

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROZANN L DALLENBACH
Claimant

HAWKEYE COMMUNITY COLLEGE
Employer

APPEAL 21A-UI-12013-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/15/20
Claimant: Appellant (3)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2)i(3) – On-call Workers
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

On April 28, 2021, the claimant, Rozann L. Dallenbach, filed an appeal from the January 8, 2021 (reference 04) unemployment insurance decision that denied benefits based upon a determination that claimant was not willing to work in her usual occupation and was therefore unavailable for work. The parties were properly notified of the hearing. A telephonic hearing was held at 9:00 a.m. on Tuesday, July 20, 2021. Appeals 21A-UI-12012-LJ-T and 21A-UI-12013-LJ-T were heard together and created one record. The claimant, Rozann L. Dallenbach, participated. The employer, Hawkeye Community College, participated through Lynn Duit, Associate Director of Human Resource Services. No exhibits were offered or admitted. The administrative law judge took official notice of the administrative record.

ISSUES:

Is the appeal timely?
Is the claimant able to work and available for work?
Is the claimant an on-call worker?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began an employment relationship with Hawkeye Community College on August 30, 2010. Most recently, claimant has been employed with this employer in a part-time on-call position as a non-credit truck driving instructor. Claimant is still employed with the employer in this capacity.

The employer's non-credit department operates differently from its standard for-credit departments. The non-credit department will publicize and market a class to encourage enrollment. If enrollment is sufficient to make the class viable, the department will arrange for an instructor and the class will proceed.

Claimant voluntarily removed herself from the workforce for a period of time due to COVID-19. Claimant's mother is 96 years old, and claimant's husband has heart problems. As claimant is the sole care provider for both her mother and her husband, she did not want to risk exposing either of them to COVID-19. Claimant did not return to work for the employer until she was fully vaccinated. Claimant received her second dose of the COVID-19 vaccine on March 18, 2021.

On March 19, 2021, claimant contacted the employer to report that she was ready to return to work. She has since worked for the employer on June 16, June 17, June 22, July 14, and July 15. Claimant denies turning down any work from the employer since receiving her second vaccine on March 18.

Claimant's base period includes wages from Hawkeye Community College (101177) and Express Services Inc. (207322). Claimant explained that there was a period of time during which Hawkeye Community College had Express Services take over the payroll for her position. That arrangement subsequently ended. Claimant continued to perform her same part-time on-call position the entire time.

A disqualification decision was mailed to claimant's last known address of record on January 8, 2021. The first sentence of the decision states, "If this decision denies benefits and is not reversed on appeal, it may result in an overpayment which you will be required to repay." The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by January 18, 2021. The appeal was not filed until April 28, 2021, which is after the date noticed on the disqualification decision. Claimant knows she received the decision at some point, but she does not recall when she received it. Additionally, she is confident that she appealed it as soon as she received it.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant is an on-call worker and is ineligible for unemployment insurance benefits.

The first issue to be considered in this appeal is whether the appellant's appeal is timely.

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) 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 of 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) If transmitted via the State Identification Data Exchange System (SIDES), maintained by the United States Department of Labor, on the date it was submitted to SIDES.

(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.

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. IDJS*, 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. IDJS*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott* 319 N.W.2d 244, 247 (Iowa 1982).

In this case, the testimony in the record supports a finding that the claimant did not have an opportunity to appeal the unemployment insurance decision because the decision was not received in a timely fashion. Without timely notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). Claimant testified confidently that she appealed the adverse decision as soon as it was received. Therefore, the appeal shall be accepted as timely.

The next issue is whether claimant was able to work and available for work.

Iowa Code § 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. ...

Iowa Code § 96.19(38) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) While employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

Iowa Admin. Code r. 871-24.22(2)i(3) 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.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market....

i. On-call workers.

(3) An individual whose wage credits earned in the base period of the claim consist exclusively of wage credits by performing on-call work, such as a banquet worker, railway worker, substitute school teacher or any other individual whose work is solely on-call work during the base period, is not considered an unemployed individual within the meaning of Iowa Code section 96.19(38)"a" and "b." An individual who is willing to accept only on-call work is not considered to be available for work.

The evidence in the record establishes that claimant is an on-call worker. All of the wage credits earned in her base period consist of wage credits from performing on-call work for Hawkeye Community College. Whether she was paid by Hawkeye Community College or Express Services, claimant testified that she was performing the same on-call instructor services throughout. Therefore, the administrative law judge finds that claimant cannot be considered an unemployed individual within the meaning of Iowa Code section 96.19(38). Benefits are withheld.

DECISION:

The January 8, 2021 (reference 04) unemployment insurance decision is modified in favor of the employer/respondent. Claimant is an on-call worker and is not eligible for unemployment insurance benefits effective November 15, 2020. Benefits are withheld.



Elizabeth A. Johnson
Administrative Law Judge
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July 28, 2021
Decision Dated and Mailed

lj/ol