

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

NAING W AUNG
Claimant

SWIFT PORK COMPANY
Employer

APPEAL NO. 20A-UI-08503-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/05/20
Claimant: Appellant (1R)

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

STATEMENT OF THE CASE:

Naing Aung filed a late appeal from the June 22 2020, reference 01, decision that denied benefits effective April 5, 2020, based on the deputy's conclusion that Mr. Aung requested and was granted a leave of absence, was voluntarily unemployed and was not available for work. After due notice was issued, a hearing was held on August 31, 2020. Mr. Aung participated. Vicky Cervantes represented the employer. Burmese-English interpreter Ngun of CTS Language Link assisted with the hearing. Exhibit A was received into evidence. The administrative law judge took official notice of the following Agency administrative records: KCCO, DBRO, KPYX, WAGE-A and the June 22, 2020, reference 01, decision.

ISSUES:

Whether there is good cause to treat Mr. Aung's late appeal as a timely appeal.
Whether Mr. Aung was able to work and available for work during the period of April 5, 2020 through May 23, 2020.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Naing Aung is employed by Swift Pork Company, also known as JBS, as a full-time, third-shift janitor at the employer's hog processing plant in Marshalltown. Mr. Aung has been with the employer for 11 years.

After Mr. Aung worked on April 13, 2020, he decided to go off work in connection with the COVID-19 pandemic. By that time, the employer had commenced taking employees' temperatures as they entered the production plant and had commenced requiring all employees to wear masks in an effort to prevent the spread of COVID-19. Due to privacy concerns, the employer did not notify employees of the identity of coworkers who tested positive for COVID-19. At the time Mr. Aung went off work, the employer had not yet implemented a number of additional steps the employer subsequently took to prevent the spread of COVID-19. At the time Mr. Aung went off work, employees were still clustering in the locker room at shift change and at other times. Mr. Aung has a newborn child at home, was concerned about catching

COVID-19 and passing it onto his family, and decided it was best to go off work for a while. The employer had relaxed attendance policies so that employees could be absent without jeopardizing their employment. Mr. Aung commenced making daily calls to the workplace to report his need to be absent for “precautionary reasons,” a term the employer used to describe absences based on an employee’s fear of contracting COVID-19. Mr. Aung continued to call in daily absences through Saturday, May 23, 2020.

Mr. Aung returned to work on Tuesday, May 26, 2020. By that time, the employer had installed partitions in the cafeteria and Plexiglas in other areas to encourage social distancing, had placed hand sanitizing stations throughout the workplace, had enhanced the sanitization regimen, and had staggered start times, lunch times and shift end times to decrease the number of employees using the cafeteria and locker rooms at the same time. The employer had also commenced issuing plastic shields to employees who came in close contact with other employees.

Mr. Aung established an original claim for benefits that was effective April 5, 2020, more than a week before he actually went off work. Iowa Workforce Development set Mr. Aung’s weekly benefit amount for regular benefits at \$500.00. Mr. Aung made weekly claims for the seven weeks between April 5, 2020 and May 23 2020 and received benefits for those weeks. Mr. Aung then discontinued his claim for benefits in connection with his May 26, 2020 return to work.

On June 22, 2020, Iowa Workforce Development mailed the June 22, 2020, reference 01, decision to Mr. Aung’s last-known address of record. The decision denied benefits effective April 5, 2020, based on the deputy’s conclusion that Mr. Aung requested and was granted a leave of absence, was voluntarily unemployed and was not available for work. The decision stated an appeal from the decision must be postmarked by July 2, 2020 or be received by the Appeal Section by that date. Mr. Aung received the decision in a timely manner within two or three days of the mailing date. Mr. Aung is an immigrant from Myanmar and an American citizen. Mr. Aung studied English as a second language for two to three years when he first arrived in the United States more than a decade ago. Mr. Aung is able to communicate in broken English, but was unable to read and understand the decision when he received it. No one in Mr. Aung’s household or in his circle of friends could read and translate the decision for Mr. Aung. Mr. Aung was aware that the employer had an employee who acted as a liaison to the Burmese community in Marshalltown and who had the ability to help Mr. Aung understand the decision, but Mr. Aung did not think it appropriate to request that person’s assistance with reading, understanding and responding to the June 22, 2020, reference 01 decision.

Within two or three days of receiving the decision, Mr. Aung contacted Ethnic Minorities of Burma Advocacy and Resource Center (EMBARC) for assistance with understanding the decision and filing an appeal from the decision. Mr. Aung took a photo of the decision and sent the photo to EMBARC. Mr. Aung subsequently had a telephonic appointment with EMBARC, but does not remember when the appointment occurred. On July 14, 2020, an EMBARC representative prepared and filed an online appeal on Mr. Aung’s behalf. The Appeals Bureau received the appeal on July 14, 2020.

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 thus becomes whether Mr. Aung 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 weight of the evidence in the record establishes an untimely appeal. Mr. Aung received the June 22, 2020 decision on or about June 24, 2020. Mr. Aung was back at work at that time. Mr. Aung elected not to utilize translation assistance that was readily available in the workplace at that point as a service to the Burmese community and elected instead to defer action on the matter until he could meet with a particular advocacy agency in Des Moines. Mr. Aung cannot say when he forwarded a copy of the decision to EMBARC or when he had his appointment with EMBARC. The weight of the evidence in the record establishes that Mr. Aung had a reasonable opportunity to file an appeal by the July 2, 2020 deadline, but chose a path that delayed the filing of his appeal until 12 days after the appeal deadline. The weight of the evidence establishes that the delay until 12 days beyond the appeal deadline was unreasonable under the circumstances. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the division after considering the circumstances in the case. Iowa Administrative Code rule 871-24.35(2)(c). Because the delay in filing the appeal was attributable to Mr. Aung, and not attributable to Iowa Workforce Development or to the United States Postal Service, there is not good cause to treat the late appeal as a timely appeal. See Iowa Administrative Code rule 871-24.35(2). Because the appeal was untimely, the administrative law judge lacks jurisdiction to rule on the able and available issue or to disturb the decision from which Mr. Aung appealed. See *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The claimant's appeal from the June 22 2020, reference 01, decision is untimely. The decision that denied benefits effective April 5, 2020, based on the deputy's conclusion that the claimant requested and was granted a leave of absence, was voluntarily unemployed and was not available for work, remains in effect. In the event this decision regarding timeliness of appeal is reversed upon further review, there is sufficient evidence in the record for entry of a decision regarding the able and available issue without need for further hearing.

This matter is remanded to the Benefits Bureau for entry of overpayment decisions regarding the regular benefits and Federal Pandemic Unemployment Compensation Benefits the claimant received for the period of April 5, 2020 through April 23, 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. *If this decision becomes final or if you are not eligible for Pandemic Unemployment Assistance (PUA), you will have an overpayment of benefits that you will be required to repay.* Individuals who do not qualify 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 under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.

A rectangular box containing a handwritten signature in cursive script that reads "James E. Timberland".

James E. Timberland
Administrative Law Judge

September 3, 2020
Decision Dated and Mailed

jet/sam