

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANDEE DUFFY

Claimant

APPEAL 21A-UI-05337-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

PRAIRIE MEADOWS RACETRACK CASIN

Employer

OC: 03/29/20

Claimant: Appellant (1R)

Iowa Code § 96.4(3) – Ability to and Availability for Work

Iowa Admin. Code r. 871-24.22 – Able & Available - Benefits Eligibility Conditions

Iowa Admin. Code r. 871-24.23(26) – Available – Part-time Same Wages and Hours

Iowa Code § 96.19(38) – Total, Partial, and Temporary Unemployment

Iowa Code § 96.7(2)a(2) – Employer Chargeability

Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

On February 07, 2021, Andee Duffy (claimant) filed an appeal from the July 21, 2020, reference 01, unemployment insurance decision that denied benefits effective March 29, 2020, based upon the determination she was still employed in her on-call position. The agency let the claimant know that she had been approved for Pandemic Unemployment Assistance (PUA) and was not eligible to receive both. The claimant decided not to pursue the appeal at that time.

On January 29, 2021, the agency issued a decision stating the claimant had been overpaid regular unemployment insurance benefits and the claimant filed another appeal. After due notice was issued, a telephone hearing was held on April 22, 2021, and consolidated with the hearing for appeal 21A-UI-05334-SC-T. The claimant participated. Prairie Meadows Racetrack & Casino (employer) participated through Pam Anderson, Senior Generalist. The claimant's Exhibit A and the department's Exhibits D1 through D3 were admitted into the record.

ISSUES:

Is the claimant's appeal timely?

Is the claimant totally, partially, or temporarily unemployed?

Was the claimant able to and available for work effective March 29, 2020?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant began working for the employer as a Banquet Worker on December 28, 2010. The employer explained when she was hired that her hours would vary depending on when there were banquets scheduled and there would be weeks in which there would not be any work available to her. The claimant was scheduled to work when work was available.

On March 16, 2020, the employer was shut down due to the COVID-19 pandemic. The claimant was paid an average of her normal wages from March 16 through May 2. After May 2, the claimant did not receive any further pay.

The claimant filed her claim for unemployment insurance benefits effective March 29, because she is primarily a self-employed in-home daycare provider and she lost revenue as a result of being shut down. The claimant's weekly benefit amount is \$307 and all insured wages in her base period are from this employer. She did not report any wages earned or any income when filing her weekly claims. The claimant received the following wages from the employer:

Week Ending	Gross Wages
04/04/20	\$282
04/11/20	\$647
04/18/20	\$646
04/25/20	\$424
05/02/20	\$423

Whether the claimant properly reported income, while filing weekly claims, and if it affects her PUA eligibility, has not been investigated or adjudicated by the Benefits Bureau.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant's appeal is timely; however, she was not unemployed under Iowa law effective March 29, 2020. Regular unemployment insurance benefits are denied.

1. Is the claimant's appeal timely?

Iowa Code section 96.6(2) provides, in pertinent part:

Filing – determination – appeal.

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. . . . 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.

Iowa Admin. Code r. 871-24.35(2) provides:

Date of submission and extension of time for payments and notices.

(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.

- a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
- b. The division shall designate personnel who are to decide whether an extension of time shall be granted.
- c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.
- d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service, the division shall issue an appealable decision to the interested party.

The claimant filed an appeal within the allotted timeframe; however, her failure to pursue the appeal was solely because of information received from an IWD representative. While the information she was given was correct at the time, given the changing rules around the pandemic, the information had changed. This delay was prompted by and perpetuated by the agency. See, Iowa Admin. Code r. 871-24.35(2). Therefore, the appeal shall proceed even though the claimant had previously elected not to pursue it.

II. Is the claimant totally, partially, or temporarily unemployed?

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:

Definitions.

38. 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 Admin. Code r. 871-24.22 provides, in relevant part:

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.

...

(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.

...

i. On-call workers.

(1) Substitute workers (i.e., post office clerks, railroad extra board workers), who hold themselves available for one employer and who do not accept other work, are not available for work within the meaning of the law and are not eligible for benefits.

...

(3) An individual whose wage credits earned in the base period of the claim consist exclusively of wage credits by performing on-call work, such as a banquet worker, railway worker, substitute school teacher or any other individual whose work is solely on-call work during the base period, is not considered an unemployed individual within the meaning of Iowa Code section 96.19(38)"a" and "b." An individual who is willing to accept only on-call work is not considered to be available for work.

Iowa Admin. Code r. 871-24.23(26) provides:

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

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

Under Iowa Employment Security Law, an individual must be unemployed through no fault of their own to be eligible for benefits. Iowa Code §§ 96.2 and 96.19(38). Total and temporary unemployment occur when someone has received no wages and performed no services during any given week. *Id.* In order to be partially unemployed, an individual must be laid off from full-time employment or working less than his or her regular full-time work week. *Id.* If an individual is employed in a part-time position working the same hours and wages as contemplated at hire, he or she cannot be considered partially unemployed. Iowa Admin. Code r. 871-24.23(26).

A part-time worker cannot be partially unemployed; however, they can be totally unemployed in a given week, if the employer does not have hours available, because the agreement at hire is that some hours will be available. In contrast, an on-call employee accepts employment with the understanding that they will not always have hours available to them and they may be totally unemployed in any given week. Therefore, an employee who only has on-call wages in their base period cannot be unemployed through no fault of their own because they agreed to the periods of total unemployment when they accepted the job.

While the claimant is scheduled for work in advance and the employer classifies her as a regular part-time employee, the claimant is an on-call worker for purposes of eligibility for unemployment insurance benefits. She entered into employment with the understanding that she would have work only when banquets were scheduled and she may have weeks of total unemployment. As the claimant's base period consists solely of on-call wages, she is not considered unemployed under Iowa law. Benefits are denied.

DECISION:

The claimant's appeal is timely. The July 21, 2020, reference 01, unemployment insurance decision is affirmed. The claimant is an on-call worker and is not considered unemployed under Iowa law. Benefits are denied.

REMAND:

Whether the claimant properly reported income, while filing weekly claims as delineated in the findings of fact, and if it affects her PUA eligibility, is remanded to the Benefits Bureau for review and processing.

A handwritten signature in dark ink, appearing to read "Stephanie R. Callahan", with a long horizontal flourish extending to the right.

Stephanie R. Callahan
Administrative Law Judge

April 30, 2021
Decision Dated and Mailed

src/ol