

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

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**LARRY STANLEY**

Claimant

and

**HD SUPPLY MGMT INC**

Employer

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**HEARING NUMBER: 16B-UI-14304**

**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: 96.23**

**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**:

**FINDINGS OF FACT:**

The Board makes the following findings of fact in lieu of those entered by the Administrative Law Judge:

The claimant was employed full-time as a driver beginning in June 1997. On July 18, 2014, the claimant suffered a work-related injury for which he received Workers' Compensation benefits charged to HD Supply Management, Inc (Employer). He received temporary total disability (TTD) benefits for the 59 weeks from July 18, 2014 through September 10, 2015. He thus received TTD starting in the third quarter of 2014, then all of the fourth quarter of 2014, then all of the first two quarters of 2015, and then most of the third quarter of 2015. The claimant did not perform any work for Employer or any other employer after his injury.

The Claimant filed for unemployment insurance benefits with an effective date of November 29, 2015. The Claimant's base period of employment was from the third quarter of 2014 through the second quarter of 2015. The Claimant thus received TTD in all four quarters of his base period.

The Claimant had \$3,137.34 in wages during the third quarter of 2014, \$00.00 of wages during the fourth quarter of 2014, \$5,609.02 of wages (profit sharing bonus) during the first quarter of 2015, and no wages in the second quarter of 2015. All wages were reported from Employer. Although the Claimant received \$4.42 from the Employer in the second quarter in 2015 this was not remuneration for personal service, but a refund of money he had paid into an associate stock purchase plan for which he was no longer eligible.

## REASONING AND CONCLUSIONS OF LAW:

The Board makes the following conclusions of law *in addition* to those of the Administrative Law Judge:

The first issue we take up, because the whole case depends on it, is whether the profit sharing payment was wages. As noted by the Administrative Law Judge the statute provides, that "[w]ages" means all remuneration for personal services, including commissions and bonuses..." Iowa Code §96.19(41). The rules of the Department parrot this language. 871 IAC 23.3(1). The testimony showed that this profit sharing was paid at the beginning of the year directly to the workers who qualified, and was not being paid into a retirement account. Moreover the Claimant on Exhibit F described it as a "bonus" and the Employer in Exhibit D stated that the "bonus" is paid pro-rated based on "months you actually worked..." Finally, in Exhibit F the Employer has withheld FICA (the Fed MED/EE and FED OASDI lines). The money was paid as remuneration for personal service (hence the prorating) and was clearly a bonus. It was thus wages, which is why Old Age and Survivor Disability Insurance (social security) and Medicare were withheld (although withholding is not dispositive on the issue). The bonus was wages.

We have next considered that perhaps the payment being deferred means that the wages should not be counted in the base period. Unfortunately, for benefit qualification purposes rule 23.2 titled "Definition of wages for employment during a calendar quarter" provides:

23.2(2) Wages paid. Wages for employment during a calendar quarter consist of wages paid during the calendar quarter. **Wages earned but not paid during the calendar quarter shall be considered as wages for employment in the quarter paid.** The Employer's Contribution and Payroll Report, Form 65-5300, shall be used as prima facie evidence of when the wages were paid. If the wages are not listed on the 65-5300, they shall be considered as paid:

- a. On the date appearing on the check.
- b. On the date appearing on the notice of direct deposit.
- c. On the date the employee received the cash payment.
- d. On the date the employee received any other type of payment in lieu of cash.

871 IAC 23.2(2). This is for deciding if a Claimant is monetarily eligible, and for determining the base period employers, and for determining the benefit amount. For those purposes what counts is when the check is cut, not when the work was done. The reason for this is obviously in part because these calculations are based on wage records reported by Iowa Employers on a quarterly basis. Since Employer payroll records are concerned with when checks get cut, monetary determinations are made on a "when paid" not a "when earned" basis. 871 IAC 23.2(2). This is different than with offsets since "Deductions from unemployment insurance payments are on a 'when earned' basis rather than on a 'when paid' basis."

871 IAC 24.52(8). Obviously claimants know when they worked, and may not, when reporting a claim, even have had a check cut yet and so do not know when they might be paid. Plus using “when earned” for offsets prevents the situation where a claimant could be paid once a month, collect benefits for 3 weeks and be off benefits only the one week when the check is cut. We note also the language in Iowa Code §96.3(3) setting out the calculation used for partial benefits refers to “that part of wages payable to the individual with respect to that week” - not to wages *paid* that week but rather *payable with respect to* that week. Thus offsets use “when earned” and monetary eligibility in contrast uses “when paid.” There is no way around this.

It follows that we agree with the Administrative Law Judge that the Claimant was paid wages of \$3,137.34 in wages during the third quarter of 2014, and \$5,609.02 of wages (profit sharing bonus) during the first quarter of 2015. This is why the fact finder in this case found “our records indicate you have insured work during at least two calendar quarters in your current base period. This makes you eligible for benefits on your current claim.” It is for this reason the request to substitute quarters was denied: the Claimant is currently monetarily eligible.

We set out the qualifying earnings calculation just to be explicit. In this case the Claimant did not receive wages in two quarters in the base period, that is, in quarter four of 2014 and in quarter two of 2015. The Claimant’s high quarter was quarter one of 2015, and the next highest was quarter three of 2014. In quarter three of 2014 he worked, and he was paid, and he **did** earn sufficient qualifying wages. 871 IAC 24.1(131)(Defining qualifying wages as “[t]he amount of wages a worker must have earned in insured work within a specified period in order to be an insured worker.”). In particular, the “average statewide average annual wage for insured work, computed for the preceding calendar year” was \$42,327.64 as that was the average statewide average annual wage in 2014. Iowa Code §96.4(4)(a); <https://www.iowaworkforcedevelopment.gov/iowans-jobless-and-injury-benefits-increase-0>. “[T]hree and five-tenths percent” of this is \$1481.47. Iowa Code §96.4(4)(a). Rounded as required this becomes \$1480. Under Iowa Code §96.4(4)(a) the Claimant is required to earn over \$1480 in his highest quarter and ½ of \$1480 during a base period quarter other than the one in which his earnings were highest in order to be monetarily eligible. Obviously, \$5,609.02 (rounded to \$5,610) is greater than \$1480 and \$3,137.34 (rounded to \$3,140) is greater than \$740. The final monetary eligibility requirement of Iowa Code §96.4(4)(a) is that the sum of his total earnings exceeds 1 ¼ times his high quarter. One and a quarter times the high quarter of \$5,610 is \$7,010 (rounded). Since the total wage of \$5,610 plus \$3,140 is \$8,750 the Claimant satisfies this monetary eligibility requirement as well. Thus since we must count the money received in the third quarter of 2014 and in the first quarter of 2015 as wages then the Claimant is monetarily eligible on the current claim.

Now we turn to the question of substitution of quarters. As noted by the Administrative Law Judge the Iowa Code states:

96.23 Base period exclusion.

1. The department shall exclude three or more calendar quarters from an individual’s base period, as defined in section 96.19, subsection 3, if the individual received workers’ compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17 or indemnity insurance benefits during those three or more calendar quarters, if one of the following conditions applies to the individual’s base period:

- a. The individual **did not receive wages from insured work** for three calendar quarters.
- b. The individual **did not receive wages from insured work** for two calendar quarters and **did not receive wages** from insured work for another calendar quarter equal to or greater than the amount required for a calendar quarter, other than the calendar quarter in which the individual's wages were highest, under section 96.4, subsection 4, paragraph "a."

Paragraph a is not relevant. Paragraph "b" seems clear enough, that is, that the Claimant must not have "receive[d] wages" for two calendar quarters (which he has not) and also not "receive[d] wages for another calendar quarter" sufficient to meet the second highest quarter test (which he has).

Reading the statute without agency gloss it is quite clear that the Claimant did "receive wages" in the first quarter of 2015, and also in the third quarter of 2014. He only has two quarters in which he "did not receive wages" and since this is less than three he cannot rely on Iowa Code §96.23(1)(a). Turning to the last statutory hope the Claimant in fact "did not receive wages for insured work for two calendar quarters" so that he could substitute under the statute if he "did not receive wages from insured work for another calendar quarter equal to or greater than the amount required for a calendar quarter, other than the calendar quarter in which the individual's wages were highest, under section 96.4, subsection 4, paragraph 'a.'" But we know that both quarters of wages exceed the second-highest quarter figure and so he fails to be qualified for substitution under Iowa Code 96.23(1)(b).

Normally this would be the end of analysis. The statute is unambiguous and the Claimant does not qualify for substitution under its terms. But both the Administrative Law Judge and the Claimant spend considerable time on agency regulation, so we turn to these.

871—24.7(96) Workers' compensation or indemnity insurance exclusion and substitution.

4.7(1) An individual who has received workers' compensation under Iowa Code chapter 85 during a healing period or temporary total disability benefits or indemnity insurance benefits for an extended period of time **and has insufficient wage credits in the base period** may qualify for unemployment insurance benefits. Under specific circumstances as described below, the department shall exclude certain quarters in the base period and substitute three or more consecutive calendar quarters immediately preceding the base period which were prior to the workers' compensation or indemnity insurance benefits.

...

24.7(3) The department shall make an initial determination of eligibility for unemployment insurance benefits. **If the individual has no wage records or lacks qualifying wage requirements**, the department shall substitute three or more calendar quarters of the base period with those three or more consecutive calendar quarters immediately preceding the base period in which the individual did not receive workers' compensation benefits or indemnity insurance benefits. The qualifying criteria for substituting quarters in the base period are that the individual:

- a. Must have received workers' compensation benefits under Iowa Code chapter 85 or indemnity insurance benefits for which an employer is responsible during the excluded quarters, and
- b. Did not work in and receive wages from insured work for:
  - (1) Three or more calendar quarters in the base period, or
  - (2) Two calendar quarters and lacked qualifying wages from insured work during another quarter of the base period.

24.7(4) Subject to the provisions of subrule 24.7(3), the department shall use the following criteria for allowances and disqualifications.

a. Allowances. When the allowance criteria are met, the department shall always exclude and substitute at least three quarters of the base period if the individual received workers' compensation or indemnity insurance benefits in:

- (1) Four base period quarters with **no earnings** in at least two of the quarters and the individual lacks qualifying **earnings**, the department will exclude and substitute all four quarters of the base period.
- (2) Three **no earnings** base period quarters, with or without earnings in the fourth quarter, the fourth quarter remains in the base period and the department will exclude and substitute only three quarters in the base period.

b. Disqualifications. The request for retroactive substitution of base period quarters **shall be denied if** the individual received workers' compensation or indemnity insurance benefits in:

- (1) At least three base period quarters but **the individual is currently monetarily eligible with an established weekly and maximum benefit amount.**
- (2) At least three base period quarters and the individual has base period wages in three or more of the base period quarters, but the claim lacks qualifying earnings
- (3) Less than three base period quarters.

Reading the highlighted language we never get to the Claimant's argument over "did not work in and receive wages for insured work" for specified quarters. This is because the Claimant is clearly monetarily eligible on his current claim and he cannot substitute quarters by the plain meaning of 871 IAC 27.7(4)(b)(1). He received TTD in at least 3 base period quarters and he is currently monetarily eligible with an established weekly benefit amount of \$243 and a maximum benefit amount of \$2916.93. Exhibit C ["green sheet"]. Not only does 27.7(4)(b)(1) apply to deny substitution but rule 27.7(3) which uses the "worked in" language relied upon by Claimant specifically conditions the substitution on the individual having "no wage records or lack[ing] qualifying wage requirements." We just never get to the "worked in" issue. In fact if we disregarded the regulations requirement that the Claimant can only substitute if not monetarily eligible we would find a conflict between the statute, which does not use "worked in," and the rules which do. But since the requirement of monetarily eligibility is there then the regulations are largely reconciled to the statute: if either of the no earnings criteria of 96.23 is satisfied then the Claimant will not be monetarily eligible and thus potentially eligible under both rule and statute for substitution. Satisfying the criteria of 96.23 means, of necessity, that the claimant is not monetarily eligible. The other way of

saying this (the contrapositive) is if the claimant is monetarily eligible then he does not satisfy the criteria of §96.23. Now there may be situations where the Claimant would not be monetarily eligible and would still not satisfy the criteria of §96.23. In such instances the Claimant would not be denied based on eligibility under the rules, but would be denied substitution under the statute. Since this case does not fall in that category we need not cross that bridge. In this case rule and statute have the same result: the Claimant *is* monetarily eligible and so cannot satisfy the either criteria of 96.23(1) and no substitution can be allowed under either the regulations or the statute. *See generally Baker v. Hayes Business Group*, 14B-UI-04937 (EAB 2014) (<http://decisions.iowaworkforce.org/ui/2014/04937.EAB.pdf>)(“worked in” requirement of regulation does not trump statutory provisions)

We generally find a sympathetic Claimant and do appreciate that his benefits are reduced due to his work related injury. We have tracked down all the angles that might alleviate the situation but see no way through. We appreciate with the Claimant’s argument on broadly construing the law but no amount of legal interpretation will make the arithmetic work out differently. Also counting bonuses as wages sometimes hurts and sometimes helps claimants, and counting wages for monetary purposes on a “when paid” basis rather than “when earned” sometimes helps and sometimes hurts claimants depending on very fact-specific circumstances. Broad construction to favor claimants is neutral on such issues. In the end, this Claimant is currently monetarily eligible and so is not eligible to substitute quarters even if we could rely solely on the “worked in” provision of the rules and ignore the statute.

**DECISION:**

The administrative law judge's decision dated January 27, 2016 is affirmed.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv

**DATED AND MAILED:** \_\_\_\_\_