

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KEITH GUTIERREZ

Claimant

APPEAL 22A-UI-05938-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CORE STRUCTURAL SERVICES LLC

Employer

OC: 04/04/21

Claimant: Appellant (4-R)

Iowa Code § 96.3(7) – Overpayment of Benefits

Iowa Code § 96.5(5) – Deductions

Iowa Code section 96.1A(37) – Total, Partial, Temporary Unemployment

STATEMENT OF THE CASE:

The claimant, Keith Gutierrez, filed a timely appeal from the February 28, 2022, (reference 03) unemployment insurance decision that found he had been overpaid \$3965.00 between May 2, 2021 and June 5, 2021 due to his failure to report wages earned during that week. After due notice was issued, a telephone conference hearing was set for April 15, 2022. Claimant participated. Operative Plasterer's and Cement Masons' Local 21 President Earl Agan provided testimony in support of the claimant. The claimant was represented by Jason McClitis, attorney at law. The employer participated through Owner Mike Ogle. Exhibit 1 was received into the record.

ISSUES:

Should the settlement agreement the claimant received be considered as earnings from May 2, 2021 to June 5, 2021?

FINDINGS OF FACT:

Having heard the testimony and having examined the evidence in the record, the administrative law judge finds:

The claimant filed for unemployment insurance benefits effective April 4, 2021. The administrative records show the employer protested the claimant's claim arguing he was not able and available. Iowa Workforce Development Department determined the claimant was able and available for work and eligible for benefits on December 29, 2021. The table below shows the weeks the claimant made weekly claims, the earnings he reported and what he was paid in benefits for each week:

	Earnings	Date Issued	How Paid	Benefits Paid
04/10/21	\$250.00	04/19/21	Direct Deposit	\$366.00
04/17/21	\$700.00	04/19/21	Direct Deposit	\$000.00
04/24/21	\$600.00	04/26/21	Direct Deposit	\$000.00

05/01/21	\$000.00	05/03/21	Direct Deposit	\$493.00
05/08/21	\$000.00	05/10/21	Direct Deposit	\$493.00
05/15/21	\$000.00	05/17/21	Direct Deposit	\$493.00
05/22/21	\$000.00	05/24/21	Direct Deposit	\$493.00
05/29/21	\$000.00	06/01/21	Direct Deposit	\$493.00
06/05/21	\$000.00	06/07/21	Direct Deposit	\$493.00
11/27/21	\$300.00	12/10/21	Direct Deposit	\$316.00
12/04/21	\$1000.00	12/10/21	Direct Deposit	\$000.00
12/11/21	\$1200.00	12/20/21	Direct Deposit	\$000.00
12/18/21	\$950.00	12/27/21	Direct Deposit	\$000.00
12/25/21	\$700.00	12/27/21	Direct Deposit	\$000.00

The claimant started working for Concrete Strategies in the second week of June 2021. This separation from employment has not been evaluated.

Local 21 of Operative Plasterers and Cement Masons filed an unfair labor practice grievance with the National Labor Relations Board regarding the labor dispute regarding contract negotiations that led to the claimant to be away from work.

On January 5, 2022, NLRB Field Attorney Kaitlin Kelly sent an email to Owner Mike Ogle regarding how the claimant would be paid. Ms. Kelly specified the claimant would be paid backpay under the proposed agreement, as if he would have worked from April 30, 2021 through June 14, 2021 with an average of 30.27 hours per week for a total of 187.6 hours.

On February 4, 2022, Core Structural Services and Local 21 of Operative Plasterers and Cement Masons reached a settlement agreement. The settlement agreement awarded payment to individual employees, including the claimant, and to Local 21 Union funds. The settlement agreement regarding payment to the claimant is block quoted below:

BACKPAY – Within 14 days from approval of this agreement, the [employer] will make whole the employee(s) named below by payment to each of them of the amount opposite each name. The [employer] will make appropriate withholdings for each named employee. No withholdings should be made from the interest or excess tax portion of the backpay. If the Centralized Compliance unit, on behalf of the Regional Director, is unable to locate any individual entitled to make-whole relief within one year of receipt of payment, the Regional Director will have sole discretion to redistribute the amounts owed to those individuals, provided no individual receives more than 100% of the backpay or other remedial monies they are owed.

Employee	Backpay	Interest	Excess Tax Liability
Keith Gutierrez	\$5,709	\$175	\$30
Adam Nevins	\$1,181	\$47	\$8

On February 28, 2022, a representative calculated the claimant owed the employer \$3965.00 from May 2, 2021 through June 5, 2021. The representative found the claimant had been overpaid \$2,465.00 in regular benefits and \$1500.00 in Federal Pandemic Unemployment

Compensation (FPUC) benefits. The decision said it had been rendered using Iowa Code § 96.3(7). The decision did not mention PL 116-136, Sec. 2104 as authority.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant must repay the \$2,465.00 he received in unemployment insurance benefits from May 2, 2021 through June 5, 2021 because he was not partially unemployed for those weeks.

Iowa Code section 96.5(5) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

5. Other compensation.

a. For any week with respect to which the individual is receiving or **has received payment** in the form of any of the following:

(1) **Wages in lieu of notice, separation allowance, severance pay, or dismissal pay.**

(2) Compensation for temporary disability under the workers' compensation law of any state or under a similar law of the United States.

(3) A governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment made under a plan maintained or contributed to by a base period or chargeable employer where, except for benefits under the federal Social Security Act or the federal Railroad Retirement Act of 1974 or the corresponding provisions of prior law, the plan's eligibility requirements or benefit payments are affected by the base period employment or the remuneration for the base period employment. However, this subparagraph shall only be applicable if the base period employer has made one hundred percent of the contribution to the plan.

b. Provided, that if the remuneration is less than the benefits which would otherwise be due under this chapter, the individual is entitled to receive for the week, if otherwise eligible, benefits reduced by the amount of the remuneration. Provided further, if benefits were paid for any week under this chapter for a period when benefits, remuneration or compensation under paragraph "a", subparagraph (1), (2), or (3), were paid on a retroactive basis for the same period, or any part thereof, the department shall recover the excess amount of benefits paid by the department for the period, and no employer's account shall be charged with benefits so paid. However, compensation for service-connected disabilities or compensation for accrued leave based on military service by the beneficiary with the armed forces of the United States, irrespective of the amount of the benefit, does not disqualify any individual otherwise qualified from any of the benefits contemplated herein. A deduction shall not be made from the amount of benefits payable for a week for individuals receiving federal social security pensions to take into account the individuals' contributions to the pension program.

Mr. McClitis makes three arguments for why the claimant is not responsible for repaying benefits. First, the claimant contends he is excused from repayment under Iowa Code section 96.3(7)(b). Second, the claimant contends he qualifies for a waiver. Third, the claimant

contends that the payments made to him cannot be result in an over payment because the settlement agreement does not specify the weeks the claimant was receiving the backpay for.

First, Mr. McClitis contends he is excused from repayment due to the employer's non-participation at factfinding. The administrative law judge disagrees. The claimant would only be excused from repayment of these benefits if he received the benefits in error due to the employer's non-participation in a factfinding regarding "the issue of the individual's separation from employment." See Iowa Code section 96.3(7)(C). The decision dated, December 29, 2021, granting the claimant benefits did not evaluate the claimant's permanent separation from employment. It merely ruled he was able and available and in fact found him to be still connected to the employer. As a result, Iowa Code section 96.3(7)(C) does not apply.

Second, Mr. McClitis contends he qualifies for a waiver of his regular unemployment insurance benefit overpayment. The administrative law judge disagrees. The waiver application only applies to overpayments resulting from the receipt of federal benefits. This is also something that is separately applied for to be evaluated in a separate hearing.

Third, Mr. McClitis contends he is not required to repay the funds because the settlement agreement is collateral to his earnings, especially because it does not specify the weeks he was receiving backpay for. The claimant contends the holding from *Sioux City Brick & Tile Co. v. Employment Appeal Bd.*, 449 N.W.2d 634 (Iowa 1989) controls. The administrative law judge finds this case to be inapplicable primarily because there is not anything in the record to suggest the claimant was entitled to this backpay for a period other than from April 30, 2021 to June 14, 2021. When the administrative law judge asked if Mr. McClitis could show this backpay could be assigned to another period of time, he exclaimed, "You're trying to get me to prove a negative," with the implication that could not be done. The administrative law judge disagrees. Such a thing is done routinely in courts and in administrative hearings. The administrative law judge was merely asking his client if backpay of another sort came up in settlement negotiations. Again, there is nothing in the record to suggest the settlement agreement regarded any other period but the period from April 30, 2021 to June 14, 2021. Indeed, the claimant, Mr. Ogle and Agan agreed that the backpay awarded was regarding this period. Unlike the agreement in *Sioux City Brick & Tile Co. v. Employment Appeal Bd.*, 449 N.W.2d 634 (Iowa 1989), other compensation is specifically delineated from his backpay. In fact, Mr. Ogle read into the record an email confirming the backpay was for this period.

Iowa Code section 96.1A(37) provides:

Totally unemployed", "partially unemployed", and "temporarily unemployed.

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.

With that in mind, the claimant earned \$951.50 for each week he made his weekly claims from May 1, 2022 through June 5, 2022. This exceeds his weekly benefit amount of \$508 or his weekly benefit amount of \$493 plus \$15.00. As a result, the claimant is not entitled to benefits he received during this period.

Iowa Code section 96.3(7)a-b, as amended in 2008, provides:

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.

b. (1) (a) If the department 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 employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal **regarding the issue of the individual's separation from employment.**

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant filed for and received his full weekly benefit amount of \$493.00 for each of the five weeks from May 2, 2022 through June 5, 2022 for a total of \$2,465.00. As shown above, the claimant is not entitled to these benefits. The representative added \$1500.00 in FPUC benefits

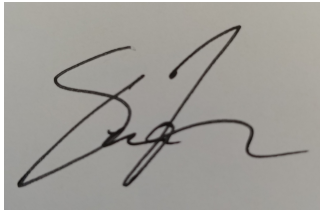
to the same decision and did not reference PL 116-136, Sec. 2104. The parties did not waive notice to PL 116-136, Sec. 2104. As a result, the administrative law judge lacks the authority to find the claimant has been overpaid FPUC benefits.

DECISION:

The February 28, 2022, (reference 03) unemployment insurance decision is modified in favor of the appellant. The claimant has been overpaid \$2,465.00 in regular unemployment insurance benefits, which must be repaid.

REMAND:

The administrative law judge is remanding to the Benefits Bureau the issue regarding whether the claimant was overpaid Federal Pandemic Unemployment Compensation benefits. He is also remanding to the Benefits Bureau the issue regarding whether the claimant has been overpaid benefits for the week ending May 1, 2021.



Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

May 6, 2022

Decision Dated and Mailed

smn/ac

Note to Claimant: Overpayment waivers of federal benefits are available. A claimant can apply for a waiver regarding federal benefits received to <https://www.iowaworkforcedevelopment.gov/application-overpayment-waiver>.