

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

Appeal Numbers: 11IWDUI035-36
OC: 04/11/10
Claimant: Appellant (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

JASON OWEN
3883 PRO ROAD NE
SOLON, IA 52333-9059

IOWA WORKFORCE DEVELOPMENT
INVESTIGATIONS AND RECOVERY
150 DES MOINES STREET
DES MOINES, IA 50309

JOE WALSH, 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.

(Administrative Law Judge)

April 22, 2011

(Dated and Mailed)

Iowa Code section 96.4-3 – Eligibility for Benefits
Iowa Code section 96.6-2 – Recovery of Overpayment Benefits
Iowa Code section 96.16-4 – Misrepresentation

STATEMENT OF THE CASE

Claimant/Appellant Jason Owen filed an appeal from two decisions issued by Iowa Workforce Development (“IWD”) dated December 15, 2010, reference 02, and December 17, 2010, reference 03. In reference 02, IWD found Owen was ineligible to receive unemployment insurance benefits because he was devoting his time and effort to becoming self-employed and was unduly limiting his availability for work. IWD denied

Owen's benefits as of May 9, 2010. In reference 03, IWD found Owen was overpaid \$15,004 for the 31 weeks between May 9, 2010 and December 11, 2010 because of the decision dated December 15, 2010, which disqualified him as not being able and available for work.

IWD transmitted the cases to the Department of Inspections and Appeals to schedule a contested case hearing. When IWD transmitted the cases, it mailed a copy of the administrative files to Owen. Irma Lewis submitted additional documents for hearing.

A contested case hearing was held on April 13, 2011. Owen appeared and testified. Lewis appeared and testified on behalf of IWD. Frank Kuennen also appeared and testified on behalf of IWD. Exhibits 1 through 7 were admitted into the record.

ISSUES

Whether IWD correctly determined the claimant is ineligible to receive unemployment insurance benefits.

Whether IWD correctly determined that the Claimant was overpaid unemployment benefits, and, if so, whether the overpayment was correctly calculated.

Whether the overpayment was the result of misrepresentation.

FINDINGS OF FACT

In 2010, Owen received unemployment insurance benefits. In the fall of 2010, Kuennen, Owen's former employer, contacted IWD and reported Owen was collecting unemployment insurance benefits while operating a business in competition with Kuennen's business. IWD investigated the report.

Lewis contacted Owen. Lewis testified Owen told her he formed a business known as Progressive Agricultural Services, Inc. ("Progressive Agricultural Services") in January 2010. Lewis reported Owen stated he formed the company to buy the Solon Feed Mill, where he previously worked. Owen reported the sale fell through, so he decided to start his own business. Lewis testified Owen told her he bought an abandoned elevator for his storefront on May 5, 2010. Lewis stated she told Owen would be disqualified as of May 9, 2010.

Lewis obtained information from the Iowa Secretary of State showing Owen is the registered agent for Progressive Agricultural Services. Kuennen supplied Lewis with advertisements for Progressive Agricultural Services. The advertisements stated Progressive Agricultural Services supplied feed for cattle, swine, horses, ponies, sheep, goats, and chickens, and carried feed for rabbits, custom creep mix, wild bird seed, dog and cat food, premium pine bedding, baling twine, net wrap, salt blocks and water softener salt. Custom mix feeds and delivery in bulk were also listed as available. Owen and his wife, Lisa, were noted to be the owners. One of the advertisements indicated the business was open between 9:00 a.m. through 6:00 p.m., Monday through Friday, and 10:00 a.m. through 2:00 p.m. on Saturday. The advertisements were not dated.

IWD issued a decision on December 15, 2010, disqualifying Owen from receiving unemployment insurance benefits as of May 9, 2010. IWD then sought to recoup the \$15,004 in unemployment insurance benefits Owen received between May 9, 2010 and December 11, 2010. The decision does not state that the overpayment was due to misrepresentation. Owen appealed. In support of his appeal Owen claimed that his self-employment did not unduly limit his ability to find and maintain other employment.

Kuennen testified Owen started his new business after he started receiving unemployment insurance benefits. Kuennen reported Owen called on Kuennen's customers and suppliers and started competing against his former employer.

Lewis testified she determined Owen was not available for work because he was operating his business from 9:00 a.m. through 6:00 p.m. Monday through Friday and on Saturday from 10:00 a.m. to 2:00 p.m. Lewis reported that Owen told her he opened the storefront in May 2010. Lewis testified she determined Owen received an overpayment due to misrepresentation.

Owen reported he formed Progressive Agricultural Services in January 2010, with the intent to purchase the Solon Feed Mill, where he previously worked. Owen stated he asked Kuennen for a purchase price and accepted Kuennen's offer. Owen testified Kuennen declined to execute the agreement.

Owen found an abandoned elevator in a nearby town in May 2010. Owen testified he did not commence operation until August 2010, at the earliest.

Owen reported he continued to look for employment. He believes his self-employment would not have prevented him from pursuing or accepting other employment. Owen stated he is the target of an angry former employer. Owen testified his self-employment has not gone well. For 2010 he had a net loss of \$22,000.

REASONING AND CONCLUSIONS OF LAW

I. Eligibility for Benefits

To be eligible to receive unemployment benefits, an unemployed individual must be able and available for work, and is earnestly and actively seeking work.¹ According to the decision, the dispute concerns whether Owen was available for work.

“The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market.”² For an individual to be considered available for work, the individual must be willing to accept suitable

¹ *Id.* § 96.4(3).

² 441 IAC 24.22(2).

employment during periods when work is normally performed.³ IWD found Owen was not available for work because he was pursuing self-employment. IWD submitted advertising showing Owen's business was open Monday through Friday 9:00 a.m. through 6:00 p.m., and Saturday, 10:00 a.m. through 2:00 p.m. His business is open more than 40 hours per week, during regular business hours.

At hearing Owen testified he has continued to look for other employment and is willing to accept suitable employment. This raises an issue of credibility. There are many factors used when considering the credibility of witness testimony. Some of the most common standards are as follows:

1. Whether the testimony is reasonable and consistent with other evidence you believe.
2. Whether a witness has made inconsistent statements.
3. The witness' appearance, conduct, age, intelligence, memory and knowledge of facts.
4. The witness' interest in the trial, their motive, candor, bias and prejudice.⁴

Owen's testimony is not reasonable or consistent with other evidence I believe. Owen was operating his business full-time. Owen had the opportunity to present other witness testimony and evidence to support his assertion he has pursued other employment. He did not submit any job search logs, applications, or witness testimony from businesses where he pursued employment. I conclude Owen was not able and available to work when he opened his business.

IWD found Owen was disqualified as of May 9, 2010. Owen testified he began operating his business in August 2010. Owen did not provide a specific date when he began operating his business. IWD did not submit any evidence showing Owen, in fact, began operating his business in May 2010. The advertisements IWD submitted were provided by Kuennen after August 2010. I conclude IWD has proven the period of disqualification commenced August 1, 2010.

II. Overpayment

When IWD determines an individual who received unemployment benefits was ineligible to receive benefits, IWD must recoup the benefits received irrespective of whether the individual acted in good faith and was not otherwise at fault.⁵ IWD may, in its discretion, recover the overpayment either by having a sum equal to the overpayment deducted from any future benefits payable to the individual, or by having the individual pay IWD a sum equal to the overpayment.⁶

³ 441 IAC 24.22(2)l.

⁴ *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996).

⁵ Iowa Code § 96.3(7) (2009).

⁶ *Id.*

Owen was ineligible to receive unemployment benefits in August 2010, yet he continued to receive benefits through December 11, 2010. Owen's weekly benefit amount was \$459. IWD has proven Owen was ineligible for unemployment benefits for 19 weeks. Thus, he received an overpayment of \$8,721.

III. Misrepresentation

IWD determined the overpayments occurred because of misrepresentation. If an individual, by reason of a nondisclosure or misrepresentation receives unemployment benefits, IWD may either deduct the overpayment amount from any future benefits payable to the individual or seek repayment directly from the individual.⁷ The decision involving the overpayment, reference 03, does not mention misrepresentation, which creates a notice problem. While I conclude an overpayment occurred, IWD has not proven the overpayment occurred as the result of misrepresentation.

DECISION

IWD's decision, reference 02, is MODIFIED. IWD has established Owen was ineligible for unemployment insurance benefits effective August 1, 2010. IWD's decision, reference 03, is MODIFIED. IWD has proven Owen received an \$8,721 overpayment, but has not proven the overpayment was due to misrepresentation.

hlp

⁷ *Id.* § 96.16(4).