

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**FERNANDO OLIVEROS**  
Claimant

**APPEAL NO: 21A-UI-04405-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ASPLUNDH TREE EXPERT LLC**  
Employer

**OC: 04/19/20**  
**Claimant: Appellant (4)**

Iowa Code § 96.4(3) – Able to and Available for Work  
Iowa Admin. Code r. 871-24.23(10) – Leave of Absence  
Iowa Code § 96.6(2) – Timeliness of Appeal

**STATEMENT OF THE CASE:**

The claimant, Fernando Oliveros, filed an appeal from the July 17, 2021, (reference 01) unemployment insurance decision that concluded he was ineligible for benefits due to a requested leave of absence. After proper notice, a telephone hearing was conducted on April 8, 2021. The hearing was held together with Appeals 21A-UI-04406-JC-T. The claimant participated personally and through a Spanish interpreter from CTS Language Link. Scott Richter testified on behalf of the claimant. The employer did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. Official notice of the administrative records was taken. Department Exhibit D-1 (Claimant's appeal letter) was admitted into evidence.

**ISSUES:**

Is the appeal timely?

Was the claimant able to work and available for work April 19, 2020 through May 23, 2020?

Was the claimant voluntarily unemployed due to a requested leave of absence?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant has worked for this employer prior to establishing his claim for unemployment insurance benefits. Claimant opened an unemployment insurance claim during the week of April 19, 2020 after he tested positive for COVID-19. Claimant tested positive on April 25, 2020. His doctor advised him to be off work for two weeks. Claimant notified employer, who agreed to the leave of absence. Claimant was not paid by the employer during this time. For the weeks of April 26, 2020 through May 9, 2020, claimant was unable to perform work because he was sick with COVID-19.

His doctor released him to go back to work May 10, 2020. However, the employer did not allow him to return. Mr. Richter said there was a lack of work and with claimant being sick, he

preferred claimant be laid off and continue to get healthy. Claimant did not request a leave of absence for the period of May 10, 2020 through May 23, 2020.

An initial unemployment insurance decision (Reference 01) resulting in a denial of benefits was mailed to the claimant's last known address of record on July 17, 2020. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by July 27, 2020. Claimant did not receive the decision in the mail. His first notice was through the overpayment decision dated January 26, 2021. The appeal was filed on February 1, 2021. (See Department Exhibit 1).

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

*The first issue to address is whether claimant filed a timely appeal.*

The law states that an unemployment insurance decision is final unless a party appeals the decision within ten days after the decision was mailed to the party's last known address. See Iowa Code § 96.6(2).

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.

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. Board 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 claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without 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). The claimant timely appealed the overpayment decision, which was the first notice of disqualification. Therefore, the appeal shall be accepted as timely.

*For the reasons that follow, the administrative law judge modifies the initial decision which denied benefits to the claimant.*

For an unemployed individual to be eligible to receive benefits, he must be able to work, available for work, and actively seeking work as required by the unemployment insurance law. Iowa Code § 96.4(3). The burden is on the claimant to establish that he is able and available for work within the meaning of the statute. Iowa Code § 96.6(2); Iowa Admin. Code r. 871-24.22.

Iowa Admin. Code r. 871-24.23(10) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

Iowa Admin. Code r. 24.22(2) provides:

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. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

j. Leave of absence. A leave of absence negotiated *with the consent of both parties*, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

(3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

(emphasis added).

**For the week of April 19, 2020 through April 25, 2020:** Claimant performed work and was not unemployed. Claimant properly reported his wages. He is not eligible for benefits during this week. See Iowa Admin. Code r. 871-24.23(23).

**For the period of April 26, 2020 through May 9, 2020:** Claimant was ill after testing positive for COVID-19. He was unable to work due to illness. The employer agreed to allow the claimant time off for that reason. See Iowa Admin. Code r. 871-24.23(10) and Iowa Admin. Code r. 871-24.23(1). The claimant is considered to be on a leave of absence and is not available for work, according to Iowa law. Therefore, the claimant is not eligible for regular, state-funded unemployment insurance benefits during this period. However, claimant may qualify for Pandemic Unemployment Assistance (PUA). Claimant will need to apply for PUA to determine his eligibility under the program. Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.

**For the period of May 10, 2020 through May 23, 2020:** Claimant was not voluntarily unemployed and established he was able and available to return to work. Employer elected for claimant to remain off work for two additional weeks based upon a lack of work and to allow him to fully heal. Claimant did not request an extension to be off work. Claimant is allowed benefits for this period, provided he meets all requirements.

**DECISION:**

The July 17, 2020 (reference 01) initial decision is modified in favor of the claimant/appellant:

For the period of April 19, 2020 through May 9, 2020, regular state benefits are denied because claimant was not able to and available for work.

For the period of May 10, 2020 through May 23, 2020, claimant was able to and available for work. Benefits are allowed, provided he meets all requirements.



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Jennifer L. Beckman  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau  
Iowa Workforce Development  
1000 East Grand Avenue  
Des Moines, Iowa 50319-0209  
Fax 515-478-3528

April 12, 2021  
Decision Dated and Mailed

jlb/scn