

FILED

FEB 24 1982

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DONALD F. BERKEY,

)

Petitioner-Appellee,

)

Filed February 24, 1982

vs.

)

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**IOWA DEPARTMENT OF JOB SERVICE and)
PITTSBURGH-DES MOINES STEEL)
COMPANY,)**

2-31
2-66900

Respondents-Appellants.)

Appeal from Polk District Court - J. P. Denato, Judge.

Respondent agency appeals from district court order reversing agency order for repayment of benefits overpaid to petitioner. **AFFIRMED.**

Walter F. Maley, Blair H. Dewey and Joseph L. Bervid, Des Moines, Iowa, for respondent-appellant Iowa Department of Job Service.

Eli J. Wirtz, Des Moines, Iowa, for respondent-appellant Pittsburgh-Des Moines Steel Company.

Dennis F. Chalupa of Brierly, McCall, Birdner & Chalupa, Newton, Iowa, for petitioner-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Respondent agency appeals from district court order reversing agency order for repayment of benefits overpaid to petitioner Donald F. Berkey. Three issues are presented on appeal: (1) whether the district court correctly reinstated this action after its dismissal by the clerk under Iowa R. Civ. P. 215.1; (2) whether the 1979 amendments to section 96.3(7), The Code, apply for purposes of determining petitioner's obligation to repay benefits received prior to the effective date of said amendment; and (3) whether, if the preceding issue is resolved against retroactivity for the 1979 amendments, the trial court's decision is correct under the law in effect prior to said amendments. We consider these issues separately.

I. Rule 215.1. The trial court reinstated this action after it had been dismissed by the clerk under rule 215.1 on the ground that the clerk failed to give the notice which is required in order to make dismissal under that rule effective. In this regard, it was held "that due notice must be given by the Clerk as set forth in the rule, [and] is a mandatory antecedent requirement to a dismissal thereunder." Seela v. Hays, 257 Iowa 606, 610, 128 N.W.2d 279, 281 (1964).

The record supports the trial court's conclusion that such notice was not given by the clerk in the present case. This fact notwithstanding, the agency urges that petitioner was constructively apprised of the consequences of rule 215.1. We cannot agree that the fact that petitioner or his counsel actually knew the case was one which would have been subject to dismissal, had proper notice been given, is a substitute for the notice required by law. The trial court correctly decided this issue.

II. Retroactivity. We do not believe the agency decision was based upon a retroactive application of the 1979 amendments to section 96.3(7). No authority has been cited by the agency which would permit retroactive application of these amendments in the present case. We therefore find that said amendments do not apply in determining the issues on this appeal.

III. Correctness of Trial Court Ruling under Pre-1979 Law. The agency urges that its order on overpayment was proper even under pre-1979 law. In this regard, the issue becomes whether there is substantial evidence in the record, considered as a whole, that the overpayment was made as a result of conduct attributable to petitioner. Galvin v. Iowa Beef Processors, Inc., 261 N.W.2d 701, 704 (Iowa 1978).

Our examination of the record reveals that while there might have been a factual issue as to whether or not petitioner failed in his claim form to disclose his Minnesota unemployment claim, this circumstance, if true, did not operate to deceive the agency. The agency records and the testimony of a member of the agency overpayment section leave no doubt as to the fact that at all times material, the agency was fully apprised of the claims attributable to petitioner's employment in Minnesota. It therefore cannot be found on the present record that the overpayment was the result of conduct attributable to petitioner. The decision of the trial court is affirmed.

AFFIRMED.