regarding when she could return to work. Claimant finally responded on April 10, indicating she was ill; believed she had broken her ribs; and could not work at that time.

Employer reached out to claimant again on April 16, 2020 to see when she may be able to return to work. There was no response, and employer attempted to contact her again on April 20. That time employer directed claimant to respond by noon on April 21. Claimant did finally respond on April 21 and indicated that she had spoken with a doctor and did not have COVID-19.

On April 23, employer again contacted claimant and requested she provide a note excusing her from work for the time missed and releasing her to return to work. Claimant responded on April 27, indicating she was setting up a doctor's appointment. On April 29, employer asked claimant if she had heard anything from her doctor yet. Claimant replied on April 30 that she was waiting for her doctor to call her.

Employer informed claimant on April 30, 2020 that if she did not provide a doctor's note by 3 p.m. on May 1 that it would assume she no longer wished to work there. Claimant did not provide a doctor's note by that time or reach out to employer to explain why she did not. She made no attempt after that time to return to work. Claimant never saw a doctor during the entire period she was out of work. She has not performed any work since March 27, 2020.

Claimant has filed a claim for benefits each week from the benefit week ending April 4, 2020 and continuing through the benefit week ending January 2, 2021.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal was timely. The October 15, 2020 (reference 01) unemployment insurance decision that denied benefits as of March 29, 2020 based on a finding claimant requested and was granted a leave of absence is MODIFIED with no change in effect. The administrative law judge finds claimant was unavailable for work from March 29, 2020 and continuing through May 1, 2020 and is therefore ineligible for benefits during that period.

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 received the decision after the due date and appealed shortly thereafter. Therefore, the appeal notice provisions were invalid. Claimant did not have a reasonable opportunity to file a timely appeal. Claimant's appeal is timely.

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".

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 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 administrative law judge did not find claimant's testimony to be credible or reliable as it related to her absence from work. Claimant's testimony that she had broken her ribs but never sought medical treatment for that injury is difficult to believe. Claimant was largely unable to explain why she did not see a doctor. Her testimony that employer told her she needed a negative COVID-19 test to return to work is not supported by the evidence. She was largely unable to explain why she made no attempt to contact employer further on or about May 1, 2020 to try to save her job. Factual findings were made accordingly.

The administrative law judge finds claimant was not available for work from the benefit week ending April 4, 2020 and continuing until the date of separation on May 1, 2020. Claimant held herself out of that work during that time. In so doing, claimant made herself unavailable for work. She is therefore ineligible for benefits during that period.

The issue of whether claimant was able to and available for work after that date need not be addressed, as claimant has been disqualified from benefits from that date. See 20A-UI-14160-AD-T.

DECISION:

The administrative law judge concludes the claimant's appeal was timely. The October 15, 2020 (reference 01) unemployment insurance decision that denied benefits as of March 29, 2020 based on a finding claimant requested and was granted a leave of absence is MODIFIED with no change in effect. The administrative law judge finds claimant was unavailable for work from March 29, 2020 and continuing through May 1, 2020 and is therefore ineligible for benefits during that period.



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

January 29, 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>.