

IOWA DEPARTMENT OF INSPECTIONS & APPEALS
Division of Administrative Hearings
Wallace State Office Building
Des Moines, Iowa 50319

Appeal Number: 10IWDUI033/095
OC: 12/13/09
Claimant: Appellant (4)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**EDWARD ELSBERRY
23899 HAYS STREET
FORT DODGE, IA 50501**

**IOWA WORKFORCE DEVELOPMENT
INVESTIGATIONS AND RECOVERY
1000 EAST GRAND AVENUE
DES MOINES IA 50319-0209**

DAN ANDERSON, IWD
JANE CONNOR, IWD

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to the Department. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

Jean M. Davis

(Administrative Law Judge)

April 29, 2010

(Dated and Mailed)

Iowa Code section 96.3-7 – Recovery of Overpayment of Benefits
Iowa Code section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE

Appellant Ed Elsberry filed an appeal from a decision issued by Iowa Workforce Development (the Department) dated January 7, 2010, reference 02. In this decision, the Department determined that Mr. Elsberry was overpaid \$1,252.00 in unemployment insurance benefits for the weeks of April 26, 2009 through May 30, 2010. The decision states that the overpayment resulted from the appellant's failure to report or correctly report wages earned with OMG Midwest, Inc.

The case was retransmitted from Workforce Development to the Department of Inspections and Appeals on March 25, 2010 for scheduling of a contested case hearing. A Notice of Telephone Hearing was mailed to all parties on April 1, 2010. On April 13, 2010, a telephone hearing was held before Administrative Law Judge Jean M. Davis. Investigator Jane Connor represented the Department and presented testimony. The documents contained in the administrative files were admitted into the record as evidence. The Appellant did not appear for the hearing.

ISSUES

Whether the Appellant filed a timely appeal.

Whether the Department correctly determined that the claimant was overpaid unemployment insurance benefits.

FINDINGS OF FACT

The Appellant had two claims for unemployment insurance benefits which are relevant to this case. The first claim date was December 14, 2008. In connection with that claim, the Appellant received a notice of overpayment dated October 26, 2009 informing him that he was overpaid in benefits during the time period December 28, 2008 through April 4, 2009 due to earnings from OMG Midwest Inc. That notice also set forth the Appellant's appeal rights and stated that November 5, 2009 was the deadline for filing an appeal. The Appellant did not file an appeal from this decision.

The Appellant also had a claim for benefits on December 13, 2009. During this claim period, the Appellant was again employed by OMG Midwest, Inc. In addition, based upon the wages earned from OMG Midwest, Inc., the Appellant was again notified by the Department that he had been overpaid in unemployment insurance benefits in the amount of \$1,252.00 during the time period of April 26, 2009 through May 30, 2009. This notice stated that an appeal from the decision must be filed by January 17, 2010. The notice further provides that if filing date falls on a Saturday, Sunday or holiday, the appeal period is extended to the next business day.

On January 15, 2010, the Appellant signed a notice of appeal which was then mailed to the Department's Appeals Section. The date stamp showing receipt in the Appeals Section indicates that the Appeal was received on January 19, 2010. January 17, 2010 was a Sunday and January 18, 2010 was a holiday (Martin Luther King Jr. Day). As such January 19, 2010 was the next business day following January 17, 2010.

Ms. Connor performed a cross match audit of the earnings earned by the Appellant and his claim for benefits during the time period April 26, 2009 through May 30, 2009. Ms. Connor verified the earnings as reported by OMG Midwest, Inc. and compared the earnings to those earning reported by the Appellant during the same period of time. Earned income was reported by the Appellant using the Department's automated telephone call in system. The Department's records of wages reported by the Appellant indicate that he sometime

under reported his earnings and sometimes failed to report earnings. During the cross match audit, Ms. Connor offered the Appellant an opportunity to meet with her to explain his earned income and the reports he filed. The Appellant declined to meet with Ms. Connor.

Based upon the audit performed, the Department initially determined that the Appellant had been overpaid benefits in the amount of \$1,252. At the hearing, Ms. Connor testified that she had recalculated the amount of the overpayment to correct an error in crediting the amount owed for the week of May 30, 2009. The recalculated overpayment actually reduced the overpayment by \$15.00. As such, at hearing, the Department lowered/modified the amount of the overpayment to \$1,237.00.

REASONING AND CONCLUSIONS OF LAW

Iowa Code section 96.6(2) requires that an appeal of a representative's decision must be filed by a claimant or other interested party "after notification or within ten calendar days after notification was mailed to the claimant's last known address." The Iowa Supreme Court has determined that timely appeal is both mandatory and jurisdictional.¹

Mr. Elsberry's appeal of January 19, 2010 from the notice dated October 26, 2009 was not timely filed. Mr. Elsberry is therefore foreclosed from challenging that decision. However, his appeal is timely filed from the notice of overpayment dated January 7, 2010. His appeal is dated stamped as received in the Appeals Section on January 19, 2010, which was the next business day following the holiday on January 18, 2010. Thus, I do have jurisdiction to review the overpayment associated with the January 7, 2010 notice.

Under Iowa law, if an individual receives unemployment insurance benefits for which he or she is subsequently determined to be ineligible, IWD can recover those benefits even if the individual acted in good faith and is not otherwise at fault. IWD may recover the overpayment of benefits by requesting payment from the individual directly or by deducting the overpayment from any future benefits payable to the overpaid claimant.² 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 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.

If the division 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

¹ *Beardslee v. Iowa Dept. of Job Services*, 276 N.W.2d 373, 377 (Iowa 1979).

² Iowa Code § 96.3(7)(a) (2009).

reimbursable employers, notwithstanding section 96.8, subsection 5.

I conclude that the claimant is overpaid benefits \$1,237.00 for the weeks determined by the Department. The Appellant had earned income which made him ineligible for the unemployment benefits he received for the same weeks. The Appellant's earnings were verified by his employer. The Department has established the existence of an overpayment based upon the records submitted by the Appellant's employer which verified the earnings paid to the Appellant. On this record, there is no basis on which to disturb the prior decision that the Appellant was overpaid however the amount of the overpayment has been modified at the Department's request.

DECISION

The Department's decision dated January 7, 2010 is AFFIRMED. The claimant has been overpaid benefits in the amount of \$1,237.00

jmd