

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

DEVAUGHN D JENKINS

Claimant

and

HY-VEE INC

Employer

:
:
:
:
:
:
:
:
:
:
:
:

HEARING NUMBER: 21B-UI-12122

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1 96.3-7

DECISION

The Employer appealed to the Employment Appeal Board on the issue of chargeability of the overpayment in this case. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision on the chargeability of the regular state benefit overpayment. The Employment Appeal Board **REVERSES** on the overpayment **chargeability without any additional adverse effect on the Claimant** as set forth below

FINDINGS OF FACT:

The Administrative Law Judge's findings of fact are adopted by the Board as its own except those pertaining to chargeability of the regular state benefit overpayment in lieu of which we set out our analysis below. In addition, the Board finds that the record shows that the employer supplied a number in the 972 area code for its third-party administrator to handle the fact finding conference, but that a call was made to a different number in the 515 area code for the fact finding conference.

REASONING AND CONCLUSIONS OF LAW:

As an initial matter we make clear that the Claimant was disqualified based on the separation from employment, and that **the disqualification decision still stands**. Also the federal overpayment of \$3,000 is not before us, and so that overpayment is not affected by today's decision. The Board thus adopts as its own all of the Administrative Law Judge's conclusions of law except for those pertaining to the overpayment of regular state benefits. In place of the remainder of the Administrative Law Judge's conclusions of law the Board makes the following Reasoning and Conclusions of Law.

Iowa Code §96.3(7) states

(a) If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

(b)(1)(a) If the department determines that an overpayment has been made, **the charge for the overpayment against the employer's account shall be removed** and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be **relieved of charges** if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(1) (b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits **shall not be recovered from an individual if the employer did not participate** in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

Under this provision if an employer fails to participate two effects follow: (1) The employer would not be relieved of any "charge for the overpayment against the employer's account" and (2) the overpayment "shall not be recovered" from the claimant.

We now take up the issue of who can be charged for benefits, party by party. We conclude neither party can be charged under the circumstance of this case, and that as a result the fund must absorb the overpayment.

Since 2008 Code section 96.3(7) has provided that, unless fraud or misrepresentation is shown, "benefits shall not be recovered" from a claimant if the employer does not participate in fact finding. The record shows that the Employer supplied a number for its third party administrator, but that at act finding the agency called an entirely different number in the wrong area code. The Employer therefore did not participate in the fact finding. We take the provision at its literal word. Thus we ask "was there fraud proven?" Since the answer is "no," we then ask "did the employer participate?" Since the answer is "no," we must conclude that the Claimant cannot be charged for any overpayment that "occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment." Iowa Code §96.3(7)(b)(1)(b). **We do not charge the overpayment of regular state benefits of \$2,267 to the Claimant.**

As for the Employer it takes a little more interpretation. The Code states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits..." Iowa Code §96.3(7)(b)(1)(a). Here the Employer did respond to a notice of a fact finding

conference with contact information. But this is not the number Iowa Workforce Development called. Thus we cannot say that benefits were paid because the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. **The Employer thus cannot be charged for the overpayment.** Since neither party is to be charged then the overpayment is absorbed by the fund – as was the case between 2008 and 2013.

The charging of the fund is consistent with federal law. Under the TAA Extension Act of 2011 the employer is only *required* to be charged with benefits if the employer not only made an inadequate response, but also had a pattern of such responses. *See generally* UIPL 02-12, *Unemployment Compensation (UC) Program Integrity – Amendments made by the Trade Adjustment Assistance Extension Act of 2011* (making clear that charging only required if a pattern is established). Our ruling is thus consistent with federal law for two reasons. First this Employer did not make an inadequate response, as we discussed above, and second there is no pattern of such inadequate responses shown in this record, nor does the record indicate that such an issue is pending. Our ruling today thus does not endanger our compliance with federal law.

DECISION:

The administrative law judge's decision dated January 8, 2021 is **REVERSED ON THE ISSUE OF OVERPAYMENT CHARGING OF REGULAR BENEFITS TO THE EMPLOYER**. The overpayment entered in the amount of \$2,267.00 in regular state benefits is **not** chargeable to the Claimant and furthermore is also **not** chargeable to the Employer. The Claimant is relieved of the responsibility to pay back the overpayment of \$2,267.00 in regular state benefits, and the Employer's account is not to be charged for those overpaid benefits. Instead, the \$2,267.00 overpayment of regular state benefits in this matter is chargeable to the fund.

Claimant's obligation for the overpayment of \$3,000 in overpaid Federal Pandemic Unemployment Compensation remains unchanged by today's decision. The issue of this overpayment was never appealed to us.

Claimant remains disqualified based on the Administrative Law Judge's decision because the issue of disqualification was never appealed to us.

James M. Strohman

Ashley R. Koopmans

Myron R. Linn