

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DANYALE BOARDMAN
Claimant

APPEAL 22A-UI-03760-AD-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

**OC: 03/15/20
Claimant: Appellant (5)**

Iowa Code § 96.3(7) – Overpayment
Iowa Code § 96.16(4) – Offenses and Misrepresentation

STATEMENT OF THE CASE:

On February 2, 2022 Danyale Boardman (claimant/appellant) filed an appeal from the Iowa Workforce Development (IWD) decision dated January 31, 2022 (reference 06) that concluded the claimant was overpaid unemployment insurance benefits in the amount of \$843.67 for ten weeks between June 28 and September 5, 2020 based on a prior decision finding claimant not able and available for work. The decision added a 15 percent penalty due to misrepresentation, notified claimant a lien may be filed, and notified claimant that an administrative penalty would be assessed in the 36 calendar months following the last week of misrepresentation.

A hearing in this and related matters was set for March 14, 2022 at 10 a.m. The hearing time was used as a pre-hearing conference to address several issues. At that time the parties agreed to delay the hearing pending decisions from the Employment Appeal Board (EAB) on related matters which were the basis for the finding of overpayment and misrepresentation. See 21A-UI-22613-JT-T, 21A-UI-22614-JT-T, 21A-UI-23019-JT-T. The EAB issued decisions on those related matters on March 17, 2022. See 22B-UI-22613-EAB, 22B-UI-22614-EAB, 22B-UI-23019-EAB.

An order following the pre-hearing conference was issued on March 15, 2022 and a consolidated telephone hearing on this and seven related matters was set for 1 p.m. on April 29, 2022. Claimant's counsel subsequently filed a motion to amend the hearing notice to have several issues added. That motion was denied for the reasons stated in the order issued on April 19, 2022.

A consolidated telephone hearing was held as scheduled on April 29, 2022. Appeal Nos. 22A-UI-03759-AD-T, 22A-UI-03760-AD-T, 22A-UI-03761-AD-T, 22A-UI-03762-AD-T, 22A-UI-03763-AD-T, 22A-UI-03764-AD-T, 22A-UI-03765-AD-T, and 22A-UI-03766-AD-T were heard together and formed one hearing record. The parties were properly notified of the hearing. Claimant participated personally and was represented by Attorney Marlon Mormann, IWD participated by investigator Daniel Noonan and was represented by IWD Attorney Jeffrey Koncsol. The administrative law judge took official notice of the administrative record.

Claimant offered proposed Exhibits A-F into evidence. Claimant's Exhibits A, B, C, D, and E were admitted. Claimant sought official notice be taken of the hearing recording for 21A-UI-22613-JT-

T, 21A-UI-22614-JT-T, and 21A-UI-23019-JT-T as its Exhibit F. The administrative law judge did take notice of the record in those cases including the hearing recording and incorporated it into the record for this matter. The recording was not admitted as a separate Exhibit F as it was not properly submitted prior to the hearing.

IWD offered proposed Exhibits 1-15 into evidence. Exhibits 1, 2, 14, and 15 were admitted. The other proposed exhibits were not admitted as exhibits as they were prior IWD decisions and part of the administrative record.

ISSUE(S):

Was the claimant overpaid regular, state unemployment insurance benefits (UI)?

Was a penalty properly imposed?

FINDINGS OF FACT:

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

The claimant filed an original claim for unemployment insurance benefits with an effective date of March 15, 2020. Claimant filed a claim for benefits each week from the benefit week ending March 21, 2020 through the benefit week ending March 13, 2021. A decision was issued on October 5, 2021 (reference 02) that denied benefits effective June 28, 2020 based on a finding that claimant was not partially unemployed. See 21A-UI-22614-JT-T.

Claimant subsequently filed an original claim for unemployment insurance benefits with an effective date of March 14, 2021. Claimant filed a claim for benefits each week from the benefit week ending March 20, 2021 through the benefit week ending June 12, 2021. A decision was issued on October 5, 2021 (reference 04) that denied benefits effective March 14, 2021 based on a finding that claimant was not partially unemployed. See 21A-UI-22613-JT-T. Another decision was issued on October 6, 2021 (reference 03) that allowed benefits effective March 4, 2020 based on a finding claimant was able to and available for work during a short-term layoff.

Those three decisions were appealed and a consolidated hearing was held on December 6, 2021. Claimant and her former employer, Attorney Elizabeth Kellner-Nelson, participated in the hearing. ALJ Timberland made an extensive record. After hearing, ALJ Timberland issued decisions in each matter dated January 7, 2022.

ALJ Timberland found claimant was not eligible for benefits in the week ending March 21, 2020 due to being out of the country during that week. He further found claimant was eligible for benefits from March 22, 2020 through June 27, 2020 based on a finding that claimant was unemployed due to a layoff and able to and available for work during the layoff. See 21A-UI-23019-JT-T.

ALJ Timberland further found claimant did not meet the availability requirement to be eligible for benefits from June 28, 2020 through June 12, 2021. This conclusion was based on a finding that employer had the same number of hours available for claimant during those weeks as during the base period and in the contract of hire but that claimant limited her availability for work. See 21A-UI-22613-JT-T; 21A-UI-22614-JT-T.

ALJ Timberland remanded those matters to the Investigations & Recovery Unit of the IWD Integrity Bureau for further action as it deemed appropriate. Claimant appealed the decisions in 21A-UI-22613-JT-T, 21A-UI-22614-JT-T, and 21A-UI-23019-JT-T to the EAB. The EAB issued

decisions on those matters on March 17, 2022. The EAB adopted ALJ Timberland's findings of fact and conclusions of law as its own and affirmed the decisions without modification. See 22B-UI-22613-EAB, 22B-UI-22614-EAB, 22B-UI-23019-EAB.

The Investigations & Recovery Unit of the IWD Integrity Bureau conducted an investigation based on ALJ Timberland's remands. Mr. Noonan conducted the investigation. Mr. Noonan's investigation consisted of reviewing ALJ Timberland's decisions, contacting the employer for a brief interview and to request completion of a form showing what hours were worked and available, and conducting a brief interview with claimant.

Employer testified in the matters before ALJ Timberland and indicated on the form it completed and provided to Mr. Noonan that 12 hours of work was available to claimant from the benefit week ending July 4, 2020 and continuing through the benefit week ending June 12, 2021 but that claimant only worked four or eight hours during those weeks.

There were numerous text messages between claimant and employer during the relevant period. See Claimant's Exhibit A. Claimant and employer discussed claimant's eligibility for benefits in these messages and were cognizant of the fact that claimant was receiving substantially more in benefits each week than she would be if she was working regular hours for employer.

Employer asked claimant on March 26, 2020 if she could come in to assist with bills. Claimant replied "It will affect my unemployment but I can still come in and help and you can pay m[e] later." Employer responded by suggesting she could pay cash. Claimant replied, "Whatever works for you. Doesn't matter to me."

Employer notified claimant via text on May 13, 2020 that she needed claimant to return to work on or about June 29, 2020 pursuant to the Paycheck Protection Program (PPP) loan employer received. Claimant indicated she was receiving benefits totaling \$703.00 per week and that she "would really like to catch up some of my salon money so if you want me earlier you can pay me cash or later too." Employer replied she could not do that or she would lose her PPP loan. Along with working for employer, claimant was self-employed and operated a salon business.

Employer asked claimant via text on July 24, 2020 if her unemployment ran out next week. Claimant confirmed it did but that she was "hoping we get another one." Employer asked if claimant could come in August 3, 2020 to get bills out and claimant agreed to do so.

Employer asked claimant on September 23, 2020 if "[her] unemployment [was] done." Claimant replied "the extra part of it is until they sign another stimulus." Employer asked if claimant was "still coming in once a week" or "prefer[red] to go back to regular hours." Claimant replied "I can go back to regular if you need me in October." Employer replied "OK. That works."

The evidence establishes that beginning June 29, 2020 there was 12 hours of work each week available to claimant. This is supported by employer's testimony in the prior matters, the form completed by employer, and the text messages in which employer asked claimant to return to work at that time. It is also established by claimant's prior testimony. In the prior matters before ALJ Timberland, claimant acknowledged that employer told her when she returned to work after the pandemic that she could come in and work even if it was just to sit, read a book, and answer the phone if it rang.

The evidence also establishes that claimant chose not to make herself available for work for the 12 hours available each week. Claimant chose not to work all the available hours because she wished to continue receiving benefits. Despite not working all the hours available claimant

reported each week that she filed a continuing claim for benefits that she was able to work and available for work.

The text message dated September 23, 2020 is particularly telling. Employer asks claimant if she wants to go back to her regular hours or keep coming in once a week. This is a strong indication that employer was offering regular hours before this time but was accommodating claimant's wishes as to how much she wanted to work due to claimant's preference to instead receive benefits worth several times what she was earning in wages with employer each week. This is also supported by employer's testimony in the prior matter before ALJ Timberland. Employer testified that she knew claimant was receiving more in unemployment than if she were working and she was trying to accommodate that. However, she made clear when she received the PPP loan that claimant must return to work by the end of June 2020.

Claimant's wish to work less and continue to receive benefits is also supported by text messages where claimant states she would prefer to "catch up" on potential income lost from her salon rather than return to work; would prefer to be paid in cash, ostensibly so she would not have to report it as wages when filing each week and remain eligible for benefits; and expresses hope that she can remain on benefits.

Claimant underreported her wages earned each week. Her hourly rate increased to \$13.00 per hour when she returned to work in June 2020 and yet she continued to report earning wages at \$12.00 per hour for nearly a year after that. The administrative law judge did not find credible claimant's testimony that this was inadvertent. It is not believable that claimant was unaware of her rate of pay for nearly an entire year. This was consistent with claimant's testimony generally being less than credible in both these matters and the matters before ALJ Timberland. Claimant was on several occasions evasive and deflective in responding to questions. Fact disputes were settled in part based on this finding as well.

Claimant was out of the country on March 15, 2020 and continuing until she landed in Chicago at approximately 4 p.m. on Thursday, March 19, 2020. This was a pre-planned vacation that she requested time off for. She was out of the country during the days she was normally scheduled to perform work for employer. Claimant nonetheless indicated when she filed a claim for benefits that week that she was able to work and available for work that week.

The administrative record shows claimant received UI in the amount of \$108.00 for the week ending March 21, 2020; UI in the amount of \$843.67 between June 28 and September 5, 2020; PEUC in the amount of \$1,257.00 between September 6, 2020 and March 13, 2021; and UI in the amount of \$631.00 between March 14 and June 12, 2021.

Claimant received FPUC in the amount of \$5,700.00 between June 28, 2020 and March 13, 2021; FPUC in the amount of \$3,900.00 between March 14 and June 12, 2021; and LWAP in the amount of \$1,800.00 between July 26 and September 5, 2020.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the decision dated January 31, 2022 (reference 06) is MODIFIED with no change in effect.

I. Was the claimant overpaid UI?

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.

The administrative record shows claimant received UI in the amount of \$843.67 between June 28 and September 5, 2020. Claimant was subsequently determined to be ineligible for benefits during that period. That decision remains in force. See 21A-UI-22613-JT-T; 21A-UI-22614-JT-T; 22B-UI-22613-EAB; 22B-UI-22614-EAB. Because claimant received UI totaling \$843.67 for which she was later deemed ineligible she has been overpaid in that amount. That amount is subject to recovery.

II. Was a penalty properly imposed?

Iowa Code section 96.16(4) 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 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. (emphasis added).

Iowa Admin. Code 871—25.1, Definitions, provides in relevant part:

“Administrative penalty” means the disqualification of a claimant from the receipt of benefits due to fraud or misrepresentation or the willful and knowing failure to disclose a material fact for a period of not more than the remaining benefit year, including the week in which such determination is made.

“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.

“Overpayment” means the amount of unemployment insurance benefits erroneously paid to a claimant due to error, misrepresentation, or fraud.

The evidence establishes that beginning June 29, 2020 there was 12 hours of work each week available to claimant; that claimant chose not to make herself available for work for the 12 hours available each week; that claimant chose not to work all the available hours because she wished to continue receiving benefits; and that despite not working all the hours available claimant reported each week that she filed a continuing claim for benefits that she was able to work and available for work. The evidence further establishes that claimant intentionally underreported her wages earned each week. Claimant made these false representations of fact in order to obtain benefits to which she was not entitled.

The administrative law judge interprets the law at issue as differentiating between fraud and misrepresentation and that a finding of misrepresentation is not sufficient to impose a 15 percent penalty. The decision is modified solely to reflect that the 15 percent penalty was properly imposed based on a finding that the overpayment was due to fraud rather than due to misrepresentation.

It does not appear that the decision seeks a lien filing or the assessment of an administrative penalty at this time, as it states only that a lien may be filed and that an administrative penalty would be assessed at a future date. As such the administrative law judge makes no findings herein as to those matters.

DECISION:

The decision dated January 31, 2022 (reference 06) is MODIFIED with no change in effect. The claimant was overpaid unemployment insurance benefits in the amount of \$843.67 for ten weeks between June 28 and September 5, 2020 based on a prior decision finding claimant not able and available for work. The 15 percent penalty was properly imposed due to fraud.



Andrew B. Duffelmeyer
Administrative Law Judge

May 10, 2022
Decision Dated and Mailed

abd/abd