

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**PHILIP HARDY**

Claimant

**APPEAL 22A-UI-05502-JD-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DECORAH COMMUNITY SCHOOL DIST**

Employer

**OC: 03/29/20**

**Claimant: Appellant (1 )**

Iowa Code § 96.6(2) – Timely Appeal  
Iowa Code § 96.4(3) – Ability to and Availability for Work  
Iowa Admin. Code r. 871-24.22(2)i(1) – Benefit Eligibility - Substitute Workers  
Iowa Admin. Code r. 871-24.22(2)i(3) – Benefit Eligibility - On-call Wage Credits  
Iowa Code § 96.19(38)a & b – Total and Partial Unemployment  
Iowa Admin. Code r. 871-24.23(26) – Still Employed Same Hours Same Wages

**STATEMENT OF THE CASE:**

On February 25, 2022, Philip Hardy (claimant/appellant) filed an appeal from the February 12, 2021, reference 02, unemployment insurance decision that concluded he was not able to and available for work due to the on-call nature of his work. A telephone hearing was held at on April 27, 2022 pursuant to due notice. The claimant, Philip Hardy, participated and was represented by Attorney James Burns. The employer Decorah Community School District participated through witness Cathy Dietzenbach, Director of Business Services, and Darlene Woodhouse, Board Secretary. Claimant's Exhibit A – B were admitted. The administrative law judge took official notice of the administrative record.

**ISSUES:**

Is the claimant's appeal timely?

Is claimant considered to be fully or partially unemployed?

Is the claimant able to and available for work?

**FINDINGS OF FACT:**

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

Having reviewed all of the evidence in the record, the administrative law judge finds: A disqualifying unemployment insurance decision was mailed to the claimant's last known address of record on February 12, 2021. Claimant testified that he never received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by February 22, 2021. The appeal was not filed until February 25, 2022, which is after the date noticed on the unemployment insurance decision. The claimant received three

overpayment decisions in the mail on or about February 21, 2022, and he filed timely appeals for those three matters and retained counsel to assist him in those matters.

Claimant was hired to work on-call or as needed evening bus driver for extra-curricular activities for the Decorah Community School District when work was available. The claimant testified that he was not guaranteed any specific hours and drove on an as-needed bases. Claimant had no other regular employment in the base period.

## **REASONING AND CONCLUSIONS OF LAW:**

### *Timeliness*

The first issue is whether the claimant's appeal shall be considered timely. The administrative law judge finds that it shall.

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).

Iowa Admin. Code r. 871-24.35(2) provides:

Date of submission and extension of time for payments and notices.

(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.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The division shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service, the division shall issue an appealable decision to the interested party.

In this case, the claimant never received the unemployment insurance benefits decision that denied benefits. He filed an appeal to the decision promptly after receiving three overpayment of benefits decisions in the mail. As such, his appeal shall be considered timely as his delay in filing the appeal was due to delay or other action by the United States postal service.

*Total, Partial, Temporary Unemployed | Able & Available*

For the reasons that follow, the administrative law judge concludes that the claimant is not considered to be unemployed and he is not considered able to work and available for work.

Iowa Code section 96.4(3)a provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. a. 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 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, 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 in pertinent part provides:

Benefit 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.

i. On-call workers.

(1) Substitute workers (i.e., post office clerks, railroad extra board workers), who hold themselves available for one employer and who do not accept other work, are not available for work within the meaning of the law and are not eligible for benefits.

(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....

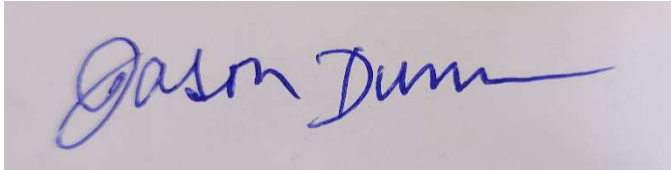
i. On-call workers.

(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 96.1A(37)"a" and "b." An individual who is willing to accept only on-call work is not considered to be available for work.

Because claimant was hired to work only on-call or as needed, and the wage history consists of only on-call wages, he is not considered to be unemployed within the meaning of the law. When an individual is hired to work on-call, the implied agreement is that they will only work when work is available and that work will not be regularly available. Thus any diminution in hours is directly related to the on-call status when work is not available as no regular hours were guaranteed. Accordingly, benefits are denied.

**DECISION:**

The February 12, 2021, (reference 02) unemployment insurance decision is affirmed. The claimant is not considered unemployed because of his on-call employment status in the wage credit history. Benefits are denied.



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

May 10, 2022

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Decision Dated and Mailed

jd/ac