

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KEVIN HANEMANN
Claimant

APPEAL 19A-UI-00046-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

**OC: 10/01/17
Claimant: Appellant (1)**

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.3(7) – Overpayment of Benefits

STATEMENT OF THE CASE:

The claimant/appellant, Kevin Hanemann, filed an appeal from the November 15, 2018 (reference 02) Iowa Workforce Development (“IWD”) unemployment insurance decision which concluded the claimant was overpaid unemployment insurance benefits because he failed to accurately report earnings when making continued claims for unemployment insurance benefits.

The parties were properly notified of the hearing. A telephone hearing was held on January 22, 2019. The claimant, Kevin Hanemann, participated personally. Kevan Irvine, Investigator, participated on behalf of IWD. IWD Exhibits 1-4 were admitted. The administrative law judge took official notice of the claimant’s unemployment insurance benefits records. 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?

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 October 1, 2017. The claimant separated from employment with Group Contractors LLC on October 2, 2017. He earned \$38.00 per hour for the employer (and worked five ten-hour days each week). He also paid \$110.00 per diem each day he worked.

For the week ending October 7, 2017, the claimant reported he earned \$200.00 in wages when he filed his weekly continued claim (Department Exhibit 3-2). As a result, he drew \$368.00 in unemployment insurance benefits for the week (Department Exhibit 3-2). Following an audit, IWD contacted Group Contractors LLC., who reported the claimant earned \$266.00 for the week based upon working seven hours at a rate of pay of \$38.00 (Department Exhibit 1-5). Based

upon the wages reported by the employer, IWD concluded the claimant may have been overpaid \$66.00 (Department Exhibit 1-4) for the week ending October 7, 2017.

The claimant was also mailed a preliminary audit on October 24, 2018 (Department Exhibit 1-3), alerting him to the potential overpayment. He disputed the employer's reporting of wages, stating he only worked five hours on October 2, 2017, and the employer must have included his per diem in the wages reported. (The claimant stated he would have only earned half of his \$110.00 per diem payment on October 2, 2017). Per diem payments are not included in the wage calculation (Kevan Irvine testimony) and would have been excluded when calculating his benefits for the week. The claimant provided no documentation to the IWD investigator or for the hearing to support his assertion that the employer wages were incorrect, or that the employer included per diem payments when reporting his wages to IWD.

Thereafter, an initial unemployment insurance decision (Reference 02) resulting in an overpayment of \$66.00 was mailed to the claimant's last known address of record on November 15, 2018 (Department Exhibit 1-1). The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by November 25, 2018 (Department Exhibit 1-1). Because November 25, 2018 was a Sunday, the final day to appeal was extended to November 26, 2018. Mr. Hanemann received the decision within the appeal period. The appeal was not filed until January 2, 2019, which is after the date noticed on the disqualification decision.

The claimant received the initial decision but denied that it contained appeal rights on the back. Mr. Irvine stated that based on the circumstances of the decision being hand-typed, to an out of state employer, and being incomplete (lacking the employer's name within the body of the decision), it may have been possible that the decision did not contain the customary backside with appeal information. The claimant stated he also made multiple attempts to reach out to Investigator Jennifer Nutting, who mailed the preliminary audit, which led to the overpayment, to discuss the overpayment and decision. When she did reply, she did not realize the claimant was not a fellow IWD employee. The claimant received instructions from Ms. Nutting and then through contact with IWD in late December 2018 before filing his appeal on January 2, 2019 (Department Exhibit 2-1).

REASONING AND CONCLUSIONS OF LAW:

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

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).

The record shows that the appellant did not have a reasonable opportunity to file a timely appeal. The claimant did receive the initial decision. However, in this case, it is possible due to Agency error that the claimant did not receive the customary appeal instruction page on the back of his initial decision (Kevan Irvine testimony). This would be an Agency error. The claimant also made multiple good faith attempts to contact an IWD representative for guidance, without success. Accordingly, the administrative law judge concludes the claimant's delay in filing timely appeal within the time prescribed by the Iowa Employment Security Law *was due to 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). Therefore, the appeal shall be accepted as timely.

The next issue to resolve is whether the claimant was overpaid benefits in the amount of \$66.00.

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.

In this case, the claimant reported he earned \$200.00 for the week ending October 7, 2017 with employer Group Contractors LLC. The employer reported the claimant was paid \$266.00 for the week in question. The credible evidence presented does not support 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 \$66.00, to which he was not entitled (Department Exhibit 1-4). The administrative law judge concludes therefore, that the overpayment was correctly calculated.

DECISION:

The November 15, 2018, (reference 02) unemployment insurance decision is affirmed. The claimant filed a timely appeal. The claimant was overpaid benefits in the amount of \$66.00, which must be repaid.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn