

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

BRADLEY A DOSE

Claimant,

and

CASEY'S SERVICES COMPANY

Employer.

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HEARING NUMBER: 14B-UI-07528

**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. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. 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**.

We affirm the Administrative Law Judge and adopt her findings and conclusions, but write additionally simply to address some of the Claimant's arguments.

The statute provides:

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."

Iowa Code §96.23.

Under the rules of the Department:

24.1(11) Base period. ...The department shall exclude three or more calendar quarters from the individual's base period in which the individual received workers' compensation or indemnity insurance benefits and substitute consecutive calendar quarters immediately preceding the base period in which the individual did not receive workers' compensation or indemnity insurance benefits. This exception applies under the following conditions:

- a. The individual did not work in and receive wages from insured work for three calendar quarters of the base period, or
- b. The individual did not work in and receive wages from insured work for two calendar quarters **and lacked qualifying wages** from insured work to establish a valid claim for benefits during another quarter of the base period.

...

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.

...

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.

First, while the Claimant's appeal faults the calculation of the base period, in his argument he recognizes that his original claim date is July 6, 2014, and that his base period is thus the last three quarters of 2013 and the first quarter of 2014.

Second, we have elsewhere discussed at length that the fact that the Claimant did not "work" in 3 base period quarters does not avail him. *Baker v. Hayes Business Group*, 14B-UI-04937 (EAB 2014) (<http://decisions.iowaworkforce.org/ui/2014/04937.EAB.pdf>). The *Code* requires that the individual "did not receive wages" for three calendar quarters to fall under 96.32(1)(a). Here the Claimant did receive such "wages" as defined by law in two quarters, and so he must qualify for substitution, if at all, under Iowa Code §96.23(b).

Third, the mere fact that the Claimant may have been paid earnings that he believes to be sick leave pay and vacation pay does not help us. Sick pay paid under a plan, and accumulated sick pay are not wages. 871 IAC 24.13(4)(d); 871 IAC 23.3(2)(d)(1). On the other hand, vacation pay is deemed to be wages by law. Iowa Code §96.5(7)(a). Now there are processes in place for determining how to attribute vacation over ensuing weeks for offset purposes, but for qualification purposes all that counts is in what quarter the vacation pay is made. The fact that the vacation allowance accrued earlier, which is always the case with vacation pay after all, is not important since it is the date of payment that counts. *E.g.* 871 IAC 23.2(2) ("Wages earned but not paid during the calendar quarter shall be considered as wages for employment in the quarter paid."). It is possible that sick leave paid out, if large enough, might affect the outcome of the case but the Claimant has the burden of proof on eligibility. Iowa Code §96.4. The agency has no way of knowing if wages reported by the Employer are actually for sick leave unless someone so informs the agency. Barring that, what is reported is quarterly wages, and we have seen no *proof* from the Claimant indicating otherwise. He offers only speculation that any of it is for sick leave, even with the new and additional evidence he submits in his appeal. Again the agency computer records do not, and cannot, break down reported wages by whether it is for vacation, or paid leave, or for work performed in this quarter or for work performed in the previous quarter, etc. What is reported for every worker in the state of Iowa is wages paid in a given quarter by every employer paying such wages to that individual. The Claimant offers only speculation that some of the amount reported by the Employer in this case was in error, and that some of the money was sick leave not wages, but we cannot base a decision on speculation.

Fourth, and more to the point, the Claimant's argument over the wage credits in the third quarter of 2013 fails to recognize that his problem is in the second quarter of 2013. Under the Code if the Claimant did not receive wages in two quarters he will be allowed to substitute quarters *only 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.'" Iowa Code §96.23(1)(b). The cited paragraph of Iowa Code §96.4(4) states:

4. a. The individual has been paid wages for insured work during the individual's base period in an amount at least one and one-quarter times the wages paid to the individual during that quarter of the individual's base period in which the individual's wages were highest; provided that the **individual has been paid wages for insured work totaling at least three and five-tenths percent of the statewide average annual wage for insured work, computed for the preceding calendar year if the individual's benefit year begins on or after the first full week in July** and computed for the second preceding calendar year if the individual's benefit year begins before the first full week in July, in that calendar quarter in the individual's base period in which the individual's wages were highest, and the individual has been paid wages for insured work totaling at least one-half of the amount of wages required under this paragraph in the calendar quarter of the base period in which the individual's wages were highest, in a calendar quarter in the individual's base period other than the calendar quarter in which the individual's wages were highest. The calendar quarter wage requirements shall be rounded to the nearest multiple of ten dollars.

Iowa Code §96.4(4)(1). So unless the Claimant has wages from at least one quarter that is less than the amount described above then the Claimant cannot substitute quarters. Iowa Code §96.23(1)(b). We set out the calculation for the Claimant's benefit.

In this case the Claimant did not receive wages in two quarters in the base period, that is, in quarter four of 2013, and quarter one of 2014. The Claimant's high quarter was quarter three of 2013, and the next highest was quarter two of 2013. In quarter two he was paid insured wages in the amount of \$3,591, in quarter three it was \$4,341. 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."). His benefit year was established in the year 2014, and so the preceding calendar year is calendar year 2013. The average statewide average annual wage for insured work was \$40,883.90 in 2013. "[T]hree and five-tenths percent" of this is \$1430.94. Rounded as required this becomes \$1430. Halved, and rounded up to the nearest 10 this becomes \$720. See Claimant Handbook, p. 5 (form 70-6200 referred to in 871 IAC 24.4(1) and found online at <http://www.iowaworkforce.org/ui/claimants/70-6200factsforworkers.pdf>). So long as the Claimant earned more than \$720 in his lowest quarter he is ineligible for substitution of quarters under Iowa Code §96.23(1)(b). This calculation lets us point out to the Claimant just how much his putative sick leave payout would have to be to qualify him for substitution. The Claimant guesses he might have such a payout in the third quarter of 2013, his high quarter. To qualify for substitution the Claimant would have to have had \$3,621 in sick leave in his high quarter, or \$2,871 in his low quarter. As we have *no evidence* of sick leave payouts of this magnitude we affirm the Administrative Law Judge.

Looked at another way, as the Administrative Law Judge did, the Claimant is plainly monetarily eligible for benefits and that means he falls under 24.7(4)(b)(1) and must be denied substitution. He earned more than \$1430 in his high quarter and more than \$720 in his second highest quarter, and the sum of his total earnings does exceed $1\frac{1}{4}$ times his high quarter. Being thus monetarily eligible he cannot substitute quarters by the plain meaning of 871 IAC 27.7(4)(b)(1).

As for the cited case we should hope it is clear by now that not only when wages are paid but how they are distributed over the base period are critical for calculation purposes. The cases cited are just different on the facts. In particular *Guzman* makes no discussion of the wages or monetary eligibility. (<http://decisions.iowaworkforce.org/ui/2011/08217.M2.Pdf>). Also *Clapp* was only concerned with when to use the alternate base period. (<http://decisions.iowaworkforce.org/ui/2011/03396.W.pdf>). Here the Claimant is *eligible* under the regular base period and so there is no occasion to use the alternate base period. Iowa Code §96.4(4)(b)(applying alternate base period only “[f]or an individual who does not have sufficient wages in the base period, as defined in section 96.19, to otherwise qualify for benefits...”). And in *Foreman* the Administrative Law Judge does not detail the wage history and all we can conclude is that the fighting issue in that case was over the WC payments, not the wage distribution. (<http://decisions.iowaworkforce.org/ui/2010/11354.H2.pdf>). In short there is nothing in any of these decisions that gets the Claimant around Code §96.23(1)(b) and rule 24.7(4)(b)(1). We appreciate with the Claimant’s argument on broadly construing the law but no amount of legal interpretation will make \$720 more than \$3,591.

Kim D. Schmett

Ashley R. Koopmans

RRA/fnv