

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS  
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

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**DONAI MARKS**  
Claimant

**APPEAL NO. 22A-UI-17187-JT-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KANDK INC**  
Employer

**OC: 11/01/20  
Claimant: Appellant (4)**

Iowa Code Section 96.3(7) – Overpayment  
Iowa Code Section 96.4(3) – Able & Available  
Iowa Code Section 96.1A(37) – Temporary & Partial Unemployment

**STATEMENT OF THE CASE:**

On September 15, 2022, Donai Marks (claimant) filed a timely appeal from the September 7, 2022 (reference 01) decision that held she was overpaid \$1,127.70 in regular state benefits for four weeks between December 27, 2020 and February 6, 2021, based on the deputy's conclusion the claimant failed to report or incorrectly reported wages earned with KandK, Inc. After due notice was issued, a hearing commenced on October 17, 2022 and concluded on October 18, 2022. Claimant participated. Krista Kay represented the employer. There were four appeal numbers set for a consolidated hearing: 22A-UI-17187-JT-T, 22A-UI-17188-JT-T, 22A-UI-17189-JT-T, and 22A-UI-17192-JT-T. Department Exhibits D-1 through D-9 were received into evidence.

**ISSUES:**

Whether the claimant was able to work and available for work between December 27, 2020 and February 6, 2021.

Whether the claimant was partially and/or temporarily unemployed between December 27, 2020 and February 6, 2021.

Whether the claimant failed to report and/or incorrectly reported wages for the period of December 27, 2020 through February 6, 2021.

Whether the claimant was overpaid regular state benefits for the period between December 27, 2020 and February 6, 2021.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

Donai Marks (claimant) established an original claim for benefits that was effective November 1, 2020. Iowa Workforce Development set the weekly benefit amount at \$348.00. The claimant made weekly claims that included weekly claims for each of the six weeks between December 27, 2020 and February 6, 2021. For that period, the claimant reported wages and received regular state benefits as follows:

<u>Benefit Week End Date</u>	<u>Wages Reported</u>	<u>State Benefits Paid</u>
1/2/21	200.00	235.00
1/9/21	0.00	348.00
1/16/21	0.00	348.00
1/23/21	150.00	285.00
1/30/21	150.00	285.00
2/6/21	150.00	259.70

In connection with her receipt of regular state benefits for the six weeks between December 27, 2020 and February 6, 2021, the claimant also received \$300.00 in Federal Pandemic Unemployment Compensation (FPUC) for each of the six weeks between December 27, 2020 and February 6, 2021. The claimant's eligibility for the \$300.00 in FPUC weekly benefits depended on her eligibility for regular benefits for the same week.

At the time the claimant established the November 1, 2020 original claim, and at the time the claimant made the weekly claims for the six weeks between December 27, 2020 and February 6, 2021, she was employed with KandK, Inc., doing business as Go Fish Marina Bar & Grill, as a part-time server and bartender. The claimant's compensation consisted of an hourly wage plus tips. The claimant began employment in March 2020. During the relevant period, the claimant's hourly wage was \$6.50 when she worked as a server and \$10.00 when she worked as a bartender. The employer had a peak business season during the warmer months and a slower business season during the cooler months. The claimant averaged 25 to 30 hours a week during the busy season, with some weeks providing significantly more hours. The claimant averaged 15 to 25 hours a week in the off-peak season.

The claimant's quarterly wages from the start of the employment through the first quarter were as follows:

<u>Quarter</u>	<u>Wages</u>	<u>Average Weekly Wage</u>
2020/1	727.96	Insufficient Data
2020/2	3,556.84	273.60
2020/3	8,017.29	616.71
2020/4	4,976.84	382.83
2021/1	3,903.62	300.28

In July 2021, Iowa Workforce Development audited the claimant's unemployment insurance claim. The audit period included the six weeks between December 27, 2020 through February 6, 2021. On July 14, 2021, IWD solicited information from the employer regarding the claimant's weekly work hours, weekly wages, and weekly tip. On July 21, 2021, the employer provided the following requested information for the six weeks in question:

<u>Week End Date</u>	<u>Hours</u>	<u>Gross Wages</u>	<u>Tips</u>	<u>(TOTAL)</u>
1/2/21	19.55	195.50	75.91	271.41
1/9/21	5.60	56.00	69.96	125.96
1/16/21	0.00	0.00	0.00	0.00
1/23/21	7.52	75.20	75.01	150.21
1/30/21	17.21	172.10	107.28	278.38
2/6/21	17.94	179.40	119.00	298.40

The claimant concedes the information provided by the employer is accurate.

On Tuesday or Wednesday, January 5 or 6, 2021, the claimant became ill with COVID-19 and tested positive for COVID-19. The claimant's husband also became ill with COVID-19. The

claimant notified the employer of her illness and that she was unable to work during the illness. The claimant continued to be ill and unable to work for about 10 days. The period of illness included the majority of the week that ended January 9, 2022 and all of the week that ended January 16, 2022.

Aside from the two weeks affected by the COVID-19 illness, the claimant made herself available for all of the work hours the employer made available for her.

Upon receipt of information from the employer pertaining to the audit, an Iowa Workforce Development representative concluded the claimant was overpaid \$235.00 for the week ending January 2, 2021, \$348.00 for the week ending January 9, 2021, \$285.00 for the week ending January 30, 2021, and \$259.70 for the week ending February 6, 2021. Some of the deputy's calculations are suspect. See Exhibit D-6.

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

Iowa Code section 96.3(7) provides, in pertinent part:

7. Recovery of overpayment of benefits.

- a. 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 department 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 department a sum equal to the overpayment.

Gross wages must be reported to Iowa Workforce Development as part of the weekly claim for the week in which the wages were earned. See Iowa Administrative Code rules 871-24.2(1)(g)(3)(2) and 871-24.2(2)(e)(2). The wages to be reported include tips. See Iowa Administrative Code rule 871-24.13(2)(g).

The reporting requirement is addressed in the 2019 Unemployment Insurance Claimant Handbook at page 8:

What to Report on the Weekly Claim?

You must report all gross earnings and gross wages on the weekly claim. Wages are reportable when earned, not when paid. Gross earnings or gross wages are your earnings before taxes or other payroll deductions are made. For additional information, please refer to the page on reportable income.

2019 Unemployment Insurance Claimant Handbook Updated 1-1-20.pdf.

Iowa Admin. Code rule 871-24.18, provides:

Wage-earnings limitation. An individual who is partially unemployed may earn weekly a sum equal to the individual's weekly benefit amount plus \$15 before being disqualified for excessive earnings. If such individual earns less than the individual's weekly benefit amount plus \$15, the formula for wage deduction shall be a sum equal to the individual's weekly benefit amount less that part of wages, payable to the individual with respect to that week and rounded to the lower multiple of one dollar, in excess of one-fourth of the individual's weekly benefit amount.

Iowa Code section 96.4(3)(a) provides as follows:

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

3. a. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3, are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) 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. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Admin. Code r. 871-24.23(1) and (29) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(1) An individual who is ill and presently not able to perform work due to illness.

...

(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

Iowa Code section 96.1A(37) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) While employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

If a claimant to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. Iowa Code section 96.7(2)(a)(2)(a).

The claimant was not able and not available for work within the meaning of the law during the weeks that ended January 9 and January 16, 2021 and was not eligible for regular state benefits for those weeks. During the majority of the week that ended January 9 and throughout the week that ended January 16, 2021, the claimant was ill and unable to work.

Because the claimant was not eligible for regular benefits for the weeks ending January 9 and January 16, 2021, the \$348.00 in regular benefits she received for the week that ended January 9 and the \$348.00 in regular benefits she received for the week that ended January 16, 2021 are benefit overpayments.

During the weeks that ended January 2, January 23, January 30, and February 6, 2021, the claimant was able to work, available for work and partially unemployed. During those weeks, the claimant was available for all of the work the employer had for her, but the employer only had reduced hours available relative to the hours the employer provided during the busy season.

For the week that ended January 2, 2021, the claimant underreported her wages as \$200.00 and received \$235.00 in regular state benefits based on the underreported wages. The claimant earned \$271.00 (rounded) in wages that week. The wages that exceeded (\$87.00) one-fourth of the weekly benefit amount were deductible from unemployment insurance benefits. **Thus, \$184.00 (\$348.00 – \$87.00= \$184.00) of the wages were deductible from the \$348.00 weekly benefit amount, leaving the claimant eligible for \$164.00 in benefits for that week, provided the claimant was otherwise eligible. Because IWD paid the claimant \$235.00 in regular state benefits that week, the claimant was overpaid \$71.00 (\$235.00 - \$164.00 = \$71.00) for the week that ended January 2, 2021.**

For the week that ended January 23, 2021, the claimant accurately reported \$150.00 in earned wages, was paid \$285.00 in regular state benefits for the week, and was eligible for those

benefits, provided she met all other eligibility requirements. There was no overpayment of regular state benefits for the week ending January 23, 2021.

For the week that ended January 30, 2021, the claimant underreported her wages as \$150.00 and received \$285.00 in regular state benefits based on the underreported wages. The claimant earned \$279.00 (rounded) that week, of which \$192.00 was deductible from the \$348.00 weekly benefit amount, leaving the claimant eligible for \$156.00 in regular state benefits for that week, provided the claimant was otherwise eligible. Because IWD paid the claimant \$285.00 in regular state benefits for the week, the claimant was overpaid \$129.00 in regular benefits for the week ending January 30, 2021.

For the week that ended February 6, 2021, the claimant underreported her wages as \$150.00 and received \$259.70 in regular benefits based on the underreported wages. The claimant earned \$298.40 in regular benefits for that week, \$211.40 of which was deductible from the \$348.00 weekly benefits amount, leaving the claimant eligible for \$137.00 (rounded) for that week, provided the claimant was otherwise eligible. Because IWD paid the claimant \$259.70 in regular state benefits for that week, the claimant was overpaid \$122.70 for the week that ended February 6, 2021.

The total overpayment of regular benefits for the period between December 27, 2020 and February 6, 2021 was \$1,018.70.

**DECISION:**

The September 7, 2022 (reference 01) decision is MODIFIED in favor of the claimant as follows. The claimant did not meet the able and available requirements during the weeks that ended January 9, 2021 and January 16, 2021 and is not eligible for benefits for those two weeks. The claimant was able to work, available for work, and partially unemployed during the weeks that ended January 2, January 23, January 30, and February 6, 2021 and was eligible for benefits for those weeks, provided the claimant met all other eligibility requirements. In connection with the partial unemployment weeks, the claimant incorrectly reported her wages and thereby underreported her wages.

The claimant was overpaid \$1,018.70 in regular benefits for the period between December 27, 2020 and February 6, 2021, as follows. The claimant was overpaid \$71.00 regular benefits for the week ending January 2, 2021. The claimant was overpaid \$348.00 for the week ending January 9, 2021. The claimant was overpaid \$348.00 for the week ending January 16, 2021. The claimant was overpaid \$129.00 for the week ending January 30, 2021. The claimant was overpaid \$122.70 for the week ending February 6, 2022. The claimant must repay the overpaid regular benefits.



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James E. Timberland  
Administrative Law Judge

October 31, 2022  
Decision Dated and Mailed

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NOTE TO CLAIMANT: This decision determines you are not eligible for *regular* unemployment insurance benefits for the weeks ending January 9 and 16, 2021 due to your COVID-19 illness. This decision also determines you were overpaid regular benefits for both of those weeks. If you disagree with this decision, you may file an appeal pursuant to the appeal instructions on the last page of this decision. Individuals who do not qualify for regular unemployment insurance benefits, but who were unemployed between February 2, 2020, and June 12, 2021, for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). *You will need to apply for PUA to determine your eligibility under the program for the weeks that ended January 9 and 16, 2021.* To apply for PUA go to <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-appeals> in the last paragraph under "WHAT TO EXPECT FROM THE HEARING." *The reference number is 117187, the pin number you used to join the appeal hearing.*

**APPEAL RIGHTS.** If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board  
4<sup>th</sup> Floor – Lucas Building  
Des Moines, Iowa 50319  
Fax: (515)281-7191  
Online: [eab.iowa.gov](http://eab.iowa.gov)**

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.

AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

**Note to Parties:** YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. 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.

**Note to Claimant:** It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**SERVICE INFORMATION:**

A true and correct copy of this decision was mailed to each of the parties listed.



**DERECHOS DE APELACIÓN.** Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board  
4th Floor – Lucas Building  
Des Moines, Iowa 50319  
Fax: (515)281-7191  
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

**UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:**

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

**Nota para las partes:** USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

**Nota para el reclamante:** es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

**SERVICIO DE INFORMACIÓN:**

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.