

State of Wisconsin



MAR 29 2021

Labor and Industry Review Commission

Candice Y. Lewis

Employee

Skogens Foodliner Inc.

Employer

Hearing No. 20012206MD

**Unemployment Insurance
Decision¹**

Dated and Mailed:

MAR 26 2021.

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The commission **reverses** the appeal tribunal decision. The employee was available for work beginning in week 12 of 2020 and is therefore eligible for unemployment insurance benefits in those weeks, if otherwise qualified.

By the Commission:


Michael H. Gillick, Chairperson


Georgia E. Maxwell, Commissioner


Marilyn Townsend, Commissioner

¹ **Appeal Rights:** See the blue enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, all other parties in the caption of this decision or order (the boxed section above), and the Department of Workforce Development. Appeal rights and answers to frequently asked questions about appealing an unemployment insurance decision to circuit court are also available on the commission's website, <http://lirc.wisconsin.gov>.

Procedural Posture

This case is before the commission to consider the employee's eligibility for unemployment insurance benefits. An administrative law judge (ALJ) of the Unemployment Insurance Division of the Department of Workforce Development (hereinafter "the department") held a hearing and issued a decision denying benefits. The commission received a timely petition for review.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission makes the following:

Findings of Fact and Conclusions of Law

1. The employee works as a deli counter worker for the employer, a grocery store.
2. The last day the employee worked for the employer was on March 12, 2020 (week 11). The employer approached the employee and suggested that the employee take a leave of absence from work due to COVID-19. The employee accepted and began a leave of absence during week 12 of 2020.
3. The employee was 70 years old at the start of her leave of absence. She has a lifelong history of respiratory illness. She is a vulnerable individual at high risk of severe illness from COVID-19.
4. The employer is an essential business within the meaning of Emergency Order #12. The employer's business has remained in operation during the COVID-19 pandemic.
5. During weeks 13 through 20 of 2020, the employee was quarantined under local, state, or federal government direction or guidance, and the employer had not provided clear instruction for the claimant to return to work. Under Emergency Order #7 and DWD Emergency Rule 2006, the employee is deemed available for work during those weeks and is therefore eligible for benefits in those weeks, if otherwise qualified.
6. During week 12 of 2020 and beginning in week 21 of 2020, the employee's restriction on work availability was not unreasonable. The employee was available for work. Accordingly, she is also eligible for benefits in those weeks, if otherwise qualified.

Memorandum Opinion

The issue in this case is whether, beginning in week 12 of 2020, the employee was able to work and available for work.

As a general rule, to be eligible for unemployment insurance benefits as to any given week, a claimant must be able to work, available for work, and actively seeking work

during the week.² “Able to work” means that the claimant maintains an attachment to the labor market and has the physical and psychological ability to engage in some substantial gainful employment in suitable work.³ “Available for work” means that the claimant maintains an attachment to the labor market and is ready to perform full-time suitable work in the labor market.⁴ “Full-time work” means work performed for 32 hours or more per week.⁵ However, an individual with a physical or psychological restriction will not be considered unavailable for work solely because of his or her inability to work full-time, provided the individual is available for suitable work for the number of hours the individual is able to work.⁶ A claimant is not available for suitable work if he or she has withdrawn from the labor market due to restrictions on his or her availability for work.⁷

Emergency Rules and Orders During the Pandemic:

On March 12, 2020 (week 11), Governor Evers issued Executive Order #72, in which he declared that a public health emergency exists in the state due to the spread of COVID-19. All state agencies were ordered to assist in the response to the public emergency.

On March 18, 2020 (week 12), in response to the COVID-19 public health emergency, Governor Evers issued Emergency Order #7, which temporarily eased eligibility requirements for individuals seeking unemployment insurance benefits. Emergency Order #7 provided, in relevant part, that:

1. Under Wis. Admin. Code § DWD 128.01, the Department of Workforce Development (DWD) shall consider a claimant to be available for suitable work during a public health emergency if the claimant is perceived by an employer as exhibiting COVID-19 symptoms preventing a return to work or the claimant is quarantined by a medical professional or under local, state or federal government direction or guidance, and one of the following applies:
 - a. The employer has instructed the claimant to return to work after the employee no longer exhibits symptoms, after a set amount of time to see if the disease is present, or after the quarantine is over.
 - b. The employer has not provided clear instruction for the claimant to return to work.
 - c. The claimant would be available for other work with another employer but for the perceived COVID-19 symptoms preventing a return to work or the quarantine.

The order took effect on March 18, 2020 (week 12) and was in effect through May 9, 2020 (week 19), when it was supplanted by an emergency administrative rule.

² Wis. Stat. § 108.04(2)(a).

³ Wis. Admin. Code § DWD 128.01(3)(a).

⁴ *Id.*

⁵ Wis. Stat. § 108.02(15e).

⁶ Wis. Admin. Code § DWD 128.01(4)(a).

⁷ *Id.*

On March 24, 2020 (week 13), Department of Health Services Secretary-designee Andrea Palm issued Emergency Order #12, the state's first Safer at Home Order, which was in effect from March 25, 2020 through April 24, 2020. On April 16, 2020, Secretary-designee Palm issued Emergency Order #28, the state's second Safer at Home Order, which went in effect on April 24, 2020. Both Emergency Orders #12 and #28 (hereafter, "the Safer at Home Orders") provided as follows:

Stay at home or place of residence. All individuals present within the State of Wisconsin are ordered to stay at home or at their place of residence, with exceptions outlined below.

The Safer at Home Orders provided an exception for Essential Businesses and Operations. However, Section 7 of the Safer at Home Orders urges all elderly people and those who are vulnerable as a result of underlying health conditions to stay home. Section 7 applies to all elderly and vulnerable individuals, including employees of essential businesses and operations.

7. Elderly people and those who are vulnerable as a result of underlying health conditions should take additional precautions. People at high risk of severe illness from COVID-19 and people who are sick are urged to stay in their home or residence to the extent possible except as necessary to seek medical care.

On May 9, 2020 (week 20), DWD Emergency Rule 2006 was promulgated by the department regarding the able to work, available for work, and work search requirements for individuals seeking unemployment benefits during the COVID-19 public health emergency went into effect, supplanting Emergency Order #7. The emergency rule included changes to Wis. Admin. Code ch. 128, which now provides, in relevant part:

DWD 128.01 Able to work and available for work.

(7) COVID-19. (a) Notwithstanding any other subsection in this section, the department shall consider a claimant to be available for suitable work if the claimant is perceived by an employer as exhibiting COVID-19 symptoms preventing a return to work, or the claimant is quarantined by a medical professional due to COVID-19 symptoms, or the claimant is instructed to stay home under local, state or federal government direction or guidance due to COVID-19, and one of the following applies:

1. The employer has instructed the claimant to return to work after the employee no longer exhibits symptoms, after a set amount of time to see if the disease is present, or after the quarantine is over.
2. The employer has not provided clear instruction for the claimant to return to work.

3. The claimant would be available for other work with another employer but for the perceived COVID-19 symptoms preventing a return to work or but for the quarantine.

Emergency Rule 2006 remained in effect through February 6, 2021 when it expired. It was supplanted by Emergency Rule 2106 on February 11, 2021 which contains identical provisions regarding availability for work to those contained in Emergency Rule 2006. Emergency Rule 2106 remains in effect.

On May 13, 2020 (week 20), the Wisconsin Supreme Court struck down the state's second Safer at Home Order, invalidating nearly all of its provisions. The only provision upheld involved mandatory school closures.

On November 10, 2020, Governor Evers issued Executive Order #94, which provides stay-at-home recommendations. This order defines vulnerable individuals to include "people over 60 years of age, pregnant women, people with compromised or weakened immune systems, and people with serious underlying health conditions including cancer, obesity, diabetes, or chronic lung, kidney or heart disease."

Availability During Weeks 13 Through 20 of 2020

The employee took a leave of absence from the employer beginning in week 12 of 2020. During weeks 13 through 20 of 2020, a public health emergency existed, Emergency Order #7 and then Emergency Rule 2006 were in effect, and the Safer at Home Orders were in effect.

Section 7 of the Safer at Home Orders urges elderly people and those who are vulnerable as a result of underlying health conditions to stay home. Order #94 defines "people over 60 years of age" as vulnerable. The employee is 70 years old and suffers from respiratory issues. She is therefore "vulnerable" within the meaning of the Safer at Home Orders.

Emergency Order #7 and DWD Emergency Rule 2006 require the department to consider a claimant available for work if the claimant is quarantined (under Emergency Order #7) or instructed to stay home (under DWD Emergency Rule 2006) under government direction or guidance due to COVID-19 and the employer has not provided clear instruction for the employee to return to work. Such is the case here.

The Safer at Home Orders constituted a government quarantine or instruction to stay home for the employee, who is a vulnerable individual under those Orders. The employer had granted a leave of absence and had not provided clear instruction for the employee to return to work. Therefore, under Emergency Order #7 and Emergency Rule 2006, during weeks 13 through 20 of 2020 the commission must deem the employee available. She is eligible for unemployment insurance benefits in those weeks, if otherwise qualified.

Availability During Week 12 of 2020 and Beginning in Week 21 of 2020

During week 12 of 2020, and beginning in week 21 of 2020, the Safer at Home Orders were not in effect, so the employee was not subject to a government quarantine or instruction to stay home. The employee was not quarantined by a medical professional due to COVID-19 symptoms, and she was not perceived by the employer as exhibiting COVID-19 symptoms. Emergency Order #7, Emergency Rule 2006, and Emergency Rule 2106, therefore, do not apply during week 12 of 2020 and beginning in week 21 of 2020. The employee's availability during those periods must be considered under the traditional able-and-available analysis.

In order to be considered available, a claimant must maintain an attachment to the labor market, be ready to perform full-time suitable work in the labor market, and must not be withdrawn from the labor market due to restrictions on his or her availability for work. A claimant is presumed to be able to work and available for work unless there is evidence that, in the relevant week, the claimant was not able to work or available for work.⁸ In determining whether an employee has withdrawn from the labor market, the commission considers, among other things, whether the claimant has placed "unreasonable restrictions on working conditions." Wis. Admin. Code § DWD 128.01(2)(7).

The employee is a vulnerable individual, as recognized by the Safer at Home Orders. She is at heightened risk for severe complications, should she contract COVID-19. The employee was instructed by her physician not to return to work that requires direct physical contact with the general public, due to her risk of severe illness from COVID-19. The employee remained willing to accept work that does not require that she have direct contact with the general public. The work that she is available to perform does not require special training or experience because she is available for all work with the only limitation being that she cannot work directly with the general public.

The employee has maintained an attachment to the labor market. She is ready and willing to perform full-time suitable work. Under the circumstances, the employee's restriction on working conditions was not unreasonable.

An employee who is out of work during the COVID-19 public health emergency due to being at high risk of severe illness from COVID-19, but who is willing to accept work that does not put him or her at higher risk of contracting the virus, has not imposed an unreasonable restriction on working conditions, and is available for suitable work.

Accordingly, the employee was able to work and available for work during week 12 of 2020 and beginning in week 21 of 2020 and is therefore also eligible for unemployment insurance benefits during those weeks, if otherwise qualified.

⁸ Wis. Stat. § 108.04(2).

Appeal Rights
For actions filed in circuit court on or after August 1, 2016

**Appealing an Unemployment Insurance decision of the
Labor and Industry Review Commission to a Wisconsin circuit court**

You may appeal the commission decision to a Wisconsin circuit court. Read the decision carefully.
If you need this information translated to another language, please contact us at (608) 266-9850.
The commission has translation services available to respond to telephone calls.

Unemployment Benefit Status - Disputed Benefit Claims:

If the decision allows benefits, the benefits will be paid, or continue to be paid, even though a party commences an action for judicial review. Wis. Stat. § 108.09(9)(a).

If the decision denies benefits, the claimant must continue to file claims for any weeks for which benefits are sought pending further appeal.

Commencing Legal Review of a Commission Decision:

Any party or the Department of Workforce Development may begin a legal action for review of the commission decision in a Wisconsin circuit court within 30 days after the date of the commission decision. Wis. Stat. §§ 108.09(7)(a) and (c)1.

The action is commenced only by filing a summons and a complaint with a circuit court in Wisconsin and serving authenticated summonses and complaints upon the commission.

An authenticated summons is a summons that has first been stamped by the clerk of court with the date the document was filed and the case number. An authenticated summons and a complaint, taken together, are considered "authenticated pleadings." There is no filing fee for filing an administrative agency review action.

The action must name the commission and the Department of Workforce Development as defendants. Every other party to the proceedings before the commission (generally all other parties listed in the caption of the commission decision) must also be made a defendant. **If a plaintiff fails to name either the department or the commission as defendants, the court shall dismiss the action.**

Both the filing of the summons and the complaint with the court and service of authenticated pleadings must be completed within 30 calendar days of the decision date. Service must be made upon a commissioner of the Labor and Industry Review Commission or an agent authorized by the commission to accept service.

Service upon the commission is considered complete service on all parties but you must provide as many authenticated pleadings as there are defendants. Wis. Stat. § 108.09(7)(c)3. For example, in a benefit claim involving an employer and employee, service must be made on the commission of three authenticated copies of the summons and the complaint, one for the commission, one for the Department of Workforce Development, and one for the employer or employee.

The case must be filed in the circuit court of the Wisconsin county where the plaintiff resides, except:

- If the plaintiff is the Department of Workforce Development, the proceedings must be in the circuit court of the Wisconsin county where a defendant other than the commission resides.
- The proceedings may be brought in any Wisconsin circuit court if all parties appearing in the case agree, or if the court, after notice and a hearing, so orders.
- For other circumstances, including the situation where the plaintiff is not a resident of Wisconsin, venue shall be as set forth in Wis. Stat. § 801.50 *et seq.*

The complaint must state the grounds upon which review is sought, or the reasons for the appeal.

The judicial review provisions in Wis. Stat. ch. 227 (Administrative Procedure), § 801.02 (Civil Procedure), and ch. 799 (Small Claims) do not apply.

The commissioners and authorized agents are located only in Madison at the address listed below. **If the authenticated pleadings are mailed to the commission, service will only be effective if they are actually received by the commission within the appeal period (30 days).** It is not sufficient for the appeal to be postmarked by the due date. Service by facsimile (FAX) is not sufficient to commence a court action.

For delivery by private carrier or service in person: Labor and Industry Review Commission 3319 West Beltline Highway, 2 West Madison WI 53713	For delivery by U.S. Postal Service: Labor and Industry Review Commission P.O. Box 8126 Madison WI 53708
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It is the responsibility of the appealing party to arrange for preparation of the necessary legal documents since neither the commission nor its representatives may assist in such preparation. A copy of these appeal rights and answers to frequently asked questions (FAQs) are available at <http://lirc.wisconsin.gov/uihowtoappeal.htm>.