

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NICK J ADRIAN
Claimant

R J PERSONNEL INC
Employer

APPEAL 18A-UI-10927-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/11/18
Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 1, 2018, (reference 10) unemployment insurance decision that denied benefits based upon a determination that he was unable to work due to injury. The parties were properly notified about the hearing. A telephone hearing was held on November 26, 2018. Claimant participated and testified. Employer did not participate. Department's Exhibit D-1 was received into evidence.

ISSUES:

Is the appeal timely?

Is the claimant able to work and available for work effective September 9, 2018?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: In August 2018 claimant dislocated his right shoulder while performing work. Claimant was in enough pain that he could not use his right arm at all and was therefore off work. Claimant was then separated from this employer. Claimant had dislocated his shoulder before and did not go to see a doctor because he believed it would heal on his own. When the injury had not gotten better by September 14, 2018 claimant saw a doctor. The doctor released claimant to return to work part-time, no more than 32 hours per week, and on light duty with a ten pound lifting restriction. The doctor indicated these restrictions would remain in place until claimant saw an orthopedist. Claimant did not immediately make an appointment with an orthopedist because he did not think it was necessary. Claimant did not file a worker's compensation claim, as it was determined by a doctor that the injury was due to a preexisting condition.

A disqualifying unemployment insurance decision was mailed to the claimant's last known address of record on October 1, 2018. He received the decision within the appeal period. The decision contained a warning that an appeal must be postmarked or received by the Appeals

Bureau by October 11, 2018. Claimant called Iowa Workforce Development because he did not understand what the decision meant and wanted to know what he needed to do to qualify for benefits. Claimant was advised that the decision disqualified him from receiving benefits because of his injury and that in order to qualify for benefits he would need to get a note from his doctor releasing him to return to work. Claimant thought this meant that once he produced a doctor's note he would be paid benefits for all weeks claimed since his claim was reopened on September 9, 2018. Claimant was not certain when he made this phone call, but went to see an orthopedist on October 26, 2018. The orthopedist released claimant to return to work without restriction. Claimant brought that doctor's note in to IWD and the lock on his claim was lifted effective October 28, 2018. It was not until then that claimant realized he would not receive benefits for the time in which he was disqualified. Claimant then filed an appeal of the October 1, 2018 (reference 10) decision on November 5, 2018.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal is untimely.

Iowa Code § 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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 96.8, subsection 5.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the 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. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

The record in this case shows 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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

Claimant received the disqualifying decision in a timely manner. Claimant indicated that he was confused as to why he was disqualified from receiving benefits but gave no indication that he was confused about the appeals process or his right to appeal. Claimant did not ask for clarification of the appeals process when he spoke to the IWD representative nor could he say for certain when that conversation occurred and whether it was within the appeal period. The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to Iowa Admin. Code r. 871-24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

Even if the appeal were timely, for the reasons that follow, the administrative law judge concludes that the claimant was not able to work and available for work from September 9, 2018 through October 28, 2018.

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.

Iowa Admin. Code r. 871-24.23(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.

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. Emp'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)).

Claimant took himself off work, without medical directive, until September 14, 2018, when he saw a doctor. On September 14, claimant's doctor released him to return to work, but with restrictions. Under these restrictions claimant could not lift more than 10 pounds or work more than 32 hours per week until he saw an orthopedist. Claimant made the choice not to seek additional medical attention from the orthopedist, which may have cleared him to return to work without restriction, until October 26, 2018, when he was released to return to work without restriction. As claimant could not have worked a regular, full time job, consistent with his education, training, and work history, while the September 14 restrictions were in place, he was not able to and available for work for this time period. Accordingly, benefits are withheld from September 9, 2018 through October 27, 2018.

DECISION:

The October 1, 2018, (reference 10) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect. Even if the appeal were timely, claimant is not able to and available from work from September 9, 2018 through October 27, 2018 and benefits are withheld during this time period.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs