

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

SHIMENDI EMBAYE

Claimant

APPEAL NO: 19A-UI-07200-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SMITHFIELD FRESH MEATS CORP

Employer

OC: 08/11/19

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 August 29, 2019, reference 01 decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 3, 2019. The claimant participated in the hearing with CTS Language Link interpreter Abraham (WOGA) and Attorney Mark King. The employer did not respond to the hearing notice and did not participate in the hearing. Department's Exhibit D-1 was admitted into evidence.

ISSUE:

The issues are whether the claimant's appeal is timely, whether he is able and available for work and whether he is on a leave of absence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to the claimant's last known address of record on August 29, 2019. The claimant never received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by September 8, 2019. That date fell on a Sunday so the appeal was due September 9, 2019. The appeal was not filed until September 10, 2019, which is after the date noticed on the disqualification decision. Because the claimant did not receive the representative's decision, the administrative law judge finds the claimant's appeal is timely.

On October 17, 2018, the claimant dislocated his left shoulder at work. He was placed on light duty until he had shoulder surgery January 4, 2019, and returned to work January 9 or January 10, 2019. He is unable to lift above his waist with his left arm and has been performing his job using his right hand and arm only since his surgery. On July 20, 2019, the employer told him it was not going to terminate his employment but he needed to go on an unpaid leave of absence until he could use both arms.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant is not able 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".

The claimant was injured at work October 17, 2018, and had surgery January 4, 2019. He worked from January 8 or 9, 2019, until July 20, 2019, using his right arm only. He did not request a leave of absence but is not able to perform his job or even light duty work using both arms. Because the claimant cannot perform his job using both arms he is not considered able and available for work as he must be able to perform the essential functions of his job if still attached to the employer. Accordingly, benefits are denied.

DECISION:

The August 29, 2019, reference 01, decision is affirmed. The claimant is not able to work and available for work effective August 11, 2019. Benefits are withheld until such time as the claimant makes himself available for work to the extent he was available during the base period history.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn