

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

BRANDON SCHMIDT

Claimant

and

FISK FARM & HOME INC

Employer

HEARING NUMBER: 18B-UI-10739

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: 96.6-4, 96.4-3

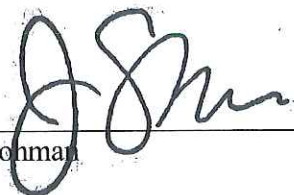
DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.



Kim D. Schmett



James M. Stromman

fnv

DATED AND MAILED: JAN 16 2018

Copies to:

BRANDON SCHMIDT
107 QUARRY ST
DECORAH IA 52101-1318

FISK FARM & HOME INC
LAURA WHITTLE
603 HWY 18 W
MONONA IA 52159

IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRANDON SCHMIDT
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APPEAL NO. 17A-UI-10739-JTT

CORRECTED
ADMINISTRATIVE LAW JUDGE
DECISION

APPEAL RIGHTS:

This Decision Shall Become Final, unless within fifteen (15) days from the date below the administrative law judge's signature on the last page of this decision, 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:

*Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
OR
Fax Number: (515)281-7191*

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.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

The name, address and social security number of the claimant.

A reference to the decision from which the appeal is taken.

That an appeal from such decision is being made and such appeal is signed.

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 Workforce Development. 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.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

ONLINE RESOURCES:

UI law and administrative rules: <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-law-and-administrative-rules>

UI Benefits Handbook: <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-benefits-handbook-guide-unemployment-insurance-benefits>

Handbook for Employers and forms: <https://www.iowaworkforcedevelopment.gov/employerforms>

Employer account access and information: <https://www.myiowaui.org/UITIPTaxWeb/>

National Career Readiness Certificate and Skilled Iowa Initiative: <http://skillediowa.org/>

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRANDON SCHMIDT
Claimant

APPEAL NO. 17A-UI-10739-JTT

**CORRECTED
ADMINISTRATIVE LAW JUDGE
DECISION**

FISK FARM & HOME INC
Employer

**OC: 08/28/16
Claimant: Respondent (4)**

Iowa Code Section 96.6(4) – Previously Adjudicated Issue
Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 16, 2017, reference 07, decision that allowed benefits to the claimant effective August 28, 2016, provided he met all other eligibility requirements. After due notice was issued, a hearing was held on November 27, 2017. Claimant Brandon Schmidt participated. Janelle Regan represented the employer. Department Exhibits D1 through D13 were received into evidence. The administrative law judge took official notice of the Employment Appeal Board's administrative file in docketed Hearing Numbers 17B-UI-13411 and 17B-UI-13411-D.

ISSUE:

Whether the issues regarding the claimant's ability to work and availability for work during the period of August 28, 2016 through February 11, 2017 were previously adjudicated and whether the prior adjudication remains binding on the parties.

Whether the issue of overpayment of \$1,956.00 in unemployment benefits for 14 weeks between August 28, 2016 and December 3, 2016 has been previously adjudicated and whether the prior adjudication remains binding on Mr. Schmidt.

Whether Mr. Schmidt was overpaid an additional \$435.00 in unemployment insurance benefits for the three-week period of December 4-24, 2016.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brandon Schmidt established an original claim for unemployment insurance benefits that was effective August 28, 2016. Mr. Schmidt made weekly claims through the benefit week that ended December 24, 2016. Mr. Schmidt thereafter discontinued the claim. As of December 5, 2016, Mr. Schmidt had received \$1,956.00 in unemployment insurance benefits for the period of August 28, 2016 through December 3, 2016.

On December 7, 2016, a Workforce Development Benefits Bureau deputy entered a reference 02 decision that disqualified Mr. Schmidt for unemployment insurance benefits and that relieved the employer account of Fisk Farm & Home, Inc. (employer account number 322537) of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Schmidt had voluntarily quit employment with Fisk Farm & Home on September 1, 2016.

Mr. Schmidt filed a timely appeal from the December 7, 2016, reference 02, decision. The Unemployment Insurance Appeals Bureau docketed the appeal as Appeal Number 16AUI13411DBT. On February 9, 2017, Mr. Schmidt and Fisk Farm & Home participated in an unemployment insurance appeal hearing. The issues addressed at the appeal hearing and in the administrative law judge decision that followed included the issue of whether Mr. Schmidt was able to work and available for work from the August 28, 2016 original claim date through, at minimum, the benefit week that ended February 11, 2017. Because Mr. Schmidt had discontinued his claim after the benefit week that ended December 24, 2016, the hearing and decision need only have addressed the able and available issues through December 24, 2016.

On February 14, 2017, the administrative law judge entered her decision in Appeal Number 16AUI13411DBT. The ruling addressed multiple legal issues, including the question of whether Mr. Schmidt had been able to work and available for work since August 28, 2016. The administrative law judge ruled that Mr. Schmidt had *not* been able to work or available for work since he established the August 28, 2016 original claim for benefits. The administrative law judge ruled that Mr. Schmidt continued to not meet the able and available requirements as of the February 14, 2017 entry date of her decision. The administrative law judge ruled that Mr. Schmidt would continue to be ineligible for unemployment insurance benefits until such time as he "demonstrates that he is able to work and available for work."

The employer and Mr. Schmidt each filed an appeal from the administrative law judge decision in Appeal Number 16AUI13411DBT. On February 22, 2017, the employer filed a timely appeal from the decision. Mr. Schmidt filed a late appeal from the decision on March 7, 2017.

While the dual appeals from the administrative law judge's decision were pending before the Employment Appeal Board, Mr. Schmidt provided the Benefits Bureau with a medical release. Mr. Schmidt submitted the medical release on March 10, 2017 as an email attachment. The medical release is from Winneshiek Medical Center Occupational Health. The release is dated March 9, 2017. The release is signed by Kristen J. Heffern, A.R.N.P. The release references an August 15, 2016 injury date and an August 22, 2016 treatment date. The release contains diagnoses of low back pain and "other dorsalgia," that is, spinal joint/muscle nerve pain. The document releases Mr. Schmidt to work with no restrictions, but includes aftercare instructions directing Mr. Schmidt to use ice or heat for 15 minutes a few times per day and to perform a gentle range of motion exercises a few times a day.

In response to receipt of the medical release document, a Workforce Associate prepared a Statement of Fact/Decision Worksheet acknowledging receipt of the medical release document. The Statement of Fact/Decision Worksheet is dated March 14, 2017. The Statement of Fact/Decision Worksheet acknowledges the administrative law judge decision that held Mr. Schmidt was not available for work due to back injury and that withheld benefits until such time as Mr. Schmidt demonstrated that he was able to work and available for work. The Workforce Associate concluded that the medical release document dated March 9, 2017 released Mr. Schmidt to work effective August 22, 2016.

On March 23, 2017, the Employment Appeal Board dismissed *the employer's* appeal from the administrative law judge decision in Appeal Number 16AUI13411DBT, based on the Board's

conclusion that the employer was not aggrieved by the administrative law judge decision. See Hearing Number 17BUI13411. Also on March 23, 2017, the Employment Appeal Board dismissed *Mr. Schmidt's* late appeal from the administrative law judge's decision, based on the Board's conclusions that Mr. Schmidt's appeal was untimely and that the administrative law judge's decision had become a *final agency decision*. See Hearing Number 17BUI13411D. Neither the employer nor Mr. Schmidt filed a petition for judicial review of the Employment Appeal Board's dismissal decisions.

On March 27, 2017, a Workforce Development Benefits Bureau deputy entered a reference 05 decision that held Mr. Schmidt was overpaid \$1,956.00 in benefits for the 14 weeks between August 28, 2016 and December 3, 2016, due to the able and available disqualification. Mr. Schmidt did not file an appeal from the overpayment decision. In the absence of an appeal from the overpayment decision, the overpayment decision became a *final agency decision*.

On or about April 6, 2017, a Workforce Development Benefits Bureau deputy, in response to the March 10, 2017 receipt of the March 9, 2017 medical release, unlocked Mr. Schmidt's unemployment insurance claim. The Workforce Development representative erroneously allowed the unlocking of the claim to apply *retroactively* to August 28, 2016. Through that error, the representative released to Mr. Schmidt an additional \$435.00 in unemployment insurance benefits for the three benefit weeks between December 4 and 24, 2016. The Benefits Bureau deputy's move to retroactively unlock the claim for benefits was inconsistent with the previous *final agency decision* that had denied benefits for the period of August 28, 2016 through, at minimum, the February 14, 2017 administrative law judge decision date. The Benefits Bureau deputy's move to retroactively unlock the claim for benefits does not appear to have been accompanied by a written Agency decision.

On August 9, 2017, Iowa Workforce Development mailed a quarterly Statement of Charges to Fisk Farm & Home, Inc. that included a charge for benefits paid to Mr. Schmidt. The employer filed a timely appeal from the charge to its account.

On September 20, 2017, an administrative law judge held an appeal hearing to address the employer's challenge of the assessment to its account. See Appeal Number 17AUI08904SCT. Mr. Schmidt and the employer each participated in the hearing. On September 25, 2017, the administrative law judge entered a decision. In her decision, the administrative law judge acknowledged prior adjudication of the able and available issues by another administrative law judge and by the Employment Appeal Board for the period of August 28, 2016 through February 11, 2017. In her decision, the administrative law judge also acknowledged the March 27, 2017, reference 05, overpayment decision that had held Mr. Schmidt was overpaid \$1,956.00 in benefits for the 14-week period of August 16, 2016 through December 3, 2016.

The administrative law judge's analysis of the employer liability issue concluded with the following:

The administrative law judge concludes that the employer filed its appeal of the Statement of Charges within the time period prescribed by the Iowa Employment Security Law because it was filed within thirty days of the first time the employer had notice the claimant was allowed to receive benefits. Prior to the Statement of Charges dated August 9, 2017, the last communication the employer received was the March 23, 2017 EAB decision affirming the ALJ's decision from February 14, 2017. It did not receive notice that an IWD representative had unlocked the claimant's claim allowing him to receive benefits based on the doctor's note he provided after the appeal hearing in February.

The issues of whether the claimant's ability to and availability for work from August 28, 2016 through week-ending February 11, 2017 were previously adjudicated by the ALJ on February 14, 2017 and the EAB on March 3 and March 23, 2017 and whether the claimant has been overpaid unemployment insurance benefits as a result are remanded to the Benefits Bureau for an investigation and determination. If the Benefits Bureau decides the claimant's ability to and availability for work from August 28, 2016 through week-ending February 11, 2017 was not previously adjudicated by the ALJ and EAB, an unemployment insurance decision allowing the claimant benefits based on his ability to and availability to work and stating the issue was not previously adjudicated shall be issued to both parties with appeals rights.

Rather than remanding the matter to the Benefits Bureau for entry of a decision *consistent with* the prior, higher-level *final agency decision* regarding the able and available issues and the Benefits Bureau's *final agency decision* regarding the \$1,956.00 overpayment for the 14-week period of August 16, 2016 through December 3, 2016, the administrative law judge decision employed problematic remand language. The remand language in the administrative law judge's decision invited Benefits Bureau error by purporting to delegate authority and discretion to the Benefits Bureau to decide that the able and available issues for the period of August 28, 2016 through February 11, 2017 and the overpayment issue for the period of August 28, 2016 through December 3, 2016 had *not* been previously adjudicated. The administrative law judge included the same problematic remand language in the Decision section of her decision.

On October 6, 2017, Mr. Schmidt filed a timely appeal to the Employment Appeal Board from the administrative law judge's September 25, 2017 decision in Appeal Number 17AUI08904SCT. See Hearing Number 17BUI08904. The employer did *not* appeal the administrative law judge's decision. On October 18, 2017, the Employment Appeal Board dismissed *Mr. Schmidt's* appeal, based on the Board's conclusion that Mr. Schmidt was not aggrieved by the administrative law judge's decision regarding the employer account assessment. Neither Mr. Schmidt nor the employer filed a petition for judicial review of the Employment Appeal Board's dismissal decision.

The problematic remand language contained in the September 25, 2017 decision in Appeal Number 17AUI08904SCT led to a Workforce Development Benefits Bureau deputy entering an October 16, 2017, reference 07, decision, that allowed benefits to Mr. Schmidt *effective* August 28, 2016, provided he was otherwise eligible, based on the Benefits Bureau deputy's conclusion that Mr. Schmidt was available for work and medically able to work. In other words, the Benefits Bureau deputy entered a decision *inconsistent with and contrary to* the higher-level decisions entered by the administrative law judge in 16AUI13411DBT and the Employment Appeal Board Decisions in Hearing Numbers 17BUI13411 and 17BUI13411D.

REASONING AND CONCLUSIONS OF LAW:

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. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as

defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) 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.

Iowa Admin. Code r. 871-24.23(1) provides:

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

(1) An individual who is ill and presently not able to perform work due to illness.

Iowa Admin. Code r. 871-24.23(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

Iowa Code section 96.3(7) provides that if a claimant receives benefits and is deemed ineligible for the benefits, Workforce Development must recover the benefits and the claimant must repay the benefits, even if the claimant was not at fault in receiving the benefits.

Unless appealed in a timely manner and reversed on appeal, a finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of Iowa Workforce Development, administrative law judge, or the employment appeal board, is binding upon the parties in proceedings brought under this chapter. See Iowa Code section 96.6(3) and (4).

Given the structure of the unemployment insurance law, including the adjudication procedure set forth at Iowa Code section 96.6, the Benefits Bureau, the first level decision maker, would have legal authority to enter a decision *consistent with* a higher-level adjudication, but would have no legal authority to enter a decision *inconsistent with* that higher-level adjudication or inconsistent with another *final agency decision*.

In light of the *final agency decision* reached through administrative law judge decision in Appeal Number 16AUI13411DBT and the Employment Appeal Board's dismissal decisions in Hearing Numbers 17BUI13411 and 17BUI13411D, the Workforce Development Benefits Bureau deputy who unlocked the claim on or about April 6, 2017 lacked legal authority to make that unlocking of the claim retroactive to cover any portion of the period between August 28, 2016 and December 24, 2016, the period for which Mr. Schmidt had claimed and received benefits. In addition, despite the remand language in Appeal Number 17AUI08904SCT, there was no legal authority for the October 16, 2017, reference 07, decision that conditionally allowed benefits effective August 28, 2016, based on the Benefits Bureau deputy's conclusion that Mr. Schmidt was able to work and available for work.

The issue of whether Mr. Schmidt was able to work and available for work for the period of August 28, 2016 through December 24, 2016 has been previously adjudicated to a *final agency decision*. That adjudication remains binding on Mr. Schmidt and Fisk Farm & Home, Inc. Pursuant to that prior adjudication, Mr. Schmidt was not eligible for benefits for any portion of the period between August 28, 2016 and December 24, 2016.

The issue of whether Mr. Schmidt was overpaid \$1,956.00 in unemployment insurance benefits for the period of August 28, 2016 through December 3, 2016, was adjudicated to a *final agency decision* through the March 27, 2017, reference 05, decision. That adjudication remains binding upon Mr. Schmidt.

There has not yet been an adjudication of the *overpayment* issue pertaining to the \$435.00 in unemployment insurance benefits that Mr. Schmidt received for the three-week period between December 4 and 24, 2016. Because a final agency decision adjudicated Mr. Schmidt as not able to work, not available for work, and not eligible for benefits for that three-week period, the benefits that Mr. Schmidt received for that three-week period constitute an overpayment of benefits that Mr. Schmidt must repay to Iowa Workforce Development.

DECISION:

The October 16, 2017, reference 07, decision is modified as follows. The issue of whether the claimant was able to work and available for work during the period of August 28, 2016 through December 24, 2016 was previously adjudicated and that prior adjudication remains in effect. Pursuant to that prior adjudication, the claimant was not able to work, not available for work, and not eligible for benefits for the period of August 28, 2016 through December 24, 2016. The claimant presented sufficient proof on March 10, 2017 to establish that he was medically able to work *beginning* March 10, 2017. The issue of whether the claimant was overpaid \$1,956.00 in benefits for the 14-week period from August 28, 2016 through December 3, 2016 was previously adjudicated and remains in effect. Pursuant to that prior adjudication, the claimant was overpaid \$1,956.00 in benefits for the 14-week period of August 28, 2016 through December 3, 2016 and must repay those benefits. The claimant was overpaid an additional \$435.00 in unemployment insurance benefits for the three-week period from December 4 and 24, 2016 and must also repay those benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs