

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

**Appeal Number:** 09-IWDUI-176-77  
**OC:** 12/28/08  
**Claimant:** Appellant (4)

**DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**ROBERT THOMAS**  
706 E. 12TH STREET  
SOUTH SIOUX CITY, NE 68776

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

DAN ANDERSON, 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.

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(Administrative Law Judge)

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September 23, 2009

(Dated and Mailed)

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Iowa Code section 96.3-7 – Recovery of Overpayment of Benefits  
Iowa Code section 96.16-4 – Misrepresentation  
Iowa Code section 96.5-8 – Administrative Penalty  
Iowa Code section 96.6-2 – Timeliness of Appeal

**STATEMENT OF THE CASE**

Robert Thomas filed an appeal from two decisions issued by Iowa Workforce Development (the Department) dated July 23, 2009, reference 05, and July 28, 2009, reference 06. In the July 23 decision, the Department imposed an administrative penalty on the appellant which disqualified him from receiving unemployment benefits

from July 19, 2009 through October 10, 2009. In the July 28 decision, the Department determined that Mr. Thomas was overpaid \$1,736 in unemployment insurance benefits for four weeks between May 31, 2009 and June 27, 2009. The decision stated that the overpayment resulted from the appellant failing to report wages earned with Ace Sign Displays Inc.

The case was originally transmitted from Workforce Development to the Department of Inspections and Appeals on August 11, 2009 to schedule a contested case hearing. The file was delayed in transit and did not reach its destination until August 25, 2009. A Notice of Telephone Hearing was mailed to all parties on August 25, 2009. On September 4, 2009, a telephone appeal hearing was held before Administrative Law Judge Laura Lockard. Investigator Larry Finley represented the Department and presented testimony. The Department presented testimony from Sharon Umland, secretary/treasurer of Ace Sign Displays Inc., and Lee Umland, crew foreman with Ace Sign Displays Inc. Appellant Robert Thomas appeared and presented testimony. Exhibits A and B were submitted by the Department and admitted into the record as evidence.

### **ISSUES**

1. Whether the Department correctly determined that the claimant was overpaid unemployment insurance benefits and, if so, whether the amount of overpayment was correctly calculated.
2. Whether the Department correctly determined that an overpayment was the result of misrepresentation on the part of the claimant.
3. Whether the Department correctly imposed an administrative penalty.
4. Whether the appellant's appeal was timely filed.

### **FINDINGS OF FACT**

#### **A. Timeliness of Appeal**

The Department's July 23, 2009 decision states that it becomes final unless an appeal is postmarked by August 2, 2009, or received by the Department's appeals section by that date. The Department's July 28 decision states that it becomes final unless an appeal is postmarked by August 7, 2009, or received by the appeals section by that date. (Exh. A, B).

The appellant's appeal is postmarked August 6, 2009. (Exh. A, p. 3).

#### **B. Overpayment and Misrepresentation**

Robert Thomas filed a claim for unemployment benefits with an effective date of December 28, 2008. Mr. Thomas made claims for and received unemployment benefits during May and June, 2009.

The Department conducted an audit of Mr. Thomas's unemployment claim for June and July, 2009. Ace Sign Displays reported that Mr. Thomas earned wages in the weeks ending June 6, June 13, June 20, and June 27, 2009. When making claims for those weeks, Mr. Thomas did not report having earned any wages. Mr. Thomas's weekly benefit amount during this time period was \$409. In addition to his weekly benefit amount, Mr. Thomas also received a \$25 stimulus payment each week during the relevant time period. (Exh. A).

The following chart sets out the amounts claimed by Mr. Thomas and reported by Ace Sign Displays, as well as the amount of benefits Mr. Thomas received each week and the amount of benefits the Department believes Mr. Thomas should have received if his wages were correctly reported.

<i>Week ending</i>	<i>Reported by claimant</i>	<i>Reported by employer</i>	<i>Benefits rec'd</i>	<i>Benefits entitled</i>
6/6	\$0	\$466	\$434 <sup>1</sup>	\$0
6/13	\$0	\$529	\$434	\$0
6/20	\$0	\$621	\$434	\$0
6/27	\$0	\$282	\$434	\$254

The Department originally determined, based on information provided by Ace Sign Displays, that Mr. Thomas earned \$923 in gross wages in the week ending June 27, 2009. The overpayment amount in the July 28 decision was calculated using that figure. At hearing, the Department's investigator acknowledged that the information Ace Sign Displays originally provided regarding the week ending June 27 was in error. The actual amount of wages Mr. Thomas received that week – \$282 – is what is reflected in the above chart. The \$254 in benefits that the Department asserts Mr. Thomas was entitled to that week includes \$229 in regular benefits, plus the \$25 stimulus payment.

Based on the foregoing, the Department originally determined that Mr. Thomas was overpaid unemployment benefits in the amount of \$1,736. Based upon the adjustment in earnings for the week ending June 27, the Department's representative stated at hearing that the overpayment should only have been \$1,482.

After determining the discrepancy between the amounts reported by Mr. Thomas and his employer, the Department sent Mr. Thomas a preliminary audit notice on June 30, 2009. That notice advised him of the discrepancy and gave him an opportunity to respond by July 10, 2009. On July 17, 2009, the Department's investigator received a note from Mr. Thomas indicating that his gross wages for the week ending June 27 were only \$256, not the \$923 reported by the employer. The investigator checked back with the employer and the employer stated again that Mr. Thomas grossed \$923 in that week.

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<sup>1</sup> The amount of benefits received in each week includes the weekly benefit amount and a \$25 stimulus payment.

On that basis, the Department issued the July 28 overpayment decision.

On July 17, 2009, the Department mailed Mr. Thomas a notice of fact-finding interview regarding possible imposition of an administrative penalty. The interview was scheduled for July 22, 2009 at 8:45 AM. The Department's investigator called Mr. Thomas at 8:50 and 9:05 AM on that date and was not able to get in touch with him.

Each week that a claimant makes a claim for unemployment benefits, he is asked whether he worked during the week. Mr. Thomas reported that he did not work during the four weeks in question. The Department's "Facts About Unemployment Insurance Booklet" advises claimants that to be eligible for unemployment benefits they must report all gross earnings in the week they are earned.

Prior to the current claim, Mr. Thomas has had at least five other claims for unemployment insurance benefits, beginning in 1996 and continuing through 2005.

### **REASONING AND CONCLUSIONS OF LAW**

#### **A. Timeliness of Appeal: Administrative Penalty**

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 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.<sup>2</sup>

Mr. Thomas's appeal of the Department's July 23 decision regarding the administrative penalty was postmarked on August 6, 2009, four days after the August 2 deadline established by statute and articulated in the notice.<sup>3</sup> The appeal was not timely. Mr. Thomas is therefore foreclosed from challenging the administrative penalty decision. Since Mr. Thomas's appeal regarding the July 23 decision was not filed timely, I do not have jurisdiction to consider whether the Department was correct in imposing an administrative penalty.

Mr. Thomas's August 6 appeal was timely with respect to the July 28 overpayment decision. The appeal deadline for that decision was August 7.

#### **B. Overpayment and Misrepresentation**

Under Iowa law, if an individual receives unemployment insurance benefits for which he or she is subsequently determined to be ineligible, IWD must 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.<sup>4</sup>

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

<sup>3</sup> An appeal filed by mail is considered filed as of the date of the postmark on the appeal envelope. 871 Iowa Administrative Code (IAC) 26.4(2).

<sup>4</sup> Iowa Code § 96.3(7)(a) (2009).

If a claimant is overpaid benefits as a result of misrepresentation, IWD may – in addition to recovering the overpayment through direct payment or deduction from future benefits – file a lien for the overpayment amount in favor of the state on the claimant's real or personal property and rights to property.<sup>5</sup>

Mr. Thomas failed to report wages during four weeks that he was employed and earned wages with Ace Sign Displays. Mr. Thomas did not dispute the employer's report of earnings for the weeks ending June 6, June 13, or June 20. Mr. Thomas did dispute the employer's initial report that he earned \$923 during the week ending June 27. Mr. Thomas reported to the Department's investigator that he earned only \$256 during that week. Sharon Umland, the secretary/treasurer for Ace Sign Displays, testified at hearing that, upon review of the payroll records, she discovered that she had erred and that Mr. Thomas actually grossed \$282 during the week ending June 27. Although the employer initially erred in reporting Mr. Thomas's wages to the Department, I found Ms. Umland's testimony regarding the correct gross wages at hearing to be credible. Apart from the statement to the Department's investigator, Mr. Thomas submitted no additional evidence to support his contention that his wages were only \$256 during the week ending June 27.

An individual who is partially unemployed may receive unemployment insurance benefits if he is working less than his normal full-time week for an employer and is earning less than his weekly benefit amount plus fifteen dollars.<sup>6</sup> Mr. Thomas, then, could have earned up to \$424 in a week and still received some amount of unemployment benefits. If a claimant earns less than the weekly benefit amount plus \$15, benefits are calculated as follows: weekly benefit amount minus the claimant's wages in the week that exceed 25% of the weekly benefit amount.<sup>7</sup>

With respect to the \$25 weekly stimulus payment, an individual is eligible to that payment as long as he is entitled to receive some amount of regular unemployment benefits during the claim week. The only week that Mr. Thomas was eligible for benefits was the week ending June 27. In that week, then, the Department cannot recoup the \$25 stimulus payment. In the remaining three weeks, however, the Department correctly included the \$25 payment each week as part of the overpayment amount.

Applying the formula above, Mr. Thomas was overpaid regular weekly benefits in the amount of \$1,407. He was overpaid stimulus payments of \$75. The total overpayment is \$1,482.

The Department considered Mr. Thomas's knowledge of the unemployment insurance system, as evidenced by his five previous claims, as well as the fact that he reported not having worked during four weeks that he received fairly substantial wages in determining that the overpayment was the result of misrepresentation.

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<sup>5</sup> 871 IAC 96.16(4).

<sup>6</sup> Iowa Code § 96.19(38)(b)(1) (2009).

<sup>7</sup> 871 IAC 24.18.

It should be noted that Mr. Thomas testified at hearing that he responded “yes” to the question of whether he worked on the weeks in question when filing his claims for those weeks on the Department’s automated system. Mr. Thomas stated that after he responded yes, the system malfunctioned and did not go on to ask him what his wages were. I do not find Mr. Thomas’s testimony on this point credible. An individual with a fairly significant history of filing unemployment claims would likely know that something was amiss if the Department’s system failed to ask him what his wages were if he reported he worked in a particular week. During three of the weeks in question, Mr. Thomas earned more than his weekly benefit amount. Mr. Thomas did not take any action consistent with his believing the system had malfunctioned. He did not, for example, report to the Department that the system failed to ask for wages during weeks he worked. He also did not take any action after he received his full weekly benefit amount in those weeks, which – given his experience with the unemployment system – he should have realized was not in keeping with the Department’s rules.

Under these circumstances, the Department correctly determined that the overpayment was a result of misrepresentation.

### **DECISION**

The Department’s decision dated July 23, 2009, reference 05, is AFFIRMED. The appellant did not timely appeal the decision, therefore there is no jurisdiction to consider the appellant’s appeal on the administrative penalty issue. The Department’s decision dated July 28, 2009, reference 06, is MODIFIED. The claimant has been overpaid benefits in the amount of \$1,482. The overpayment is the result of misrepresentation.

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