

Iowa Department of Inspections and Appeals
Administrative Hearings Division
Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

Condon Family Home Builders, LLC)	
Katie Duda)	
20585 Utica Ridge Road)	Case No. 22IWDM0006
Davenport, IA 52807,)	
)	
Appellant,)	
)	
v.)	ADMINISTRATIVE LAW JUDGE
)	DECISION
Iowa Workforce Development,)	
)	
Respondent.)	

STATEMENT OF THE CASE

Katie Duda, the appellant, appealed from a decision by Iowa Workforce Development (IWD) finding that payments in excess of her percentage of ownership of a multiple-member LLC should be reported as wages. The matter was transmitted by IWD to the Administrative Hearings Division to schedule a contested case hearing. A telephone hearing was held on May 20, 2022. IWD was represented by its attorney, Jeffrey Koncsol. Field auditor Lisa Gaeta appeared and testified for IWD. Supervisor Barbara Corson appeared but did not testify. Duda appeared and testified, along with her witnesses Pat Condon, William Doll, Scott Stoltenberg, and John Condon, Jr.

IWD submitted its 42-page Appendix, which includes the decision letter, the appeal letter, IWD’s synopsis, and other evidence. Just prior to hearing, IWD submitted another exhibit, marked Exhibit B, which was admitted. Duda submitted one exhibit, an email chain, which was admitted and is herein referred to as Exhibit 1.

ISSUE

Whether member Katie Duda’s wages/payments in excess of her percentage of ownership should be reported as wages.

FINDINGS OF FACT

Several years ago, John Patrick (“Pat”) Condon established Condon Family Home Builders, LLC (“the LLC”). At all times relevant to this appeal, the LLC had five or six members: Pat Condon (prior to 2020), and his five children—Casey Condon-Yu, James Condon, Kelly Condon, John Condon, Jr., and Katie Duda. Before Pat Condon left the LLC, he held a 5% ownership interest and the children each owned 19%. Since his departure, each child has a 20% ownership interest. (Duda testimony; P. Condon testimony; App. pp. 27-31).

The name of the LLC perhaps suggests a construction business, but while construction and real estate are the family business, the LLC itself does not purport to conduct any such business. The LLC exists to serve as a “bank” for the children, should they wish to use it. Presently, only one has availed herself of that opportunity: Duda. Duda borrows money from the substantial holdings of the LLC to finance her construction business, which she operates under her own name, and then repays the LLC with interest. The interest payments are split evenly among the (now-five) members of the LLC. What profits Duda makes from her business she keeps. (Duda testimony; P. Condon testimony; J. Condon testimony).

The LLC remunerated its members as follows:

Member	2016	2017	2018	2019	2020
Casey Condon-Yu	\$1600	\$5804	(\$1031)	\$3568	\$9403
James Condon	\$1600	\$5804	(\$1031)	\$3568	\$9403
Kelly Condon	\$1600	\$5804	(\$1031)	\$3568	\$9403
John Condon, Jr.	\$1600	\$5804	(\$1031)	\$3568	\$9403
Katie Duda	\$20,001	\$36,315.54	\$1969	\$48,866.70	\$91,616
Pat Condon	\$421	\$1528	(\$271)	\$939	n/a

(App. pp. 27-31). For each year, the difference between Duda’s remuneration and her siblings is as follows:

- 2016: $20,001 - 1600 = \$18,401$
- 2017: $36,315.54 - 5804 = \$30,511.54$
- 2018: $1969 - (1031) = \$3000$
- 2019: $48,866.70 - 3568 = \$45,298.70$
- 2020: $91616 - 9403 = \$82,213$

IWD investigated whether the LLC had employees. A pre-audit questionnaire asked Duda to describe “the business activity” and she responded, “1-3 new construction projects per year.” The questionnaire asked, “For [an] LLC, are any of the company’s members actively engaged in the business?” Duda responded, “Yes.” The questionnaire asked, “For [an] LLC, do any of the members receive remuneration which exceeds their ownership percentage? Explain.” Duda responded, “No. As an operating member Katie Duda receives a contract payment per project.” Duda additionally reported the LLC did not issue any 1099 forms. (App. pp. 22-23).

In a 2020 email, Duda stated, “Condon Family Home Builders is a partnership of shareholders who all have other full-time jobs. Casey, John, Kelly, JJ, Katie are all shareholders. Katie is also an independent contractor hired by Condon Family Home Builders. 100% of work performed on Condon Family Home Builder projects is done by independent contractors. Earnings are retained by LLC to build equity within the business.” (Ex. 1). In a 2021 email, Duda reported something similar: “As [a partner in the LLC], she performs the services of construction management as a contractor and receives compensation and assumes the risk of loss of revenue for each project. Katie is paid on a job basis and receives a flat dollar amount for each house completed. She works totally independent[ly] and on her own schedule, no dictated hours. Katie uses her personal computer, vehicle and offices out of her home. Katie personally pays her own Federal and State income tax and there is no shared social security contribution from the LLC.” (App. p. 25).

Check stubs from the LLC show the following payments made to Duda:

- \$18,400, on December 30, 2016, for “closing commission”
- \$2000, on April 18, 2017, for “2016 taxes”
- \$28,513.54, on December 31, 2017, for “closing”
- \$36.34, on November 12, 2018, for “reimb for locks + padlocks for homes Menards”
- \$3000, on November 12, 2018, for “commission”
- \$10,000, on March 31, 2019, for “draw on const. mgmt”
- \$50, on March 31, 2019, for “temp heat reimb”
- \$6000, on July 27, 2019, for “construction mngmt”
- \$1086.95, on July 31, 2019, for “const. mgmt. balance after bookkeeping”
- \$28,213.75, on September 27, 2019, for “const. mgmt fee balance after bookkeeping”
- \$1411, on March 7, 2020, for “ordering cbnts mngmt.”
- \$8000, on August 19, 2020, for “Maysville draw”
- \$5000, on November 9, 2020, for “Maysville 2nd draw commission”
- \$67,800, on December 3, 2020, for “profit construction management”

(App. pp. 32-42). These stubs sum to the following:

- 2016: \$18,400 (\$1 less than the difference calculated on the previous page)
- 2017: \$30,513.54 (\$2 more)
- 2018: \$3036.34 (\$36.34 more, equal to the locks/padlocks reimbursement)
- 2019: \$45,350.70 (\$52 more, \$2 more after deducting the heat reimbursement)

- 2020: \$82,211 (\$2 less)

IWD determined the LLC was liable for unemployment insurance contribution taxes because it paid sufficient wages in employment, and that the employer failed to report a member's wages that were out of proportion to membership interest. (App. pp. 10-11, 17). This appeal followed. (App. pp. 7-8).

CONCLUSIONS OF LAW

An "employer" is any employing unit which paid wages for service in employment. Iowa Code § 96.1A(14)(a). An "employing unit" is any type of organization that has in its employ one or more individuals performing services for it within Iowa. Iowa Code § 96.1A(15). "Employment" means service performed for wages or under any contract of hire, written or oral, expressed or implied. Iowa Code § 96.1A(16)(a). Employment also means any service performed by a member of a limited liability company. Iowa Code § 96.1A(16)(a)(8).

23.3(1) "*Wages*" means all remuneration for personal services, including commissions and bonuses and the cash value of all remuneration in any medium other than cash. Wages also means wages in lieu of notice, separation allowance, severance pay, or dismissal pay. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rule 23.2(96).

23.3(2) The term "wages" shall not include:

a. Subsistence payments. The amount of payment made by an employer to its employee, which is in addition to the employee's regular wages and is paid for the sole purpose of compensating the employee for expenses inherent in the performance of services by the employee away from the regular base of operation of the employer and employee, commonly referred to as subsistence pay.

b. Travel and other ordinary and necessary expenses. Amounts paid specifically for travel or other ordinary and necessary expenses incurred or reasonably expected to be incurred in the employer's business are not wages. Travel and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts if both wages and expense allowances are combined in a single payment.

c. Employer's payments to persons performing military services. Cash payments, or the cash value of other remuneration, made voluntarily and without contractual obligation to, or in behalf of, an individual for periods during which such individual is in active service or training as a member of the national guard, or the military or naval forces of the United States, including the organized reserves.

d. Sick pay.

(1) "Wages" shall not include any amounts paid as sick pay if the payments are made by or on behalf of an employer under a plan or system. The plan or system must provide sick pay for the employees of the employer or a class or classes of the employer's employees. The plan may include dependents.

(2) In the absence of a plan or system any amounts paid by or on behalf of an employer on account of sickness shall not be included after the expiration of six calendar months following the last calendar month in which the employee worked for such employer.

e. Supplemental unemployment benefit plan (SUB). The term "wages" shall not include the amount of any payment by an employing unit for or on behalf of an individual in its employ, under a plan or system established by such employing unit, with approval of the department. Such plan or system must make provision for payment to a trust fund or similar account on behalf of individuals performing services for it. The account must be used to pay supplemental unemployment benefits to such employing unit's employees over and above any sum to which such employees might be entitled under the provisions of the state employment security law. Such payments to employees are not remuneration for the purposes of reducing or preventing payment of unemployment benefits. Such plan shall contain the following features:

(1) The employer pays into a separately established trust fund or similar account an amount per hour (or amount equivalent) worked by the employees covered by the agreement until the maximum amount called for has been reached. The plan specifically provides for the supplementation of unemployment benefits under the written terms of an agreement, contract, trust arrangement, or other instrument.

(2) These payments made by the employer into the trust fund or similar account are not subject to recovery by the employer before the satisfaction of all liabilities to employees covered by the plan.

(3) The trust fund or similar account is to be used to pay supplemental unemployment benefits to employees over and above any sum to which they might be entitled under the provisions of a state employment security law.

(4) That the agreement shall provide that such employee is not entitled to receive any payment from the trust fund or similar account unless the employee is also concurrently eligible for benefits under a state employment security law.

(5) The plan requires that benefits are to be determined according to objective standards. Thus a plan may provide similarly situated employees with benefits which differ in kind and amount, but may

not permit such benefits to be determined solely at the discretion of the administrator of the fund.

(6) That the employee has no vested right in any of the moneys paid into the trust fund or similar account except as the employee may qualify for benefits under the terms of the agreement.

(7) That any payment made to or on behalf of an employee be from and to a trust fund or similar account described in Section 401(a) of the United States Internal Revenue Code title 26 of 1970 which is exempt from tax under Section 501(a) of said Code.

(8) The employer shall seek approval of its plan by petitioning that its plan be designated as a supplemental unemployment benefit (SUB) plan in the manner provided for petitioning for a declaratory ruling. The employer should include a written copy of its plan in the petition for declaratory ruling. The department will respond in the manner provided for declaratory rulings.

f. Officers of corporation. The term "employment" shall not include wages paid to an officer of corporation if such officer is a majority stockholder:

(1) Unless such services are subject to a tax to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund; or

(2) If such services are required to be covered under this chapter of the Code as a condition to receiving a full tax credit against the tax imposed by the Federal Unemployment Tax Act (FUTA) (26 U.S.C. 3301-3309).

g. Remuneration paid by state or political subdivision. The term "employment" shall not include wages paid by this state or any of its political subdivisions or by an Indian tribe to:

(1) An elected official,

(2) A member of a legislative body,

(3) A member of the judiciary of a state or political subdivision,

(4) A member of the state national guard or air national guard,

(5) An employee serving on a temporary duty basis for fire, storm, snow, earthquake, flood, or similar emergency, or

(6) A person serving in a nontenured policymaking capacity or advisory capacity pursuant to state law which ordinarily does not require duties of more than eight hours per week.

See rule 871-23.71(96) for further definition of exemptions (1) through (6).

h. Sole proprietorship or partnership drawing accounts. The term "wages" shall not include any of the following:

(1) Any amount of personal compensation withdrawn by a bona fide sole proprietor from the business or profession.

(2) Any amount of personal compensation withdrawn by a bona fide partner or partners from their partnership entity.

(3) Remuneration for services which are paid by a limited partnership to a limited partner is reportable. If a limited partner performs the duties of a general partner, remuneration is considered to be exempt.

i. Payments into 401K and other deferred compensation plans. Payments made by an employer to a deferred compensation plan, established to provide for an employee's retirement, are not wages subject to contributions unless the payments were deducted from the employee's pay through a salary reduction agreement. In circumstances where both the employer and the employee contribute to the plan, the employer's share is not wages unless the employee would receive a cash payment if the employee chose not to participate in the plan.

j. Remuneration paid to members of limited liability companies based on membership interest. The term "wages" shall not include remuneration paid to a member of a limited liability company based on a membership interest in the company provided that the remuneration based on membership interest is allocated among members, or classes of members, in proportion to their respective investments in the company. The term "wages" shall not include any remuneration for services performed in lieu of a contribution of cash or property to acquire a membership interest in the limited liability company. See Iowa Code sections 96.19(18a)(9) and 96.19(41e). If the amount of remuneration attributable to membership interest or the purchase of a membership interest and the amount attributable to services performed cannot be determined, the entire amount of remuneration shall be considered to be based on the services performed.

k. Inmates of correctional institutions. The term "employment" shall not include wages paid for services performed by an inmate of a correctional institution. Persons in work release programs are considered inmates and their wages are not reportable. Remuneration paid to residents of halfway houses is reportable.

23.3(3) The term "wages" shall include:

a. Small business corporation remuneration. Remuneration paid to officers of "subchapter S" corporations for services performed in Iowa shall be deemed to be wages. Any corporate dividends must be approved and recorded in the corporate minutes prior to payment of such dividends. Remuneration to shareholders shall not be deemed to be dividends if such remuneration is paid regularly, either weekly or monthly, and is not in proportion to such shareholder's amount of stock, or in proportion to such shareholder's investment in the corporation. Corporate dividends are not considered wages. Ordinary income distributions as reported on IRS Form

K-1 will not be considered to be wages provided that distributions are made proportionate to stock ownership or shareholder's investment, and provided that corporate officers performing services for the corporation have received appropriate remuneration for services performed as defined by the Internal Revenue Service and the remuneration is reported as wages. See subrule 23.3(2)"f" for possible exclusion of wages paid to corporate officers who are majority stockholders.

b. Wages of employees hired with equipment. Where an employee is hired with equipment, except where it is ordinary in custom and usage in the trade or business for employees to furnish such equipment at their own expense, the fair value of the remuneration for the employee's services, if specified in the contract of hire, shall be considered wages. If the contract of hire does not specify the employee's wages, or the value of the wages agreed upon under the contract of hire is not a fair value, the department shall determine the employee's wages, taking into consideration the prevailing wages for similar work under comparable conditions, and the wages thus determined shall apply as wages and be so reported by the employer.

c. Union members. Members of a union, subject to the direction and control of the union and acting on behalf of the union, are considered employees of the union with respect to the services performed. Payments made to them by the union as reimbursement for time lost from their regular employment are considered wages.

d. Cafeteria plans. A cafeteria plan is a set of benefit options offered by the employer to employees or to a class of employees. A particular benefit in a cafeteria plan will be considered to be "wages" subject to contributions (tax) for Iowa unemployment insurance purposes if the employee has the option of receiving a cash payment in lieu of the benefit. If the employee does not have the option of receiving a cash payment, the benefit will still be considered "wages" subject to contributions unless the benefit is specifically excluded from the definition of "wages" in Iowa Code subsection 96.19(41).

e. Personal use of company vehicle. The cash value of personal use of a company automobile or other vehicle is "wages" subject to contributions (tax) for Iowa unemployment insurance purposes and shall be reported to the department as wages paid in the quarter in which the personal use occurred.

Iowa Admin. Code r. 871-23.3; *see also* Iowa Code § 96.1A(40). The burden of proof rests with the employer or employing unit. Iowa Admin. Code r. 871-23.55.

Here, the LLC is an employing unit. It has one or more individuals performing services for it in Iowa: Duda told IWD the business activity of the LLC is "1-3 new construction projects per year" and at least one of the company's members (presumably, Duda) is engaged in that business. Duda

further reported she is “an independent contractor hired by” the LLC and that she, as a partner in the LLC, “performs the services of construction management.” Duda performed those services in Iowa. And she did so while in the employ of the LLC, because either (1) she performed the services under some unwritten contract of hire, or (2) she performed the services while a member of the LLC. Iowa Code § 96.1A(16)(a), (a)(8). Because the LLC had in its employ one or more individuals performing services for it within Iowa, it’s an employing unit. Iowa Code § 96.1A(15).

If an employing unit pays wages for service in employment, it’s an employer. See Iowa Code § 96.1A(14)(a). “Wages” means all remuneration for personal services. Iowa Admin. Code r. 871-23.3(1). But “wages” do not include the remuneration paid to members of LLCs based on those members’ membership interest. Iowa Admin. Code r. 871-23.3(2)(j).

This case, of course, is no different. The remuneration based on the members’ membership interest is not “wages.” But, every year, Duda has income in excess of the remuneration her siblings receive. That income comes from checks paid by the LLC. That income depends on Duda performing services and is paid based on the services she performs. In other words, that income is remuneration for personal services in Duda’s employment. This makes the LLC an employer. Iowa Code § 96.1A(14)(a).

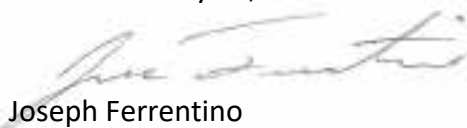
While Duda maintains she operates her business as a sole proprietorship, and the tribunal finds her belief credible, the paper trail tells another story. Duda may assert she falls under Iowa Administrative Code rule 871-23.3(2)(h), disqualifying sole proprietorship or partnership drawing accounts, from “wages,” but she is not “drawing” from her own business or a partnership entity. Her payments come from a multiple-member LLC of which she is a member. Objectively, the LLC employs Duda and pays her wages. The law requires more than a good-faith subjective belief in an organizational structure. The LLC at issue here remunerated Duda in excess of that which would have been paid to her based solely on her membership interest. That excess remuneration was for personal services—that is, it was wage income. Those wages were paid for employment.

Based on the foregoing, IWD’s decision should be affirmed.

DECISION

IWD’s decision is affirmed. IWD shall take any steps necessary to implement this decision.

Dated this May 25, 2022.



Joseph Ferrentino
Administrative Law Judge

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cc: Condon Family Home Builders, L.L.C., Katie Duda, 20585 Utica Ridge Road, Davenport, Iowa 52807; Katie.condon@gmail.com (by mail and email)

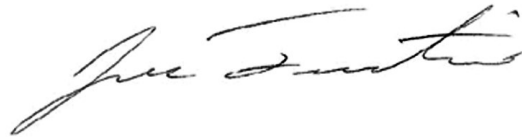
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Case Title: CONDON FAMILY HOME BUILDERS, L.L.C. V. IOWA
WORKFORCE DEVELOPMENT
Case Number: 22IWDM0006
Type: Proposed Decision

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Joe Ferrentino", written in a cursive style.

Joseph Ferrentino, Administrative Law Judge