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

SUSAN L KELSO	:	
	:	**HEARING NUMBER:** 20B-IWDUI-0061
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
BROADLAWNS MEDICAL CENTER	:	
	:	
Employer	:	

N O T I C E

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: 96.4-3

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

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

REASONING AND CONCLUSIONS OF LAW:

Regular Unemployment Benefits: The able and available requirements are so fundamental to the unemployment system that under section 303(a)(12) of the Social Security Act federal funds will not be released to a state unless that state's law requires that an individual is able to work, available to work, and actively seeking work as a condition of eligibility for regular UC for any week. 42 U.S.C. 503(a)(12)("A requirement that, as a condition of eligibility for regular compensation for any week, a claimant must be able to work, available to work, and actively seeking work.") Even during the Pandemic, the federal Department of Labor instructs that states **must continue to apply** the ability and availability requirements as set forth in their laws, or else run afoul of federal requirements. The Department of Labor explained:

On March 18, 2020, the President signed the *Families First Coronavirus Response Act, which includes the Emergency Unemployment Insurance Stabilization and Access Act* of 2020 (EUISAA) set out at Division D. Section 4102(b) of EUISAA states:

> Notwithstanding any other law, if a State modifies its unemployment compensation **law and** policies with respect to **work search, waiting week, good cause, or employer experience rating** on an emergency temporary basis as needed to respond to the spread of COVID-19, such modifications shall be disregarded for the purposes of applying section 303 of the [SSA] and section 3304 of [FUTA] to such state law.

This provision allows emergency temporary flexibility as needed to respond to the spread of COVID-19 **for the specified UC requirements**, and is further discussed in UIPL No. 13-20, issued on March 22, 2020. While implementing these flexibilities, states must be mindful of the temporary duration of the flexibilities. Unlike the requirement to actively search for work, the EUISAA emergency temporary flexibility provision **does not apply to the "able to work" and "available to work"** provisions of Section 303(a)(12) of the SSA. UIPL No. 10-20 details **existing** state flexibilities regarding how individuals meet the "able to work" and "available to work" requirements in light of efforts to mitigate the spread of COVID-19. However**, EUISAA's temporary flexibility does not allow for even temporary departure from the application of these provisions**. Thus, a temporary suspension of the weekly certification process, including the "able to work" and "available to work" provisions, for any amount of time runs afoul of the SSA Section 303(b) requirement that states receiving payments "comply substantially" with the relevant provisions of the Act in administering their laws. As already noted, **a state's failure to apply these conditions of UC eligibility puts the state out of conformity** and substantial compliance with federal UC law.

UIPL 23-20, p. 5-6 (DOLETA 5/11/20)(emphasis added); *see also* Iowa Code §17A.9A(1) ("In addition, this section does not authorize an agency to waive or vary any requirement created or duty imposed by statute.") So, the flexibility cited only applies to job search, waiting week (Iowa has none) and experience rating.

This flexibility, limited as it was, still only meant that the states were given the power to modify their law "and" policies. Iowa did not modify its law. The way the federal-state system works is that federal law sets out minimum requirements that state laws must meet in order for a state to be eligible for certain monies for administration of its UI system and certain tax-breaks to its employers. If the federal government announces flexibility in the interpretation of these federal provisions all this means is that the federal authorities wouldn't complain if the state workforce agencies exercise flexibility. The federal government, however, lacks the authority to actually change the state statutes, and so the guidance is always cast in terms of states exercising flexibility allowed by state law. Even UIPL 10-20 cited by the Claimant provides "In short, an individual may be quarantined or otherwise affected by COVID-19 but still eligible for UC, **depending on state law**" and that "[t]o clarify, UI is not intended to be used as paid sick leave." *UIPL 10*-20, p. 3. If the state law has no such flexibility, the federal government cannot create it.

The persons with the power to change Iowa's law did consider this issue in 2020. Amendment H-8164 (https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=H-8164) was proposed on March 16, 2020. One provision in the proposed amendment would have mandated payment of unemployment benefits to hourly workers if the workers were off work for COVID related reasons. The language employed would have mandated payment regardless of other requirements. This amendment would have overridden availability requirements since those in "quarantine" must be paid under the amendment, and such persons are ordinarily not available to work. The

Amendment was ruled out of order. The bill passed and the legislature adjourned, reconvened, and adjourned again without altering the Employment Security Law. We cannot now act as if they did. Also, the Governor has the power under Iowa Code §29C.6 to proclaim a disaster, and part of this power is to "[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders or rules, of any state agency…" Iowa Code §29C.6(6). Obviously, the criteria for benefit eligibility are not in a "regulatory statute prescribing the procedures for conduct of state business…." Also even such statutes can only be suspended in a written official proclamation stating the reasons for the suspension. *Id.* The Administrative Law Judge cites to none, and are not aware of any such proclamation.

Fundamentally, the able and available requirements cannot be circumvented because a lot of people find themselves physically unable to be at work. The fact is, it is always true that a lot of people find themselves unable to work for a period of time and yet benefits are denied during that period. The classic example is pregnant women placed on restrictions. Under the regulations of the Department "[a] pregnant individual must meet the same criteria for determining ableness as do all other individuals." 871 IAC 24.22(1). Under 96.5(1)(d) a worker who leaves work due to "pregnancy upon the advice of a licensed and practicing physician" may receive benefits but only once she is fully recovered and has her offer of reemployment rejected. Iowa Code §96.5(1)(d); *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa Ct. App. 1985); 871 IAC 24.25(35). It is certainly not obvious why we would set aside the availability for work requirement for people whose condition is related to the Pandemic, but not for women who are limited in working in order to protect the health on an unborn child. The sympathetic nature of the reasons for limiting one's availability does not change the fact that one is unavailable. The approach of the Administrative Law Judge radically alters the nature of the benefit being administered without authorization by statute or regulation. This we may not do.

Iowa Code section 96.4(3) provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds:
>
> The individual is able to work, is available for work, and is earnestly and actively seeking work….

871 IAC 24.22 expounds on this:

> 871—24.22 Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> 24.22(1) Able to work. An individual must be physically and mentally able to work in **some gainful employment, not necessarily in the individual's customary occupation**, but which is engaged in by others as a means of livelihood.
>
> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

> b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, **but able to work in some reasonably suitable, comparable, gainful, full-time endeavor**, other than self-employment, which is generally available in the labor market in which the individual resides.

The reasons that can render an individual no longer **able** to work include:

> 24.23(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

871 IAC 24.23(34)-(35).

On the issue of being ***available*** for work Iowa Administrative Code 871 IAC 24.22(2) states:

> j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.
>
> (1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.
>
> (2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.
>
> (3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed

Similarly, rule 871 IAC 24.23(10) states:

> 24.23 Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.
>
> …
>
> (10) The claimant requested and was granted a leave of absence; such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

Under these provisions, most forcefully rule 24.23(10), the Claimant was not available for work from March 16 through June 22, the period of her leave of absence. She is denied **regular state benefits for this period only.**

Although we have denied regular benefits we write further to give important information to the Claimant about the effect of our decision.

Pandemic Unemployment Assistance:

Pandemic Unemployment Assistance [PUA] is a benefit payable to people for various COVID related reasons. One of these is that the individual is unable to reach their place of employment because the individual has been

advised by a health care provider to self-quarantine due to concerns related to COVID-19. According to the operating instructions issued by the Federal Department of Labor "An individual whose immune system is compromised by virtue of a serious health condition and is therefore advised by a health care provider to self-quarantine in order to avoid the greater-than-average health risks that the individual might face if he or she were to become infected by the coronavirus" meets the condition for being eligible for PUA. *UIPL 16-20, Attachment I* (DOLETA 4/20/2020). The issue is not before us, but the information submitted by the Claimant seems to go a long way to establishing PUA eligibility. We note that PUA is payable for up to 39 weeks but no later than the week ending 12/26/20. It is 38 weeks from the week the Claimant filed for benefits to 12/26/20. The weekly amount of PUA is set to the weekly amount of the regular benefits.

We thus give this very important information to the Claimant:

THE CLAIMANT SHOULD APPLY FOR PANDEMIC UNEMPLOYMENT ASSISTANCE AS SOON AS POSSIBLE.

To do so the Claimant should Visit:
https://www.iowaworkforcedevelopment.gov/pua-information

We make this statement because the databases we can access do not show that the Claimant has yet applied for this benefit. PUA is not a lesser benefit. It is an alternate benefit designed for people who do hands-on work, but whose medical condition is such that they have been advised to self-quarantine. We now take the time to explain how PUA would work in this case. We note that this discussion is for information purposes and none of this influenced our decision today on the separation from employment.

Since we denied benefits based on the lack of availability to work, the Claimant is denied benefits so long as her unavailability to work, or leave of absence (whichever is longer) lasts. But since we did not rule the Claimant quit, the Claimant does **not** have to earn 10 times the weekly benefit amount in order to start collected regular unemployment benefits.

If we allowed regular benefits in this case starting on March 29, 2020 then the Claimant at most could get 26 weeks of regular benefits, plus an additional 13 weeks of a federal benefit called PEUC, plus possibly state Extended benefits. She could thus collect perhaps as much as 52 weeks of benefits, plus $600 for the weeks between March and late July.

If the Claimant applies for and receives PUA, she will be allowed to backdate the claim. "**An individual does not need to demonstrate good cause to backdate a PUA claim**. Rather, the claim must be backdated to the first week during the Pandemic Assistance Period [starting on 2/2/2020] that the individual was unemployed, partially unemployed, or unable or unavailable to work because of a COVID-19 related reason…" *UIPL 16-20, Attachment I, Change 1* (DOLETA 4/27/2020)(emphasis added). Since the weekly PUA is set to the same amount as the regular UI, the Claimant could receive the same weekly benefit. But PUA is the benefit of last resort, meaning that for any week that the Claimant is able to collect regular benefits she is *not* able to collect PUA. UIPL 16-20, Attachment 1, p. I-9("In processing claims for PUA, states must verify that individuals have no regular UI entitlement [and if] the individual's eligibility for regular UI is questionable … then the state must first require the individual to file a regular UI initial claim. If the individual is subsequently disqualified, then the state may consider the individual for PUA eligibility."). The two benefit periods thus would never overlap. Thus, if we ruled as the Administrative Law Judge did then the main effect in self-quarantine leave of absence cases would be to charge the employer for benefits in such cases, rather than the federal benefit fund.

Now today we have made a decision that denies regular unemployment, but only so long as the Claimant was on the leave of absence. 871 IAC 24.22(2)(j)(1) ("If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.")

This all means that **if** the Claimant applies for and receives PUA then she will get PUA for those weeks she was unavailable for PUA-qualifying reasons (likely the period of the leave of absence). **If** this is what happens then during the period we have denied regular state benefits the Claimant will be allowed PUA in identical amounts. This is what seems likely if she is approved for PUA:

> If the Claimant can get PUA the Claimant would receive that benefit so long as the Claimant is unavailable because on a leave of absence for COVID reasons, and then be eligible to receive regular state benefits once she is available to work again, if she were to become unemployed in the future for non-disqualifying reasons.

Doing things this way would maximize the number of weeks of benefits available to the Claimant while minimizing the charges to the Employer. This is because one can switch back and forth between regular benefits/PEUC/EB and PUA depending on availability. If not available for COVID reasons, one can go on PUA, and then once available again one goes back to regular benefits/PEUC/EB. But putting the Claimant on regular benefits early would use up weeks of regular benefit/PEUC/EB availability which would not be available should Claimant become unemployed in the future, for example, due to an economic downturn. Starting regular benefits sooner means Claimant would be out of regular benefits sooner. The only way it is better to go on regular benefits starting in spring 2020 is if the Claimant again becomes unavailable to work in 2021, and there is no congressional extension of the PUA benefit. At this point, however, the record shows the Claimant is available once again. If this continues in the future she is better off drawing PUA rather than regular benefits for the weeks we disqualify today (**if** she is eligible for PUA).

We finally note that the Claimant did not apply for regular benefits until March 29, but she started her leave back on March 17. Since PUA is backdated, then she may be able to get some additional benefits for the two weeks between March 16 and March 29, if she is approved for PUA.

Of course, this has nothing to do with our ruling. We rule as the law requires us to rule given the facts of the case.

We do not rule on any of this at this point because the Claimant has not applied for PUA from what we can see.

Overpayment Deferred: We do not at this time address the amount of overpayment, or any possible waiver of the FPUC overpayment because if the Claimant is approved for backdated PUA over the same (or longer) period then she will owe no overpayment. In general Claimants have a right to appeal PUA determinations. That appeal process, however, is not the same as this case. If the Claimant should be denied backdating, in whole or part, which *could* result in an overpayment, and the Claimant wish to appeal PUA, or reapply with different proof, the Claimant should do so following the guidance from IWD. This decision we issue today does not decide the PUA issue. This means, of course, that even though our decision today says benefits are denied, this is for regular benefits and does not change the Claimant's ability to collect PUA.

DECISION:

The administrative law judge's decision dated September 1, 2020 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was unavailable for work from March 29, 2020 through June 20, 2020. She is denied regular state benefits for those weeks, inclusive of the weeks between.

No remand for determination of overpayment is made at this time, but if the Claimant fails to apply for PUA, or is denied PUA, an overpayment may be assessed. The issue of any possible overpayment is left for determination at a later time if necessary.

Should the Claimant wish to apply for Pandemic Unemployment Assistance. Again, information on how to do so is found at:

https://www.iowaworkforcedevelopment.gov/pua-information

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Ashley R. Koopmans

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James M. Strohman

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Myron R. Linn

RRA/fnv