

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ELMER P SCHECKEL**  
Claimant

**APPEAL NO. 08A-UI-11717-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KLEIMAN CONSTRUCTION INC**  
Employer

**OC: 01-06-08 R: 04**  
**Claimant: Respondent (2R)**

Section 96.4-3 - Able and Available  
Section 96.3-7 - Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the December 10, 2008, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on December 31, 2008. The claimant did participate. The employer did participate through Cindy Ferring, Office Manager. Employer's Exhibit One was received. Claimant's Exhibit A was received.

**ISSUES:**

Is the claimant able to and available for work?

Has the claimant been overpaid unemployment insurance benefits?

**FINDINGS OF FACT:**

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: The claimant worked a full day on Monday, October 20. On Tuesday, October 21, he took two hours off for personal reasons. On Wednesday, October 22, he took the full day off for personal reasons. On Thursday, October 23, the claimant worked four and one-half hours but was off work for three and one-half hours due to rain. On Friday, October 24, the claimant was off work due to rain.

The claimant did not make himself available for work for ten hours for the week ending October 25, 2008 because he took time off to attend to personal matters.

The claimant would have been paid an additional \$196.16 dollars had he worked all the hours that were available to him.

Claimant has received unemployment benefits since filing a claim with an effective date of January 6, 2008.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant was not able to work and available for work for the week ending October 25, 2008.

Iowa Code § 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".

871 IAC 24.23(16) provides:

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

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

The claimant was off work due to rain when no work was available for eleven and one-half hours during the week. The claimant took time off for ten hours for the week to attend to personal matters. The claimant could have worked for ten hours that he chose not to during the week. The claimant limited his availability by not working all of the hours that were available to him. Thus, the administrative law judge must conclude that the claimant did not make himself fully available for the week ending October 25, 2008. The claimant earned \$370.00 in wages for the week, but could have earned an additional \$196.00 or a total of \$566.00. Accordingly, benefits are denied for the week ending October 25.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

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) 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. 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. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this states pursuant to section 602.10101.

Because claimant was not able to and available for work for the week ending October 25, 2008, benefits were paid to which claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

**DECISION:**

The December 10, 2008, reference 02, decision is reversed. The claimant is not able to work and available for work effective for the week ending October 25, 2008. Benefits are denied. Claimant is overpaid benefits in the amount of \$121.00.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

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