

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

VIRGINIA KELLS
Claimant

TAHER INC
Employer

APPEAL 21R-UI-18935-AD-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/22/20
Claimant: Appellant (5)

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

STATEMENT OF THE CASE:

On March 31, 2021, Virginia Kells (claimant/appellant) filed an appeal from the March 16, 2021 (reference 01) unemployment insurance decision that denied benefits as of November 22, 2020 based on a finding she could not be contacted by the Department for a job referral and was therefore unavailable for work.

A telephone hearing was set for June 16, 2021. A default decision was issued based on claimant's failure to appear for the hearing. Claimant appealed the default decision to the Employment Appeal Board, which remanded for a new hearing.

A telephone hearing was held on October 19, 2021. The parties were properly notified of the hearing. Claimant participated personally. Taher Inc., (employer/respondent) did not register a number for the hearing or participate.

Official notice was taken of the administrative record.

ISSUE(S):

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

FINDINGS OF FACT:

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

The Unemployment Insurance Decision was mailed to claimant at the above address on March 16, 2021. That was claimant's correct address at that time. Claimant never received the decision. She appealed shortly after calling into the Department to inquire as to why she had not received benefits and learning at that time of the denial.

Claimant began working for employer on February 17, 2017. She was employed full-time as a food server at a school. Claimant began working for another employer but in the same position beginning July 1, 2021, as the prior employer lost the bid to perform food service at the school. Claimant was aware when beginning work with both employers that little to no work would be available during the fall, winter, spring, and summer school breaks.

Claimant filed a claim for benefits each week from the benefit week ending November 28, 2020 through the benefit week ending March 27, 2021; and again from the benefit week ending May 29, 2021 through the benefit week ending August 21, 2021. There was less or no work available due to scheduled breaks in the weeks ending November 28, 2020; December 26, 2020; January 2, 2021; March 30, 2021; and May 29, 2021 through August 21, 2021. Claimant has not received any contact from the Department regarding job referrals.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal was timely. The March 16, 2021 (reference 01) unemployment insurance decision that denied benefits as of November 22, 2020 based on a finding claimant could not be contacted by the Department for a job referral and was therefore unavailable for work is MODIFIED with no change in effect.

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.
 - (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. 871-24.23(23) provides:

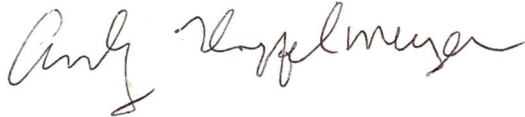
Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

The administrative law judge finds claimant was employed to such an extent during the weeks filed as to be removed from the labor market. While there was less work available in some of the weeks filed, that was due to scheduled breaks which claimant was aware of at the time of hire. Claimant was not looking for work elsewhere during those weeks and so was removed from the labor market for that reason as well. Benefits are therefore denied during the weeks filed.

DECISION:

The administrative law judge concludes the claimant's appeal was timely. The March 16, 2021 (reference 01) unemployment insurance decision that denied benefits as of November 22, 2020 based on a finding claimant could not be contacted by the Department for a job referral and was therefore unavailable for work is MODIFIED with no change in effect. Claimant was unavailable for work during the weeks filed due to being employed to such an extent as to be removed from the labor market.



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

October 28, 2021
Decision Dated and Mailed

abd/kmj

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>.