

IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
Division of Administrative Hearings
Lucas State Office Building
Des Moines, Iowa 50319

Appeal Number: 07-IWDUI-018
OC: 12/24/06
Claimant: Appellant (4)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4TH Floor Lucas Building, Des Moines, Iowa 50319.**

HERBERT D EWING
3839 MERLE HAY ROAD STE #226
DES MOINES IA 50310-1312

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

INVESTIGATIONS AND RECOVERY
IOWA WORKFORCE DEVELOPMENT
1000 EAST GRAND AVENUE
DES MOINES IA 50319-0209

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to the department. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

DAN ANDERSON, IWD

(Administrative Law Judge)

February 9, 2007

(Decision Dated & Mailed)

Section 96.4-3 - Able and Available
Section 96.5-8 - Administrative Penalty
871 IAC 25.9(2) - Penalties

STATEMENT OF THE CASE:

The claimant filed an appeal from an Iowa Workforce Development Department decision dated January 12, 2007, reference 01, which disqualified the claimant from receiving benefits for a period from January 7, 2007 to the remainder of the benefit year on December 23, 2007, due to a prior overpayment based on misrepresentation.

The hearing was held pursuant to due notice on February 6, 2007, by telephone conference call. The claimant participated. Dave Ecklund, Investigator/Supervisor, participated on behalf of Iowa Workforce Development, Investigation and Recovery.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses, and having considered all of the evidence in the record, finds: The claimant was the subject of an audit and investigation on his claim for benefits effective December 25, 2005. A representative of Iowa Workforce Development issued a decision that the claimant was over paid benefits \$324.00 due to misrepresentation on August 17, 2006, and a further decision that the claimant was overpaid benefits due to misrepresentation on December 19, 2006. The decisions were not appealed, and they have now become final.

When the claimant filed his most recent claim effective December 24, 2006, a department representative notified Investigator Lewis. Lewis mailed a letter to the claimant dated January 2, 2007 that reviewed the claimant's overpayment history, and advised him that the department was considering an administrative penalty on his current claim. The claimant responded to Lewis with a written reply dated January 12 with an apology and statement that he did not intend to file false claims. The claimant has a history of working for construction companies, and he has experienced a practice of companies banking his hours, paying wages at a later date, and allowing claims.

The department utilizes guidelines when considering a penalty period. The overpayment decisions (\$324,\$1,370) involved eight weeks that included four weeks of no wage reports, and four weeks of substantial under-reporting of wages. The guidelines for this case call for a penalty ranging from sixteen (16) weeks of disqualification to the remainder of the benefit year. The minimum period increases by four weeks where there is a prior offense. The department noted the claimant had an overpayment history in 1995 (\$627), and 2001 (\$292).

Due to the overpayment history, and number of recent overpayment weeks (8), the department elected a penalty period of up to the remainder of the benefit year. The outstanding overpayment of \$1,370 has been reduced to \$235 as of the date of this hearing by offset procedure.

When the claimant appealed, he requested an in-person hearing, and this matter was scheduled for it on February 7, 2007. The claimant waived the in-person hearing request to a telephone hearing due to obtaining recent employment.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant is able and available for work.

Iowa Code Section 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.

The further issue is whether the administrative penalty imposed is correct.

Iowa Code Section 96.5-8 provides:

8. Administrative Penalty. If the department finds that, with respect to any week of an insured worker's unemployment for which such person claims credit or benefits, such

person has, within the thirty-six calendar months immediately preceding such week, with intent to defraud by obtaining benefits not due under this chapter, willfully and knowingly failed to disclose a material fact; such person shall be disqualified for the week in which the department makes such determination, and forfeit all benefit rights under the unemployment compensation law for a period of not more than the remaining benefit period as determined by the department according to the circumstances of each case. Any penalties imposed by this subsection shall be in addition to those otherwise prescribed in this chapter.

871 IAC 25.9(2) provides:

b. The general guide for disqualifications for deliberate falsification for the purpose of obtaining or increasing unemployment insurance benefits is listed below. It is intended to be used as a guide only and is not a substitute for the personal subjective judgment of the investigator because each case must be decided on its own merits. The administrative penalty recommended for falsification ranges from three weeks through the end of the benefit year.

The administrative law judge concludes that the administrative penalty imposed by the department should be modified pursuant to Iowa Code Section 96.4-3 and Iowa Code Section 96.5-8. The claimant was the subject of a overpayment decisions due to misrepresentation within the time period established by the law, which were not appealed, and they have now become final. The remainder of the benefit year period of disqualification imposed by the department is within the administrative penalty discretion of the law.

Although the claimant has a poor record of filing accurate unemployment claims, there is some measure of truth about the practice of construction companies banking hours with the knowledge that it helps keep their employees attached to the company during slow periods while they claim unemployment benefits. However, the claimant did not appeal the misrepresentation-overpayment decisions that the department is relying on for imposing a penalty.

In addition, the department may not rely upon overpayment decisions beyond the 36-calendar-month window in imposing a penalty period. Supervisor Ecklund's overpayment experience with the claimant was not part of the decision in this case, and may not be considered.

The minimum penalty of sixteen weeks (department guidelines) for eight weeks of overpayment is applicable in this case, and would represent two weeks of disqualification for each week of overpayment. However, the claimant's repeated overpayment history does not demonstrate a desire to correct this pattern of benefit abuse, and it dictates something more than the minimum. A four-week disqualification for each of the eight weeks of overpayment for a thirty-two week period is appropriate.

DECISION:

The decision of Iowa Workforce Development dated January 12, 2007, reference 01, is MODIFIED in favor of the claimant. The claimant is disqualified from receiving benefits for the 32-week period ending August 18, 2007.

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