

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

Appeal Number: 08-IWDUI-010
OC: 12/09/07
Claimant: Appellant (4)

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 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.

MIKE A GILMORE
2051 KING AVENUE APT #17
DES MOINES IA 50320-2900

STATE CLEARLY

INVESTIGATION AND RECOVERY
IOWA WORKFORCE DEVELOPMENT
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)

February 22, 2008

(Decision Dated & Mailed)

Section 96.4-3 - Able and Available
Section 96.5-8 - Administrative Penalty
871 IAC 25.9(2) - Penalties

STATEMENT OF THE CASE:

The claimant filed an appeal from an Iowa Workforce Development Department decision dated January 9, 2008, reference 01, which disqualified the claimant from receiving benefits for a period from January 6, 2008 to May 24, 200, due to prior overpayments based on misrepresentation.

The hearing was held pursuant to due notice on February 20, 2008, by telephone conference call. The claimant participated. Irma Lewis, Investigator, participated on behalf of Iowa Workforce Development, Investigations and Recovery. Department Exhibit One was received as evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses, and having considered all of the evidence in the record, finds: The claimant was the subject of an audit and investigation on his claim for benefits effective October 16, 2005. A representative of Iowa Workforce Development issued a decision that the claimant was over paid benefits \$268.00 due to misrepresentation on May 30, 2006. A subsequent decision was issue on the same claim that the claimant was overpaid benefits \$536 due to misrepresentation on May 22, 2007. The decisions were not appealed, and they have now become final.

The claimant was the subject of an audit and investigation on his claim for benefits effective December 10, 2006. A representative issued a decision that the claimant was overpaid benefits \$1,292 due to misrepresentation on September 13, 2007. A subsequent decision was issued on the same claim that the claimant was over paid benefits \$323 due to misrepresentation on November 28, 2007. The decisions were not appealed, and they have now become final.

When the claimant filed his most recent claim effective December 9, 2007, a department representative notified Investigator Lewis. Lewis had mailed a warning letter to the claimant on October 18, 2007 about imposing an administrative penalty due to his overpayment history. Lewis mailed a further warning letter to the claimant on December 18, 2007 regarding his overpayments that totaled \$2,419 with a warning about an administrative penalty.

The overpayment history shows that the claimant failed to report wages for eight weeks, and the most recent period involved a period of four-weeks followed by one week. Lewis focused on the most recent five weeks of unreported wages (\$1,615) against the claimant's three-week history of overpayments totaling (\$804). The department guideline is to impose a penalty of eight to twenty weeks for a five-week overpayment with an overpayment history due to misrepresentation.

Although the claimant made a voluntary payment of \$75 toward his outstanding overpayment on November 30, 2007, the remaining payments by offset procedure has reduced the outstanding balance to \$508.00. Lewis considered the failure of the claimant to respond to the department audits as a factor in imposing the penalty, as well as the lack of voluntary re-payments.

The claimant noted that most of the overpayment history evolved over a short period of time, and that he did address this issue in August, October, and November 2007. The claimant has consistently worked with the same employer, Leechman Hardwood Floors, during his overpayment history.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant is able and available for work.

Iowa Code Section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work.

The further issue is whether the administrative penalty imposed is correct.

Iowa Code Section 96.5-8 provides:

8. Administrative Penalty. If the department finds that, with respect to any week of an insured worker's unemployment for which such person claims credit or benefits, such person has, within the thirty-six calendar months immediately preceding such week, with intent to defraud by obtaining benefits not due under this chapter, willfully and knowingly failed to disclose a material fact; such person shall be disqualified for the week in which the department makes such determination, and forfeit all benefit rights under the unemployment compensation law for a period of not more than the remaining benefit period as determined by the department according to the circumstances of each case. Any penalties imposed by this subsection shall be in addition to those otherwise prescribed in this chapter.

871 IAC 25.9(2) provides:

b. The general guide for disqualifications for deliberate falsification for the purpose of obtaining or increasing unemployment insurance benefits is listed below. It is intended to be used as a guide only and is not a substitute for the personal subjective judgment of the investigator because each case must be decided on its own merits. The administrative penalty recommended for falsification ranges from three weeks through the end of the benefit year.

The administrative law judge concludes that the administrative penalty imposed by the department should be modified pursuant to Iowa Code Section 96.4-3 and Iowa Code Section 96.5-8. The claimant was the subject of overpayment decisions due to misrepresentation within the time period established by the law, which were not appealed, and they have now become final. The 20-week period of disqualification imposed by the department is within the administrative penalty discretion of the law.

The department correctly focused on the most recent, five-week, overpayment record in imposing the penalty. The older overpayment history involves one week in May 2006, and two-weeks in May 2007. The claimant was slow in responding to his overpayment problem, but he did have contact with Investigation & Recovery that lead to a voluntary payment of \$75 on November 30, 2007 in light of department offsets that reduced his outstanding overpayment from \$2,419 to \$508. While the overpayment history cannot be ignored (One plus two weeks), it is not so onerous to give rise to a greater than minimum penalty (eight weeks) given the circumstances in this case.

DECISION:

The decision of Iowa Workforce Development dated January 9, 2008, reference 01, is MODIFIED in favor of the claimant. The claimant is disqualified from receiving benefits for the 8-week period ending March 1, 2008. The claimant is entitled to receive benefits effective March 2, 2008, provided he is otherwise eligible.

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