

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GRETTA F DIRKS
Claimant

APPEAL 19A-UI-00682-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE DEVELOPMENT
DEPARTMENT**

OC: 02/11/18
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 filed an appeal from the October 15, 2018 (reference 06) Iowa Workforce Development (“IWD”) unemployment insurance decision that found claimant was overpaid unemployment insurance benefits because she incorrectly reported, or failed to report, earnings from Cedar River Landing Inc. (“Cedar River”) between February 11, 2018 and September 15, 2018. IWD imposed a 15% administrative penalty due to misrepresentation. The parties were properly notified of the hearing. A telephone hearing was held on February 8, 2019. The claimant participated personally. Troy Shelley participated on behalf of IWD. IWD Exhibits A - C were admitted. The administrative law judge took official notice of the claimant’s unemployment insurance benefits records.

ISSUES:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

A decision dated October 15, 2018 (reference 06) which found that the claimant was overpaid benefits of \$7,365.06 due to claimant incorrectly reporting wages earned from Cedar River was mailed to the claimant’s correct address of record. The claimant did receive the decision within ten days from the date of mailing. The decision stated “this decision becomes final unless an appeal is postmarked by 10/25/18, or received by Iowa Workforce Development Appeal Section by that date.” See Exhibit C. Claimant faxed her appeal to the Appeal Section on October 25, 2018; however, the appeal was not received by the Appeal Section fax machine. Mr. Shelley also received an email from the claimant on October 25, 2018 stating that the claimant had

faxed her appeal letter to the Appeal Section. After not receiving any notification regarding a hearing, claimant telephoned Mr. Shelley and learned that the appeal fax had not been received. Claimant then drafted another appeal letter dated January 10, 2019. She is currently residing in a treatment facility and is only allowed out of the facility at certain times. Claimant had her counselor fax the appeal letter for her. The appeal was faxed by her counselor to the Appeal Section on January 24, 2019.

The claimant had filed an initial claim for unemployment insurance benefits with an effective date of February 11, 2018 after she separated from her full-time employer. Her established weekly benefit amount was \$490.00. Claimant read the Unemployment Insurance Benefits Handbook when she filed her claim. IWD conducted an audit and discovered that claimant earned wages from Cedar River during the period of February 11, 2018 through September 15, 2018 but incorrectly reported the wages earned when filing her weekly-continued claims for benefits. IWD received a completed recheck of wages from the employer's representative to verify the claimant's wages earned during the period investigated. See Exhibit A.

Claimant worked as a bartender and band booker at Cedar River. She was paid hourly for her work as a bartender, earning \$8.00 per hour plus tips. She was paid in kind by the employer for her hours worked booking bands by receiving bar tab credit towards food and drink at the employer's establishment.

Claimant's reason for incorrectly reporting wages during this period was that she did not believe that she had to report tips earned. Claimant disputes the overpayment amount calculated in Exhibit A because she believes the tips listed by the employer were total tips received by all staff members for the week, rather than her own portion of tips earned. Claimant provided no information as to what amount she believed she earned in tips for the period investigated.

The amount of wages reported by the claimant, the amount of wages earned by the claimant, the amount of benefits paid to the claimant, the amount of benefits claimant was entitled to, the amount of underpayment of benefits and the amount of overpayment of benefits for each week investigated are listed in the chart below.

Week Ending	Wages Reported By	Wages Reported By	UI Benefits		Underpayment	Overpayment
	Claimant	Employer	Amount Paid	Entitled		
02/17/18	120	303	490	309	0	181
02/24/18	120	380	490	232	0	258
03/03/18	130	492	482	120	0	362
03/10/18	150	432	462	180	0	282
03/17/18	390	379	222	233	11	0
03/24/18	120	664	490	0	0	490
03/31/18	128	369	484	243	0	241
04/07/18	120	408	490	204	0	286
04/14/18	180	256	432	356	0	76
04/21/18	180	625	432	0	0	432
04/28/18	150	445	462	167	0	295

05/05/18	120	311	490	301	0	189
05/12/18	290	346	322	266	0	56
05/19/18	100	657	490	0	0	490
05/26/18	110	259	490	353	0	137
06/02/18	240	414	372	198	0	174
06/09/18	180	355	432	257	0	175
06/16/18	160	427	452	185	0	267
06/23/18	140	385	472	227	0	245
06/30/18	160	435	452	177	0	275
07/07/18	170	304	442	308	0	134
07/14/18	280	641	332	0	0	332
07/21/18	220	498	392	114	0	278
07/28/18	150	619	462	0	0	462
08/04/18	180	388	432	224	0	208
08/11/18	170	281	442	331	0	111
09/01/18	220	495	392	117	0	275
09/08/18	260	565	352	0	0	352
09/15/18	220	620	313.06	0	0	313.06
				Net Total	11	7376.06
				Gross Total		7365.06

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

The first issue is whether the claimant’s appeal shall be considered timely. The administrative law judge finds that it should.

Iowa Code § 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. 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. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 1, paragraphs “a”

through “h”. 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. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

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 Code § 96.6(2). In addressing an issue of timeliness of an appeal under that portion of this Code section, the Iowa Supreme Court has held that this statute clearly limits the time to do so, and compliance with the appeal notice provision is mandatory and jurisdictional. *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979).

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.

(emphasis added).

In this case, the claimant faxed a timely appeal prior to the expiration of the appeal deadline. However, the fax was not received by IWD fax machine. The failure of the IWD fax machine to receive the claimant's fax shall be considered division error. Therefore, the appeal shall be accepted as timely.

The next issue is whether the claimant has been overpaid unemployment insurance benefits. The administrative law judge finds that she has.

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

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) (a) 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.

Iowa Code section 96.16(4)(a) provides:

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, in the discretion of the department, either be liable to have the sum deducted from any future benefits payable to the individual under this chapter or 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.

Iowa Admin. Code r. 871- 25.1— Definitions.

"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.

“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.

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.*

Claimant’s testimony that she was unaware that she was to report tips received as gross wages earned is not credible. Claimant read the Unemployment Insurance Benefits Handbook and had an opportunity to contact IWD if she had questions whether she was to report tips as part of her gross income. Further, even excluding tips received, claimant still incorrectly reported the gross wages she earned each week when filing her weekly-continued claims for benefits.

As such, it is clear that claimant knowingly omitted material information to IWD when she failed to correctly report her wages earned from February 11, 2018 to September 15, 2018 when she filed for her weekly unemployment insurance benefit claims. Claimant’s intentional concealment of wages led to her receiving an overpayment of unemployment insurance benefits. The overpayment amount calculated by IWD is correct. The penalty of 15% of the amount of the fraudulent overpayment was correctly assessed by IWD.

DECISION:

The claimant’s appeal shall be considered timely. The October 15, 2018 (reference 06) unemployment insurance decision is affirmed. The claimant is overpaid unemployment insurance benefits of \$7,365.06 due to her failing to report earnings from Cedar River. IWD correctly imposed the 15% administrative penalty due to the claimant’s misrepresentation.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs