

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICK J FOSTER
Claimant

APPEAL NO. 09A-UI-02954-E2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

MOEN CONCRETE INC
Employer

OC: 12/14/08
Claimant: Appellant (2)

Iowa Code § 96.4-3 – Able and Available
Iowa Code § 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant appealed the February 3, 2009, reference 01, decision that concluded the claimant was not able and available. A telephone hearing was held on March 19, 2009, pursuant to due notice. The claimant did not participate. The employer did not participate. Official notice was taken of the fact finding interview notes, protest and appeals contained in the administrative file.

ISSUES:

The issue is whether the appeal by the claimant was timely.
The issue is whether the claimant is able and available.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The decision was mailed to the claimant's address of record on February 3, 2008. The claimant did receive the decision. The decision incorrectly states the claimant has until "04-04-04" to appeal the decision. The decision did not tell the claimant to file an appeal within 10 days. He filed an appeal on February 24, 2008.

The employer had snow removal work available for the claimant. The claimant was in a half-way house and needed to have 24 hours notice before he could go to work. The employer could not give such notice. The claimant was not hired to do snow removal. The employer no longer wants the claimant to work for him and has discharged him.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The claimant did not receive proper notice of his appeal rights. The administrative law judge determines it is.

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 claimant did not have an opportunity to appeal the fact-finder's decision because the decision incorrectly included a wrong date for appeal. Without proper notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Employment Security Commission*, 212 N.W.2d 471, 472 (Iowa 1973). Therefore, the appeal shall be accepted as timely.

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".

871 IAC 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.

The administrative law judge concludes that the claimant is able and available for work. The claimant is able and available for work in the general labor market. There is no indication how long the employer expected the claimant to work, either hours or days, in January of 2009. There is not sufficient evidence to show that the recall was for suitable work.

DECISION:

The claimant's appeal is timely. The February 3, 2009, reference 01, decision is reversed. The claimant was able to work and available for work. Benefits are allowed.

James Elliott
Administrative Law Judge

Decision Dated and Mailed

jfe/pjs