

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ELIAS AGUILAR-PALOMO
Claimant

APPEAL NO. 06A-UI-09870-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LUNA INC
Employer

OC: 08/27/06 R: 03
Claimant: Respondent (2)

Section 96.4-3 - Able to and Available for Work
Section 96.3-7 - Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated October 4, 2006, reference 02, that concluded the claimant was ineligible to receive partial unemployment insurance benefits and the employer's account was chargeable for benefits paid to the claimant since his hours and/or wages had been reduced. A telephone hearing was held on October 23, 2006. The parties were properly notified about the hearing. The claimant participated in the hearing with the assistance of an interpreter, Ike Rocha. Luis Luna participated in the hearing on behalf of the employer.

ISSUES:

Was the claimant able to and available for work?

Was the claimant overpaid unemployment insurance benefits?

FINDINGS OF FACT:

The claimant worked about 60 hours per week for the employer as a cook from June 2006 to early August 2006. His rate of pay was a salary of \$1,000.00 every two weeks. In early August 2006, the claimant was off work due to medical reasons.

When the claimant was released to return to work, he requested to work as a server rather than as a cook. The owner, Luis Luna, informed the claimant that if he worked as a server, he would no longer receive a salary but instead would receive a hourly wage of \$3.50 per hour plus tips. Luna did not guarantee the claimant any particular number of hours or days of work as a server, but told him to get additional hours, he would have to work some shifts as a cook. The claimant agreed to this arrangement. Afterward, the claimant was scheduled to work part time as a server and cook but missed several work shifts due to being sick. The claimant has not worked all his scheduled hours.

The claimant filed a new claim for unemployment insurance benefits with an effective date of August 27, 2006. His weekly benefit amount was determined to be \$273.00.

The claimant filed for and received a total of \$1,660.00 in unemployment insurance benefits for the weeks between August 27 and October 14, 2006.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was eligible for partial unemployment insurance benefits effective August 27, 2006.

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. Luna testified that the claimant could have worked full time as a cook after coming back from being off work due to medical reasons but he requested to be a server. The claimant denies this happened. Luna's testimony is more credible on this point.

The unemployment insurance law states an individual must be able to and available for work. Iowa Code section 96.4-3. 871 IAC 24.23(26) states that a claimant is disqualified from receiving benefits if he is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire. The claimant was not eligible for unemployment insurance benefits because he took the job as a server knowing that he was not guaranteed any particular number of hours of work and then failed to work all his scheduled hours.

The next issue in this case is whether the claimant was overpaid unemployment insurance benefits.

Iowa Code section 96.3-7 provides:

7. 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 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.

As a result of this decision, the claimant is disqualified from receiving unemployment insurance benefits effective August 27, 2006, and was overpaid \$1,660.00 in unemployment insurance benefits for the weeks between August 27 and October 14, 2006.

DECISION:

The unemployment insurance decision dated October 4, 2006, reference 02 is reversed. The claimant is ineligible for unemployment insurance benefits effective August 27, 2006, and continuing until he reopens his claim for benefits and establishes that he is fully available for work. The claimant was overpaid \$1,660.00 in unemployment insurance benefits, which must be repaid.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/cs