

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LEANA S CREECY
Claimant

“EXPRESS LANE INC
Employer

**APPEAL 21A-UI-23208-AD-T
ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/05/20
Claimant: Appellant (4)**

Iowa Code § 96.6(2) – Filing – Timely Appeal
Iowa Code § 96.4(3) – Able to and Available for Work

STATEMENT OF THE CASE:

On October 18, 2021, Leana Creecy (claimant/appellant) filed an appeal from the decision dated June 11, 2021 (reference 01) that denied unemployment insurance benefits as of July 5, 2020 based on a finding that claimant was unable to perform work due to injury.

A telephone hearing was held on December 10, 2021. The parties were properly notified of the hearing. Claimant participated personally. Express Lane Inc (employer/respondent) participated by President Kathy Peugh.

Official notice was taken of the administrative record.

ISSUE(S):

- I. Is the appeal timely?
- II. Is claimant able to and available for work?

FINDINGS OF FACT:

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

Claimant began working for employer in December 2011. She most recently performed work for employer on February 5, 2020. Claimant went on a medical leave beginning on that date to undergo knee surgery. Claimant could have performed light duty for employer beginning in approximately July 2020 but employer did not have light duty work available.

Shortly after that claimant underwent back surgery. Employer separated claimant on September 29, 2020. Around that time claimant began searching for secretarial work, as she still could not

stand or sit for extended periods of time. Claimant continued searching for this type of work until she stopped filing for benefits due to being approved for SSDI.

Claimant filed a claim for benefits each week from the benefit week ending July 11, 2020 through the benefit week ending April 17, 2021.

The Unemployment Insurance Decision was mailed to claimant at the above address on June 11, 2021. Claimant did not receive the decision. She was prompted to appeal when she received overpayment decisions approximately four months later.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal was timely. The decision dated June 11, 2021 (reference 01) that denied unemployment insurance benefits as of July 5, 2020 based on a finding that claimant was unable to perform work due to injury is MODIFIED in favor of appellant.

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 never received the decision. Therefore, the appeal notice provisions were invalid and claimant did not have a reasonable opportunity to file a timely appeal. Claimant filed the appeal shortly after learning of the decision denying benefits. This is a good cause reason for delay and the administrative law judge therefore concludes the appeal is timely. Because the appeal is timely, the administrative law judge has jurisdiction to address the underlying issues.

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 Admin. Code r. 871-24.22(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.

To be able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of

determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723. The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Empl't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

Employers are required to make reasonable accommodations for employees with disabilities under state and federal law. See Iowa Code section 216.6; 42 U.S.C.A. § 12112. An employee who can perform the essential functions of a job with or without a reasonable accommodation is able to work. *Sierra* at 723. Employers are not required to make reasonable accommodations for employees unable to work due to injury.

The administrative law judge finds claimant was unable to work from the benefit week ending July 11, 2020 through the benefit week ending September 26, 2020. This is because claimant was unable to perform her job due to medical procedures and recovery. Employer had no duty to accommodate claimant during this period. She is therefore ineligible for benefits during those weeks due to being unable to work.

Once employer separated claimant then her ability to work is not judged by whether she can return to her position but based on her skills and experience. Claimant was able to do light duty work, such as secretarial work, and was searching for that work beginning with the week ending October 3, 2020. Claimant continued searching for this type of work until she stopped filing for benefits due to being approved for SSDI. Claimant is therefore eligible for benefits from the benefit week ending October 3, 2020 and continuing through the benefit week ending April 17, 2021.

DECISION:

The administrative law judge concludes the claimant's appeal was timely. The decision dated June 11, 2021 (reference 01) that denied unemployment insurance benefits as of July 5, 2020 based on a finding that claimant was unable to perform work due to injury is MODIFIED in favor of appellant. She is ineligible for benefits from the benefit week ending July 11, 2020 and continuing through the benefit week ending September 26, 2020. She is eligible for benefits from the week ending October 3, 2020 and continuing through April 17, 2021.

REMAND:

The administrative law judge notes claimant did not receive benefits after January 2, 2021 but did file weekly claims after that date. This matter is remanded for release of benefits due claimant consistent with the findings and conclusions above.



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

December 27, 2021
Decision Dated and Mailed

abd/abd

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 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>.