

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SALVADOR A ALMANZA**  
Claimant

**APPEAL NO. 07A-UI-00885-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OSCEOLA FOODS CORP**  
Employer

**OC: 12-03-06 R: 03  
Claimant: Appellant (1)**

Section 96.4-3 – Able and Available  
Section 96.6-2 – Timeliness of Appeal

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the January 3, 2007, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on February 8, 2007. The claimant did participate through the interpretation of Susan Jaquez. The employer did participate through Judy Callahan, Human Resources Manager. Claimant's Exhibit A was received. The hearing was reconvened on February 22, 2007 for additional testimony after an issue was added to the hearing notice and the hearing notice was resent to the parties. Due notice was given for the February 22, 2007 portion of the hearing. The claimant did participate through the interpretation of Susan Jaquez. The employer did participate through Gary Sample, Human Resources Coordinator.

**ISSUES:**

Is the claimant's appeal timely?

Is the claimant able to and available for work?

**FINDINGS OF FACT:**

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a production worker full time beginning July 31, 2006. The claimant is still employed by Osceola Foods but is on a medical leave of absence due to a non-work-related injury to his shoulders. He is currently waiting to have shoulder surgery. The claimant has work restrictions from his treating physician that include no raising or lifting with his arms. The claimant's problems with his shoulders and arms are due to a non-work-related injury. His employer is unable at this time to accommodate his work restrictions as they are due to non-work-related conditions.

The claimant is unable to read English and did not understand how to file his appeal. He faxed the appeal to the wrong number on January 5, 2007. The claimant, when he learned that the appeal had been misdirected, returned to his local office where it was discovered that his appeal

had been faxed to the wrong number. His appeal was faxed to the correct number immediately after the initial fax error was discovered.

### **REASONING AND CONCLUSIONS OF LAW:**

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

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, 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 was written in English which the claimant neither reads nor speaks. The claimant attempted to file a timely appeal but his appeal was faxed to the wrong number. Without 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). The claimant learned of his error and returned to his local office and had his appeal faxed to the correct number. The claimant was unable to file a timely appeal due to his inability to understand English. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work.

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".

871 IAC 24.22(1)a 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.

(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.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

871 IAC 24.23(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

Inasmuch as the injury was non-work-related and the treating physician has not released the claimant to return to work without work restrictions, the claimant has not established an ability to work. The employer is unable to accommodate the claimant's work restrictions at this time. The claimant indicated that he is unable to work because of his restrictions. Benefits are withheld until such time as the claimant obtains a full medical release to return to work.

**DECISION:**

The representative's decision dated January 3, 2007, reference 02, is affirmed. The claimant is not able to work and available for work effective December 3, 2006. Benefits are withheld until such time as the claimant obtains a full medical release to return to work.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

tkh/pjs