

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

MARTY J MCDONALD

Claimant

and

SEVENTH AVENUE INC

Employer

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HEARING NUMBER: 21B-UI-12772

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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: 96.5-2-A, 96.5-1

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

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 the administrative law judge's decision is correct. With the following modification, the administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION IN THE CLAIMANT'S FAVOR BUT WITHOUT EFFECT ON THE EMPLOYER:**

FINDINGS OF FACT:

The Administrative Law Judge's findings of fact are adopted by the Board as its own, with the following additions.

The Claimant worked in and was paid wages in excess of \$2,150 with employers other than Seventh Avenue, Inc. between October 1, 2020 and the week commencing December 6, 2020. The Claimant's weekly benefit amount is \$215.

REASONING AND CONCLUSIONS OF LAW:

The Administrative Law Judge's reasoning and conclusions of law are adopted by the Board as its own, with the following additions and corrections.

Division I: Claimant Availability Dates

The Administrative Law Judge ruled that the Claimant was not available as of June 28, 2020. This was based on the lack of a release, and also on the Claimant being on an agreed-to leave of absence. 871-24.23(1) & (10). But the Administrative Law Judge also found that the Claimant had separated from the Employer in September, and that he started another part-time job in October. Clearly, the leave of absence had ended with the employment, and so that would not be a reason to find the Claimant not able and available to work following the separation. Also the Claimant had started another part-time job by October, and since he only needed to be available for part-time work then he was clearly available to work by the time he started working for The Frontier Again. 871 IAC 24.22(2)(a) (“If an individual is available for work on the same basis on which the individual’s wage credits were earned ... then the individual meets the requirement of being available for work.”). Thus, his restrictions were no reason to find him not available once he started work for The Frontier Again.

The upshot is we affirm the finding that the Claimant was not available as of June 28, 2020, but only through the week ending September 19, 2020. He will be overpaid for the \$2,483 in state benefits he collected during this period. As for any FPUC overpayment that is discussed in Division III. He has since become available again, and thus his claim should be **unlocked at this time**.

Division II: Claimant Quit & Requalification

We affirm the Administrative Law Judge’s finding that the Claimant left work as of September 8, 2020. Leaving work, without good cause attributable to the Employer, is disqualifying under Iowa Code §96.5(1). We therefore disqualify the Claimant from September 19, 2020 going forward based on his voluntary leaving of work with Seventh Avenue. Once again, however, this will not result in a claim lock.

Although the Claimant’s quit is disqualifying, the disqualification is only in effect until the Claimant requalified. The requalification period runs from the date of the separation. “In order to meet the ten times the weekly benefit amount in insured work requalification provision, ...[s]ubsequent to leaving or refusing work, the individual shall have worked in (except in back pay awards) and been paid wages equal to ten times the claimant’s weekly benefit amount.” 871 IAC 23.43(8). As we have found the Claimant quit back in September of 2020. In the fourth quarter of 2020 the Claimant worked in and was paid covered wages of \$2,411 with The Frontier Again. His weekly benefit amount on the claim with an original claim date of June 28, 2020 is \$215. Since ten times \$215 is \$2,150 the Claimant has requalified based on his being paid \$2,411 in covered wages by The Frontier Again. The Claimant ceased reporting wages from The Frontier Again as of the benefit week commencing on December 6, 2020. We therefore hold that as of the benefit week commencing December 6, 2020 the Claimant had earned in excess of \$2,150.

The Claimant has thus requalified for benefits. **As of December 6, 2020 benefits are allowed even though the September 2020 quit was disqualifying. The Employer shall not be charged** for any benefits paid since “[a]n employer’s account shall not be charged with benefit payments to an eligible claimant who quit such employment without good cause attributable to the employer ... but [such payments] shall be charged to the balancing account.” 871 IAC 24.43(8)(b); *See also* Iowa Code §96.7(2)(b).

Division III: Waiver Of Possible FPUC Overpayment

The Board adds the following analysis to the Reasoning and Conclusions of Law:

The CARES Act provides:

In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency, **except** that the State agency may waive such repayment if it determines that—

(A) the payment of such Federal Pandemic Unemployment Compensation was without fault on the part of any such individual; and

(B) such repayment would be contrary to equity and good conscience

PL116-136, Sec. 2104(f)(2). In this case the Claimant was allowed benefits and the Employer appealed. After the hearing, the Employer prevailed. We note that Claimants are advised throughout the appeal process to continue to file weekly claims even if denied benefits. The Claimant here did so and has continued to receive benefits. The Claimant was paid FPUC in addition to regular state benefits. We now consider whether the FPUC overpayment can be waived.

In deciding the question of fault, we will consider factors such as whether a material statement or representation was made by the Claimant in connection with the application for benefits, whether the Claimant knew or should have known that a fact was material and failed to disclose it, whether the Claimant should have known the Claimant was not eligible for benefits, and whether the overpayment was otherwise directly caused by the knowing actions of the Claimant. In deciding equity and good conscience we consider whether the overpayment was the result of a decision on appeal, and the financial hardship caused by a decision requiring overpayment. *Cf.* 871 IAC 24.50(7) (setting out factors for similar issue under TEUC from 2002). Applying these factors to the totality of the circumstances in this case including that there is no evidence of material misrepresentation, we find on this individualized basis that any **FPUC overpayment** should be waived.

The Employer should note that the Employer will not be charged for any waived FPUC.

DECISION:

The December 23, 2020 decision of the Administrative Law Judge is **MODIFIED IN THE CLAIMANT'S FAVOR.**

The Claimant is not able and available for work from June 28, 2020, but only through the week ending September 19, 2020. He **will be continue to be overpaid for the \$2,483** in state benefits he collected during this period.

The Claimant is disqualified for voluntarily leaving work as discussed by the Administrative Law Judge, but the Claimant has since requalified for benefits. This disqualification commences on September 20, 2020. The Claimant has since requalified. We order that the claim **shall not be locked** at this time, and that benefits payable for weeks from December 6, 2020 onward shall continue to be payable so long as the Claimant is otherwise eligible for benefits. Of course, Seventh Avenue Inc. **will not be chargeable** for benefits paid on this claim, nor will it be chargeable for benefits paid in the future on a subsequent benefit year claim, if any were to be filed.

The overpayment in FPUC benefits is hereby waived, and the Claimant has no obligation to pay back those benefits. Our decision today does not alter the obligation to repay a state overpayment one way or the other. The Employer will not be charged for waiver of FPUC since FPUC is a federally funded benefit.

The upshot of today's decision is that the Claimant is denied from June 28 through September 19, 2020 and overpaid the \$2,483 in state benefits he collected during this period. He is not denied outside this time period, and not overpaid for any benefits collected outside this time period. Seventh Avenue Inc. will not be chargeable for benefits collected after June 28, 2020 which is the effective date of this claim. Seventh Avenue Inc. is not liable for any waived overpayment.

James M. Strohman

Ashley R. Koopmans

CONCURRING & DISSENTING OPINION OF MYRON R. LINN:

I concur in Divisions I and II of the majority decision. I respectfully dissent from Division III of the majority decision of the Employment Appeal Board. After careful review of the record, I would not waive any FPUC overpayment.

Myron R. Linn