

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LYNDA HARRELL
Claimant

APPEAL 19A-UI-02512-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

**OC: 06/17/18
Claimant: Appellant (1)**

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.3(7) – Overpayment of Benefits
Iowa Code § 96.16(4) – Offenses and Misrepresentation
Iowa Admin. Code r. 871-25.1 – Misrepresentation & Fraud

STATEMENT OF THE CASE:

The claimant/appellant, Lynda Harrell, filed an appeal from the February 27, 2019 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision which concluded the claimant was overpaid unemployment insurance benefits because she failed to accurately report earnings while concurrently filing weekly claims for unemployment insurance benefits. IWD also imposed a 15% administrative penalty due to misrepresentation.

The parties were properly notified of the hearing. A telephone hearing was held on April 11, 2019. The claimant, Lynda Harrell, participated personally. Kasandra Ellenwood, Investigator, participated on behalf of IWD. The issue of timeliness of the claimant’s appeal was raised and both parties waived proper notice. The administrative law judge took official notice of the claimant’s unemployment insurance benefits records. IWD Exhibits A-D were admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is the appeal timely?
Did IWD correctly determine that the claimant was overpaid unemployment insurance benefits, and was the overpayment amount correctly calculated?
Did IWD properly impose a penalty based upon the claimant’s misrepresentation?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant filed a claim for unemployment insurance benefits with an effective date of June 17, 2018. When the claim was established Ms. Harrell agreed to read the claimant handbook online (Department Exhibit B2). The Unemployment Insurance Handbook includes instructions for properly filing claims and informs claimants that failure to follow the instructions could result in a denial or overpayment of benefits. The handbook also informs claimants that they should call

IWD customer service for help if they don't understand the information in the handbook. The claimant stated she has filed claims for several years and read the handbook.

With respect to "Reporting Earnings," the handbook states:

Gross earnings/wages (before tax and payroll deductions) must be reported on the weekly claim during the week the wages are earned, not when the wages are paid. Earnings must be reported even if the payment has not been received yet. To calculate the amount to report, the individual should multiply the number of hours worked by the hourly wage. Individuals should report the full gross amount of earnings and IWD will calculate any deductions. If an individual earns \$15.00 over their WBA, they will not receive a benefit payment

The handbook also provides in part:

Overpayment

Individuals are responsible for repaying any benefits they were not eligible to receive. Future UI benefit payments are withheld until the overpayment has been recovered in full. If the individual is not making attempts to repay the overpayment, the debt may be recovered by withholding state and federal tax refunds, casino and lottery winnings, and vendor payments. Overpayments caused by fraud include a 15% penalty.

The handbook also alerted the claimant to consequences for providing false or fraudulent statements to collect benefits:

Fraud is knowingly providing false information or withholding information to receive UI benefits. Fraudulently collecting UI benefits is a serious offense. It can lead to severe penalties, which include:

- criminal prosecution
- denial of future benefits by administrative penalty
- repayment of fraudulently collected UI benefits plus a 15 percent penalty
- wages garnishments and liens
- interception of state and federal tax refunds (Department exhibit C1)

In addition, each week Ms. Harrell would complete a weekly continued claim, she would see a screen online which provided:

It is important that you answer all questions truthfully.

WARNING: Attempting to claim and receive unemployment insurance benefits by entering false information can result in loss of benefits, fines and imprisonment.

Before completing her weekly continued claim each week, the claimant had to check a box that stated she understood the warning message above and wished to proceed (Department Exhibit C2). IWD conducted an audit and discovered that Ms. Harrell earned wages from ABM Industry Groups and Nordstrom Inc. during the time period of June 24, 2018 through August 4, 2018, but failed to report the wages. IWD contacted the employers to verify the claimant's wages earned with the employers, who confirmed the claimant performed work. The claimant performed work for the week ending June 30, 2018 at ABM Industries Groups. The claimant earned wages and performed work for Nordstrom Inc. for the period of July 8 through August 4, 2018. (The claimant's last day at Nordstrom was July 30, 2018.) (Harrell testimony).

A review of the administrative file reflects the claimant did not report the same wages as the employer. For the week ending June 30, 2018, the claimant reported she earned \$0.00 for the week (Department Exhibits C5, C6). Each week, from July 8, 2018 through August 4, 2018, the claimant reported she earned \$0.00 in wages, when she filed her weekly continued claim (Department Exhibits C5, C6), even though she was performing work each week through Nordstrom Inc.

As a result of the employer's verification of wages, Investigator Ellenwood also contacted the claimant. The claimant was mailed a preliminary audit which stated she may have been overpaid benefits in the amount of \$687.00, for failing to report her wages (Department Exhibit C3). The letter also informed her that an overpayment may result in consequences including a 15% penalty (Department Exhibit C3).

Ms. Harrell contacted Investigator Ellenwood on February 13, 2019 in response to the letter and left a voicemail. Ms. Ellenwood attempted to call the claimant back on February 14 and 21, 2019 and left two voicemails. The claimant stated the number called by Investigator Ellenwood was not an updated number. No conversation occurred between the parties.

Ms. Harrell's weekly benefit amount was \$170.00 (Department Exhibit B4). Because the claimant did not accurately report her wages during this same period, an overpayment of \$687.00 was determined by IWD (Department Exhibit B4). The agency established the overpayment based upon the following incorrect payments made to the claimant: (Department Exhibit B4)

| WEEK ENDING | WAGES REPORTED | WAGES EARNED | BENEFITS PAID | BENEFITS ENTITLED | OVERPAYMENT |
|-------------|----------------|--------------|--------------------|-------------------|-------------|
| 06/30/18 | \$0 | \$91.00 | \$170.00 | \$121.00 | \$ 49.00 |
| 07/14/18 | \$0 | \$432.00 | \$170.00 | \$0 | \$170.00 |
| 07/21/18 | \$0 | \$540.00 | \$170.00 | \$0 | \$170.00 |
| 07/28/18 | \$0 | \$540.00 | \$170.00 | \$0 | \$170.00 |
| 08/04/18 | \$0 | \$170.00 | \$170.00 | \$42.00 | \$128.00 |
| | | | | | |
| | | | SUBTOTAL: | | \$687.00 |
| | | | 15% Penalty | | \$103.05 |
| | | | NET TOTAL | | \$790.05 |

In addition to the overpayment, a 15% penalty was imposed, due to the overpayment arising from the claimant's misrepresentation or intentional omission of wages to collect benefits. On five occasions, the claimant responded to her weekly continued claim that she had not performed any work and that she did not earn any wages. The claimant does not agree with the calculated overpayment but did not provide evidence which contradicted employer reported wages. The claimant acknowledged she did not report her wages for Nordstrom Inc. because she didn't know how long the work would last. She did not offer an explanation for why she didn't report wages earned for June 30, 2018 with ABM Industries.

After the investigation, an initial unemployment insurance decision (Reference 01) resulting in overpayment and penalty was mailed to the claimant's last known address of record on February 27, 2019 (Department Exhibit D1). The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by March 9, 2019. Because March 9, 2019 was a Saturday, the final day to appeal was March 11, 2019. The initial decision also stated: "If you have questions please call customer service at 866-239-0843" (Department Exhibit D1).

She received the decision March 2 or 3, 2019. She did not contact Ms. Ellenwood after her call on February 13, 2019 and could not provide details of any calls to the customer service line. Her appeal was not filed until March 22, 2019, which is after the date noticed on the decision (Department Exhibit C11).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant's appeal is untimely.

Iowa Code section 96.6(2) provides, in pertinent part:

Filing – determination – appeal.

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. . . . 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.

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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes Ms. Harrell did have a reasonable opportunity to file a timely appeal.

In this case, the claimant filed her appeal on March 22, 2019 and the final day to appeal was March 11, 2019. She admitted she received the decision March 2 or 3, 2019, within the prescribed period to appeal. Based on the evidence presented, the administrative law judge concludes the failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law *was not due to any Agency error or misinformation or delay or other action of the United States Postal Service* pursuant to Iowa Admin. Code r. 871-24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

In the alternative, even if the claimant's appeal was deemed untimely, the administrative law judge would conclude that IWD did correctly establish and calculate the claimant's overpayment of benefits, and did correctly impose a 15% penalty due to the claimant's misrepresentation.

Iowa Code section 96.3(7) provides, in pertinent part:

7. Recovery of overpayment of benefits.

Recovery of overpayment of benefits. 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 division of job service 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 division a sum equal to the overpayment.

The administrative law judge is persuaded the claimant knew or should have known she must report all wages earned each week that she sought to claim unemployment insurance benefits, and that failure to properly do so, could result in an overpayment, which she must repay (Department Exhibit C1). However, the claimant reported she did not perform work or earn wages for the period of June 24, 2018 through August 4, 2018, and misrepresented she was

unemployed as she filed weekly continued claims for unemployment insurance benefits during the same time (Department Exhibit C5-C-6). No evidence was presented that the wages reported by the employer to IWD were inaccurate or incorrect. Consequently, the claimant was able to collect both wages and unemployment insurance benefits each week. As a result, the claimant was overpaid benefits in the amount of \$687.00, to which she was not entitled (Department Exhibit C3). The administrative law judge concludes therefore, that the overpayment was correctly calculated.

The next issue is whether the imposition of a 15% penalty due to fraud or misrepresentation was warranted.

The Department is authorized to impose an administrative penalty when it determines that a claimant has within the thirty-six preceding calendar months, willfully and knowingly failed to disclose a material fact with the intent to obtain unemployment benefits to which the individual is not entitled. Iowa Code section 96.5(8).

Iowa Code section 96.16(4)(a) and (b) provide in part:

4. Misrepresentation.

a. An individual who, by reason of the nondisclosure or misrepresentation by the individual or by another of a material fact, has received any sum as benefits under this chapter while any conditions for the receipt of benefits imposed by this chapter were not fulfilled in the individual's case, or while the individual was disqualified from receiving benefits, shall, be liable to repay to the department for the unemployment compensation fund, a sum equal to the amount so received by the individual. If the department seeks to recover the amount of the benefits by having the individual pay to the department a sum equal to that amount, the department may file a lien with the county recorder in favor of the state on the individual's property and rights to property, whether real or personal. The amount of the lien shall be collected in a manner similar to the provisions for the collection of past-due contributions in section 96.14, subsection 3.

b. The department shall assess a penalty equal to fifteen percent of the amount of a fraudulent overpayment. The penalty shall be collected in the same manner as the overpayment. The penalty shall be added to the amount of any lien filed pursuant to paragraph "a" and shall not be deducted from any future benefits payable to the individual under this chapter. Funds received for overpayment penalties shall be deposited in the unemployment trust fund.

"Fraud" means the intentional misuse of facts or truth to obtain or increase unemployment insurance benefits for oneself or another or to avoid the verification and payment of employment security taxes; a false representation of a matter of fact, whether by statement or by conduct, by false or misleading statements or allegations; or by the concealment or failure to disclose that which should have been disclosed, which deceives and is intended to deceive another so that they, or the department, shall not act upon it to their, or its, legal injury. Iowa Admin. Code r. 871- 25.1. "Misrepresentation" means to give misleading or deceiving information to or omit material information; to present or represent in a manner at odds with the truth. Iowa Admin. Code r. 871- 25.1

Based on the evidence presented, the administrative law judge concludes the claimant knowingly omitted material information to IWD when she failed to correctly report her wages earned and she filed for unemployment insurance benefits. On five separate occasions, the claimant reported she earned \$0.00 in wages but in fact performed work (Department C3). This

was blatantly false. The claimant's repeated and intentional concealment of wages led to the claimant receiving an overpayment of unemployment insurance benefits.

Therefore, the administrative law judge concludes the calculated overpayment was correct, and the claimant knowingly omitted material information to IWD when she failed to correctly report wages earned for the period June 24, 2018 through August 4, 2018, and concurrently filed for unemployment insurance benefits. Accordingly, the administrative law judge concludes the overpayment was correctly calculated and the application of a 15% penalty due to misrepresentation was warranted.

DECISION:

The February 27, 2019 (reference 01) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect. The claimant was overpaid benefits. IWD correctly imposed the administrative penalty due to the claimant's misrepresentation.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn