IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
DIVISION OF ADMINISTRATIVE HEARINGS
LUCAS STATE OFFICE BUILDING
Des Moines, Iowa 50319

DECISION OF THE ADMINISTRATIVE LAW JUDGE

EDWIN L HOBBS
207 GRANT STREET
BEDFORD IA 50833

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

DAN ANDERSON, IWD

Appeal Number: **06-IWDUI-217**
OC: 04/09/06
Claimant: Appellant (4)

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 Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor Lucas Building, Des Moines, Iowa 50319***.

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

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.

_____
(Administrative Law Judge)

December 22, 2006
(Decision Dated & Mailed)

Section 96.3-7 - Recovery of Overpayments
Section 96.5-7 - Vacation Pay
871IAC24.16 - Vacation Pay

STATEMENT OF THE CASE:

The claimant appealed a representative's decision dated November 16, 2006, reference 05, which held that he was overpaid benefits $255.00 for the 2-weeks ending April 22, 2006 due to either failing to report or incorrectly reporting vacation pay from Gear for Sports.

The hearing was held pursuant to due notice on December 18, 2006, by telephone conference call. The claimant participated. John Doidge, Investigator, participated on behalf of Investigation and Recovery, Iowa Workforce Development.

FINDINGS OF FACT:

Having heard the testimony and having examined the evidence in the record, the administrative law judge finds: The claimant last worked for Gear for Sports on April 12, 2006. The claimant filed a claim for benefits effective April 9, 2006. The claimant submitted paperwork to the department that his final wages was $65, and he did not believe he would receive any vacation pay. The employer did not protest the claimant's claim in any manner.

A wage cross match audit for the second quarter of 2006, showed that the claimant received unemployment benefits in April during the same period that his employer paid wages to him. An employer's representative submitted a form to the department, which showed that it paid the claimant some regular wages and vacation pay ($226) after April 10, 2006.

Investigator Doidge reviewed the employer's report of regular and vacation pay for the claimant, and adjusted the figures according to the provisions of the Iowa Employment Security law. Since the employer failed to protest the claim, the amount of vacation pay credited to the claimant was limited to 40 hours or one week (five working days).

Investigator Doidge applied eleven regular hours of wages paid to the claimant for the week ending April 15, 2006 totaling wages of $81, and two days of vacation pay ($90), for a total of $171. Investigator Doidge applied the remaining three days of vacation pay, $135, to the next week, April 22, 2006. The claimant reported regular wages of $65 for the week ending April 15, and he received a benefit of $150. Based on the department adding $90 of his $226 vacation pay for that week plus regular wages of $65, he was entitled to a benefit of $76 that causes an overpayment of $74. Applying the remaining three days of vacation pay ($135) to the week ending April 22, increases the overpayment by $30 from $105 to $135. The total overpayment for the two weeks ending decreases from $255 to $209.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is overpaid benefits $255 due to receiving vacation pay.

Iowa Code Section 96.5-7 provides:

> An individual shall be disqualified for benefits: Y

> 7. Vacation pay.

> a. When an employer makes a payment or becomes obligated to make a payment to an individual for vacation pay, or for vacation pay allowance, or as pay in lieu of vacation, such payment or amount shall be deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" hereof.

> b. When, in connection with a separation or layoff of an individual, the individual's employer makes a payment or payments to the individual, or becomes obligated to make a payment to the individual as, or in the nature of, vacation pay, or vacation pay allowance, or as pay in lieu of vacation, and within ten calendar days after notification of the filing of the individual's claim, designates by notice in writing to the department the period to which the payment shall be allocated; provided, that if such designated period is extended by the employer, the individual may again similarly designate an extended period, by giving notice in writing to the department not later than the beginning of the extension of the period, with the same effect as if the period of extension were included

in the original designation. The amount of a payment or obligation to make payment, deemed "wages" as defined in section 96.19,subsection 41, and shall be applied as provided in paragraph "c" of this subsection 7.

c. Of the wages described in paragraph "a" (whether or not the employer has designated the period therein described), or of the wages described in paragraph "b", if the period therein described has been designated by the employer as therein provided, a sum equal to the wages of such individual for a normal workday shall be attributed to, or deemed to be payable to the individual with respect to, the first and each subsequent workday in such period until such amount so paid or owing is exhausted. Any individual receiving or entitled to receive wages as provided herein shall be ineligible for benefits for any week in which the sums, so designated or attributed to such normal workdays, equal or exceed the individual's weekly benefit amount. If the amount so designated or attributed as wages is less than the weekly benefit amount of such individual, the individual's benefits shall be reduced by such amount.

d. Notwithstanding contrary provisions in paragraphs "a", "b", and "c", if an individual is separated from employment and is scheduled to receive vacation payments during the period of unemployment attributable to the employer and if the employer does not designate the vacation period pursuant to paragraph "b", then payments made by the employer to the individual or an obligation to make a payment by the employer to the individual for vacation pay, vacation pay allowance or pay in lieu of vacation shall not be deemed wages as defined in section 96.19, subsection 41, for any period in excess of one week and such payments or the value of such obligations shall not be deducted for any period in excess of one week from the unemployment benefits the individual is otherwise entitled to receive under this chapter. However, if the employer designates more than one week as the vacation period pursuant to paragraph "b", the vacation pay, vacation pay allowance, or pay in lieu of vacation shall be considered wages and shall be deducted from benefits.

871 IAC 24.16(96) Vacation Pay.

24.16(1) If the employer properly notifies the department within ten days after the notification of the filing of the claim that an amount of vacation pay, either paid or owed, is to be applied to a specific vacation period, a sum equal to the wages of the individual for a normal workday of designated vacation period until the amount of the vacation pay is exhausted.

24.16(2) If the employer makes the original designation of the vacation period in a timely manner, the employer may extend the vacation period by designating the period of the extension in writing to the department before the period of extension begins.

24.16(3) If the employer fails to properly notify the department within ten days after the notification of the filing of the claim that an amount of vacation pay, either paid or owed, is to be applied to a specific vacation period, the entire amount of the vacation pay shall be applied to the one-week period starting on the first workday following the last day worked as defined in subrule 24.16(4). However, if the individual does not claim benefits after layoff for the normal employer workweek immediately following the last day worked, then the entire amount of the vacation pay shall not be deducted from any week of benefits.

24.16(4) Unless otherwise specified by the employer, the amount of the vacation pay shall be converted by the department to eight hours for a normal workday and five workdays for a normal workweek.

This rule is intended to implement Iowa Code Section 96.5(7).

871 IAC 24.17(96) Vacation Pay procedure.

24.17(1)

a. Upon receipt of the vacation information, the unemployment insurance representative shall immediately issue the appropriate decision concerning vacation pay to the employer and to the claimant. The unemployment insurance representative shall then check the current status if the claim on the computer record to ascertain if any weeks have been reported.

c. If the computer record shows that the claimant has not reported or claimed for some or all of the weeks indicated for the vacation period, the unemployment insurance representative shall take no further action on the weeks not claimed.

d. The claimant shall be instructed to only report vacation pay applicable to the first week. The claimant shall also be instructed that vacation pay designated by the employer in excess of one week may result in an overpayment of benefits.

Iowa Code Section 96.3-7 provides:

7. 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.

If the division 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 administrative law judge concludes that the claimant is overpaid benefits $209 for the two-weeks ending April 22, 2006 due to receiving vacation pay from the Gear for Sports pursuant to Iowa code sections 96.5-7 and 96.3-7. There is no evidence that the employer properly notified Iowa Workforce Development within ten days after notification of the claim of the payment of vacation pay. Therefore, the vacation pay, $226, is attributed to the first five workdays following April 12, 2006. Investigator Doidge properly applied a portion of the vacation pay to the week ending April 15 (two days -$90) 2006, and the remaining amount, $$135 (three days), to the week ending April 22, 2006, which created the overpayment. The claimant's testimony he earned final wages of $65 (not $81 as reported by the employer) is credible based on him proving proof of that amount to a workforce representative when he filed his claim.

DECISION:

The decision of the representative dated November 16, 2006, reference 05, is MODIFIED in favor of the claimant. The claimant is overpaid benefits $209.00.

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