

IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
DIVISION OF ADMINISTRATIVE HEARINGS
LUCAS STATE OFFICE BUILDING
Des Moines, Iowa 50319

Appeal Number: 05-IWDUI-0934
OC: 07/18/04
Claimant: Appellant (3)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

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 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.

JANEL L ORTON
19619 186TH AVENUE
NEW LONDON IA 52645

STATE CLEARLY

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

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.

Dan Anderson, IWD

(Administrative Law Judge)

April 22, 2005

(Decision Dated & Mailed)

Section 96.3-7 - Recovery of Overpayments
Section 96.5-7 B Vacation Pay
871IAC24.16 - Vacation Pay

STATEMENT OF THE CASE:

The claimant appealed a representative's decision dated March 21, 2005, reference 02, which held that she was overpaid benefits \$108.00 during a review period from July 18, 2004 to October 2, 2004, due to either failing to report or incorrectly reporting wages from Jet Stop – New London Inc., and Newport Junction Corp.

The hearing was held pursuant to due notice on April 19, 2005, by telephone conference call. The claimant participated. Karen von Behren, Investigator, participated on behalf of Investigation and

Recovery, Iowa Workforce Development. Claimant Exhibit A and Department Exhibit One were received as evidence.

FINDINGS OF FACT:

Having heard the testimony and having examined the evidence in the record, the administrative law judge finds: The claimant filed a claim for benefits effective July 18, 2004, as she was laid-off from work due to a change of ownership. The claimant worked as a salaried store manager of the Jet Stop, and she was advised that she needed to take her accumulated vacation pay during the final week she worked for the employer. The claimant earned an annual salary of \$25,780 that was paid bi-weekly at a rate of \$991.54. The final bi-weekly pay-period ran from July 12, 2004 to July 25, 2004 with a pay-date of July 28, 2004.

The department audited the claimant's claim for the third quarter of 2004. Representatives of two employers, Jet Stop – New London Inc., and Newport Junction Corp. responded to the audit by reporting the hours worked, vacation pay, and gross wages paid to the claimant during a review period from July 18, 2004 to October 2, 2004.

The department compared the employers' report of wages for the claimant against her benefit claim record for the same weeks. Newport reported that it paid the claimant vacation pay of \$551, and regular pay of \$162 for the week ending July 24, 2004. The claimant reported wages of \$35 for the week ending July 24, and she received a benefit of \$310. Jet Stop reported paying wages to the claimant in an amount greater than what she reported for the weeks ending August 28, September 4, September 11, Sept 18 and October 2, 2004.

The department concluded the claimant earned excessive pay for the week ending July 24 that causes an overpayment of \$310, and for the 5-weeks ending October 2 the total amount of \$56. The department noted the claimant reported wages of \$296 for the week ending August 21 that reduced her benefit to \$91 when no employer reported any wages, which created an *under-payment* of \$291. The department also noted a \$39 *under-payment* for the week ending September 25. The underpayments (\$219 & \$39) reduced the overpayment from \$366 to \$108.

Investigator von Behren mailed an audit notice with the employer wage reports to the claimant on March 4, 2005 regarding the \$108 overpayment. There was no response, and the department issued the decision. The claimant conferred with Investigator von Behren on March 29 about the overpayment, and she filed an appeal.

After the appeal, von Behren revised the department audit for the week ending July 24, 2004 by eliminating any consideration of regular pay that was earned by the claimant during her final workweek (the first week of the bi-weekly pay-period ending July 25, 2004), but applying the vacation pay (\$551) to the subsequent week ending July 24, 2004 that disqualifies the claimant due to excessive wages and confirms the \$310 overpayment.

Investigator von Behren contacted the Jet Stop representative regarding the wages earned, and she confirmed what the claimant had advised von Behren that wages of \$305 were paid for the week ending August 21, 2004. The wage report changed the \$219 *under-payment* to an overpayment of \$9. Further corrected wage information changed the overpayments for the weeks ending August 28 from \$5 to \$6, and September 4 from \$13 to \$2.

Investigator von Behren concludes that the total overpayment due to the revised audit has increased from \$108 to \$326 that is based primarily on the Jet Stop err of failing to report \$305 wages earned by the claimant in the initial audit (instead of \$219 *under-payment*, \$9 overpayment).

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is overpaid benefits \$108 due to receiving vacation pay, and excessive wages.

Iowa Code Section 96.5-7 provides:

An individual shall be disqualified for benefits: γ

7. Vacation pay.

a. When an employer makes a payment or becomes obligated to make a payment to an individual for vacation pay, or for vacation pay allowance, or as pay in lieu of vacation, such payment or amount shall be deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" hereof.

b. When, in connection with a separation or layoff of an individual, the individual's employer makes a payment or payments to the individual, or becomes obligated to make a payment to the individual as, or in the nature of, vacation pay, or vacation pay allowance, or as pay in lieu of vacation, and within ten calendar days after notification of the filing of the individual's claim, designates by notice in writing to the department the period to which the payment shall be allocated; provided, that if such designated period is extended by the employer, the individual may again similarly designate an extended period, by giving notice in writing to the department not later than the beginning of the extension of the period, with the same effect as if the period of extension were included in the original designation. The amount of a payment or obligation to make payment, is deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" of this subsection 7.

c. Of the wages described in paragraph "a" (whether or not the employer has designated the period therein described), or of the wages described in paragraph "b", if the period therein described has been designated by the employer as therein provided, a sum equal to the wages of such individual for a normal workday shall be attributed to, or deemed to be payable to the individual with respect to, the first and each subsequent workday in such period until such amount so paid or owing is exhausted. Any individual receiving or entitled to receive wages as provided herein shall be ineligible for benefits for any week in which the sums, so designated or attributed to such normal workdays, equal or exceed the individual's weekly benefit amount. If the amount so designated or attributed as wages is less than the weekly benefit amount of such individual, the individual's benefits shall be reduced by such amount.

d. Notwithstanding contrary provisions in paragraphs "a", "b", and "c", if an individual is separated from employment and is scheduled to receive vacation payments during the period of unemployment attributable to the employer and if the employer does not designate the vacation period pursuant to paragraph "b", then payments made by the employer to the individual or an obligation to make a payment by the employer to the individual for vacation pay, vacation pay allowance or pay in lieu of vacation shall not be deemed wages as defined in section 96.19, subsection 41, for any period in excess of one week and such payments or the value of such obligations shall not be deducted for any period in excess of one week from the unemployment benefits the individual is otherwise entitled to receive under this chapter. However, if the employer designates more than one week as the vacation period pursuant to paragraph "b", the vacation pay, vacation pay allowance, or pay in lieu of vacation shall be considered wages and shall be deducted from benefits.

e. If an employer pays or is obligated to pay a bonus to an individual at the same time the employer pays or is obligated to pay vacation pay, a vacation pay allowance, or pay in lieu of vacation, the bonus shall not be deemed wages for purposes of determining benefit eligibility and amount, and the bonus shall not be deducted from unemployment benefits the individual is otherwise entitled to receive under this chapter.

871 IAC 24.16(96) Vacation Pay.

24.16(1) If the employer properly notifies the department within ten days after the notification of the filing of the claim that an amount of vacation pay, either paid or owed, is to be applied to a specific vacation period, a sum equal to the wages of the individual for a normal workday of designated vacation period until the amount of the vacation pay is exhausted.

24.16(2) If the employer makes the original designation of the vacation period in a timely manner, the employer may extend the vacation period by designating the period of the extension in writing to the department before the period of extension begins.

24.16(3) If the employer fails to properly notify the department within ten days after the notification of the filing of the claim that an amount of vacation pay, either paid or owed, is to be applied to a specific vacation period, the entire amount of the vacation pay shall be applied to the one-week period starting on the first workday following the last day worked as defined in subrule 24.16(4). However, if the individual does not claim benefits after layoff for the normal employer workweek immediately following the last day worked, then the entire amount of the vacation pay shall not be deducted from any week of benefits.

24.16(4) Unless otherwise specified by the employer, the amount of the vacation pay shall be converted by the department to eight hours for a normal workday and five workdays for a normal workweek.

This rule is intended to implement Iowa Code Section 96.5(7).

871 IAC 24.17(96) Vacation Pay procedure.

24.17(1)

a. Upon receipt of the vacation information, the unemployment insurance representative shall immediately issue the appropriate decision concerning vacation pay to the employer and to the claimant. The unemployment insurance representative shall then check the current status of the claim on the computer record to ascertain if any weeks have been reported.

c. If the computer record shows that the claimant has not reported or claimed for some or all of the weeks indicated for the vacation period, the unemployment insurance representative shall take no further action on the weeks not claimed.

d. The claimant shall be instructed to only report vacation pay applicable to the first week. The claimant shall also be instructed that vacation pay designated by the employer in excess of one week may result in an overpayment of 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 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 reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant is overpaid benefits \$326 for the 7-weeks ending October 2, 2004 due to receiving vacation pay and earning excessive wages from Newport Junction and Jet Stop pursuant to Iowa code sections 96.5-7 and 96.3-7. The primary contention of the claimant is that her accumulated vacation pay of \$551 should have been applied to the last week of her work that was the first week of her bi-weekly pay period (July 12-July 18, 2004) rather than the second week ending July 24, 2004. The employer designated in the department audit that the vacation pay should apply to the week ending July 24, 2004 that coincides with her lay-off that occurred on July 19, 2004. The employer designation is in conformity with the law sections cited above, and the amount of pay disqualifies her from receiving the \$310 benefit paid to her.

The primary reason for the overpayment increasing from \$108 to \$326 is the claimant's veracity in pointing-out to the Investigator that Jet Stop had erred by failing to report the \$305 wages that eliminated the under-payment (\$219), and caused an overpayment (\$9). The claimant did not take issue with the minor overpayments that occurred in 5 of the 7 weeks during the audit review.

DECISION:

The decision of the representative dated March 21, 2005, reference 02, is MODIFIED ADVERSELY to the claimant. The claimant is overpaid benefits \$326.00.

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