

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

RODNEY D USHER

Claimant,

and

ANTHONY D BILL

Employer.

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HEARING NUMBER: 10B-UI-17013

**EMPLOYMENT APPEAL BOARD
DECISION**

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.3-7, 40.321

D E C I S I O N

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES AND REMANDS** as set forth below.

FINDINGS OF FACT:

This procedurally complex case comes to us on the issue of overpayment only. We thus do not address factual issues pertaining to the Claimant's separation. Instead we focus on procedure. We set out our fact findings in the following time-line because this is perhaps the only clear way to do it:

September 28, 2008.....Original Claim date on first claim. This claim generates case 00091

December 3, 2008.....Claimant is fired

December 30, 2008Claim representative grants benefits on the Able & Available issue in what becomes appeal 00091

January 2009ALJ Morman issues decision in case 00091 granting benefits on the Able and Available issue

February 21, 2009EAB affirms the decision in 00091 and grants benefits on the Able and Available issue. EAB remands on the question of the separation

September 27, 2009.....Claimant established a new benefit year. This claim generates case 16089 (separation) and case 17013 (overpayment)

October 21, 2009.....Claims representative denies benefits based on the separation in what becomes case 16089

November 3, 2009Claims representative assesses overpayment of \$14,894.17 for the 43 weeks between 12/21/08 and 10/17/09. This becomes case 17013 (the instant case).

December 15, 2009Administrative Law Judge Lewis issues a decision affirming the disqualification in case 16089

January 29, 2010Administrative Law Judge Lewis issues a decision affirming the assessment of the overpayment in case 17013

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether an overpayment can be assessed once a benefit year has ended. In the past we have applied a rule of “one protest per claim.” Under this rule an employer who fails to protest a claim based on a separation, may do so in a subsequent benefit year, but that protest would only challenge payment of benefits in the second year. Here this rule does not apply. The Claimant was not separated until after the protest period. The Employer did bring this to the agencies’ attention when we remanded the matter in February of 2009. Thus the Employer did protest in the first benefit year and is not prevented from protesting payment of charges in the first benefit year merely because our remand never got processed. Thus we relieve the Employer of charges for any claim made after December 21, 2008 as set out in the claims decision of November 3, 2009.

It does not follow that the Claimant must pay back all these benefits. Iowa Code section 96.6(2)(a) (2009) provides:

...If an administrative law judge affirms a decision of the representative, or the Appeal Board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5....

This is further explained in the regulations:

Rule of two affirmances.

a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.

b. However, if the decision is subsequently reversed by higher authority:

(1) The protesting employer involved shall have all charges removed for all payments made on such claim.

(2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.

(3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

871 IAC 23.43(3). Here in case 00091 Judge Morman affirmed a decision of the claims representative allowing benefits. That decision was then appealed to this Board which, on February 21, 2009 also affirmed to allow benefits but remanded the matter on the issue of the separation. When the remand was finally process the Claimant was denied benefits for the entire period, including the first benefit year.

Given this procedural context the question is: Is it a double affirm if the Board remands following an ALJ affirmance allowing benefits if the Board ultimately denies benefits? The Supreme Court of Iowa has already answered this question.

In *Reichl v. IDJS*, 333 N.W.2d 836 (Iowa 1983) a claimant won on the issue of disqualification for misconduct before the claims representative and the Administrative Law Judge. On appeal to the Board, the case was affirmed on the separation but also remanded on the question of refusal of suitable work. On the issue of suitable work the claimant was denied benefits. The Supreme Court found that the claimant fell under the double affirm rule. Its discussion is directly on point:

Respondent argues that neither section 96.6(2) or Iowa Administrative Code 370-3.43 precludes recoupment of benefits unless two favorable decisions allowing benefits are "reversed by higher authority." Because the present case involves a remand by the appeals board for determination of an issue not previously considered, the agency asserts this condition has not been met. We do not interpret either the statute or the agency rule as providing support for this claim. Under both the statute and the rule, the circumstances which create a proscription against benefit recoupment are two favorable decisions "allowing payment of benefits." In the present case, both the May 14, 1980 decision of the claims deputy and the June 25, 1980 decision of the hearing officer were favorable to petitioner. It is undisputed that as a result of these decisions the agency proceeded to pay benefits to petitioner in the face of a protest by the employer. Under these circumstances, we conclude that these decisions must be characterized as "allowing payment of benefits."

Reichl at 838. The case, in as much as it relies on the first affirmance by the Administrative Law Judge, is indistinguishable from the case at bar. The double affirm rule must apply.

Even if this were not binding precedent the plain language of the statute and rule make clear that this is a double affirm. That language specifies that “**whenever** an administrative law judge affirms a decision of the representative” then “the benefits shall be paid **regardless** of **any** appeal.” By finding that the benefits should be paid regardless of the Board’s remand order we do no more than take this language literally. Finally, we note that had we reversed in case 00091 the Claimant would have clearly benefited from the double affirm rule. It would be a bizarre result if the Claimant failed to fall under the double affirm rule merely because the reversal took place even later due to technical problems with the government’s processing. No doubt this is why the Supreme Court ruled the way it did in *Reichl*. The case at bar epitomizes what the Supreme Court explained in another case: “To force unemployed workers to either await prolonged litigation for a final adjudication or to pay back at some remote later date benefits already received and used for family support would defeat the overriding purpose of the act. In many instances it would, indeed, compound, rather than cure, the problem.” *Galvin v. Iowa Beef Processors, Inc.*, 261 N.W.2d 701, 704 (Iowa, 1978).

The only bad news for the Claimant, aside from losing in case 16089 which is not at issue, is that we cannot read the double affirm rule as applying outside the benefit year. Once the Claimant filed a new claim then, since the separation had not been previously adjudicated, the Employer was free to protest based on the separation. In short, the double affirm only applies to the claim that was affirmed twice. So the 2008 claim is covered by the double affirm rule, but the 2009 claim is not. No one has allowed benefits on the claim originally filed on September 27, 2009.

We conclude the Claimant is overpaid for the three weeks from September 27, 2009 through October 17, 2009. Obviously our decision today saves the Claimant forty of the forty-three weeks of benefits. Although we remand for an exact calculation it appears to us that the Claimant will owe about \$996. We reiterate that the Employer will not be charged for any of the weeks in question. We will remand this matter to the Claims Section to recalculate the overpayment consistent with our decision.

DECISION:

The administrative law judge's decision dated January 29, 2010 is **REVERSED IN PART, AFFIRMED IN PART**. That portion of the overpayment assessed against the Claimant which is attributable to benefits collected prior to September 27, 2009 is vacated and set aside. That part of the overpayment covering the three weeks from September 27, 2009 through October 17, 2009 is affirmed. The Employer's account shall not be charged for any benefits collected since December 21, 2008. The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

John A. Peno

Elizabeth L. Seiser

Monique Kuester

RRA/ss