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

NATHAN J DAVIDSON Claimant and **HY-VEE INC** Employer	: : : : : : : : :	**HEARING NUMBER:** 21B-UI-14357 **EMPLOYMENT APPEAL BOARD DECISION**

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: 96.5-2 96.5-1

D E C I S I O N

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 IN THE CLAIMANT'S FAVOR BUT WITHOUT EFFECT ON THE EMPLOYER**:

Division I: Additional Analysis

The Board adds the following discussion to the analysis in this case.

Among the duties of this Board is to be the final decision-making authority in OSHA cases. It is thus our business to track OSHA directives and standards, even more so in the midst of a public health emergency. Generally, OSHA classifies risks in a Pandemic by higher risk, medium risk and lower risk. This has been the case for some time, as OSHA has in the past issued guidance for other pandemics, *e.g.*, the H5N1 flu. In general, working in *high volume* retail settings is a medium risk. https://www.osha.gov/coronavirus/control-prevention/retail (We note this COVID-specific guidance is in the process of revision at the time of writing). Less than high volume retail settings are low risk. *Id.* Delivery is generally a low to medium risk. *See generally* https://www.osha.gov/coronavirus/hazards.

Now, where an employee quits because of allegedly illegal working conditions the reasonable belief standard applies. This standard requires the Claimant to prove "a person of reasonable prudence would believe, under the circumstances faced by [Claimant], that improper or illegal activities were occurring at [Employer] that necessitated his quitting." *O'Brien v. EAB*, 494 N.W.2d 660, 662 (Iowa 1993); *accord Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330, 337 (Iowa 1988)(misconduct case). Naturally the concept of "improper" mentioned in *O'Brien* would include an unsafe work place. So, the Claimant did not have to prove the job was in fact a serious risk to health, but neither was it sufficient for him to prove that he personally thought there was such a risk. He had to prove under an objective standard that a reasonable person would have felt compelled to resign under the circumstances faced by him based on work-related conditions. We note that many of the complaints made by the Claimant exceed the OSHA guidance *then in effect* for package delivery. These have changed in 2021, but this reflects that the situation was much different in the Spring of 2020, and so too was what could be *reasonably* expected of employers. *Compare COVID-19 Guidance for Package Delivery*, (OSHA 3998-03R 2021) *with COVID-19 Guidance for Package Delivery*, (OSHA 3998-03R 2020) (still available at https:// web.archive.org/ web/ 20200531040316/ https:// www.osha.gov/ Publications/ OSHA3998.pdf.) Retail standards remain unchanged at this time, and under these we likewise find the Claimant's evidence is insufficient to meet his burden. We concur with the Administrative Law Judge that the Claimant has failed to prove under an objective standard that a reasonable person would have felt compelled to resign under the circumstances faced by him in the spring of 2020. We do **not**, however, concur in any implication that there is duty to complain about detrimental working conditions that are attributable to the Employer. Our denial is based on a failure to meet the standard of proof discussed above, **not** on any failure to complain or to take the matter further up the chain of command.

We do not think the Administrative Law Judge abused her discretion in excluding the evidence offered by the Claimant. We thus deny the application to present new and additional evidence. Nevertheless, we have reviewed and considered the new and additional evidence. Even if we admitted it, and much of it is not relevant or consists of argument rather than evidence, still careful consideration of the proferred information does not cause us to change our opinion that Claimant failed to carry his burden.

Next, the Claimant in this case indicates that he was unwilling to work, at least in certain settings, due to his concern for the health of the person he lived with. This is understandable (although not attributable to Hy Vee), and since it is not specific to any one employer it raises the issue of the Claimant's availability during the time he claimed for benefits. The able and available requirements are fundamental to the unemployment system. 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."). Iowa's law has had such a provision since 1936. 47 GA ch. 102, §4(c). The requirement is an indispensable and defining part of the unemployment system. Without this requirement the unemployment benefit system becomes a form of disability insurance. This it is not designed to do. *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223, 226 (1991) ("unemployment compensation under this chapter is not disability insurance and simply does not cover physically disabled persons during the periods when they are unemployable."); *White v. Employment Appeal Board*, 487 N.W.2d 342, 345 (Iowa 1992) ("the Employment Security Law is not designed to provide health and disability insurance"); *Butts v. Iowa Dep't of Job Serv*., 328 N.W.2d 515, 517 (Iowa 1983) ("the legislature has merely determined not to provide maternity leaves"); *Amana Refrigeration v. Iowa Dept. of Job Service*, 334 NW 2d 316, 318 (Iowa App. 1983).

The availability requirement applies to workers who are not genuinely attached to the general labor market because they limit work activities out of concerns for loved ones. *C.f.* 871 IAC 24.23(8) (lack of child care). Availability is a no-fault concept. One who is injured, and then hospitalized, while saving a child from a burning house would still not get unemployment benefits while unable to work. Thus, no matter how understandable it may be that someone is isolated from working because of COVID concerns, that person would still be unavailable to work and still be denied benefits. This has happened thousands of times in the last year. Those quarantining for their own health conditions upon the advice of physicians, are still denied *regular* benefits. This is why there is Pandemic Unemployment Assistance for such persons that runs through September of *this* year. (Unfortunately, PUA does not generally cover quarantining out of concern for a household member). Thus, someone who restricts his availability out of concern for the health of those he lives with would normally not be available to work, and would be denied benefits for any such week. And this denial would have nothing to do with quitting. A person whose job separation is not disqualifying still must be available to work in order to collect benefits.

The availability issue was not noticed for hearing, and so we may not adjudicate it on this record. Normally this would call for a remand. However, since the Claimant is already disqualified for the weeks in question based on the job separation, we forebear on remanding on this issue *at this time.*

Finally, we note for the edification of the parties that "[a] finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or the employment appeal board, is binding only upon the parties to proceedings brought under this chapter, and is not binding upon any other proceedings or action involving the same facts brought by the same or related parties before the division of labor services, division of workers' compensation, other state agency, arbitrator, court, or judge of this state or the United States." Iowa Code §96.6(4). This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise. See also Iowa Code §96.11(6)(b)(3)("Information obtained from an employing unit or individual in the course of administering this chapter and an initial determination made by a representative of the department under section 96.6, subsection 2, as to benefit rights of an individual shall not be used in any action or proceeding, except in a contested case proceeding or judicial review under chapter 17A…)

Division II: Waiver Of Possible FPUC & PEUC Overpayments

The CARES Act provides:

> In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency, **except** that the State agency may waive such repayment if it determines that—
>
> (A) the payment of such Federal Pandemic Unemployment Compensation was without fault on the part of any such individual; and
>
> (B) such repayment would be contrary to equity and good conscience
>
> ….
>
> SEC. 2107. PANDEMIC EMERGENCY UNEMPLOYMENT COMPENSATION.
>
> (e)(2) Repayment.--In the case of individuals who have received amounts of pandemic emergency unemployment compensation under this section to which they were not entitled, the State shall require such individuals to repay the amounts of such pandemic unemployment compensation to the State agency, **except** that the State agency may waive such repayment if it determines that—

(A) the payment of such pandemic emergency unemployment compensation was without fault on the part of any such individual; and

(B) such repayment would be contrary to equity and good conscience.

PL116-136, Sec. 2104(f)(2); 2107(e)(2).

In this case the Claimant was allowed benefits and the Employer protested. The claim was not locked until Iowa Workforce issued its second claims decision in October. We note that Claimants are advised throughout the appeal process to continue to file weekly claims even if denied benefits. The Claimant here did so and was paid benefits until IWD issued the decision locking the claim. The Claimant was paid FPUC and PEUC in addition to regular state benefits. It appears that the Claimant would have received $9,600 in FPUC payments. He was not qualified for extended benefits and so was paid PEUC instead. He received PEUC for thirteen weeks at $261 a week for a total of $3,393. We now consider whether the FPUC and PEUC overpayments can be waived.

In deciding the question of fault, we will consider factors such as whether a material statement or representation was made by the Claimant in connection with the application for benefits, whether the Claimant knew or should have known that a fact was material and failed to disclose it, whether the Claimant should have known the Claimant was not eligible for benefits, and whether the overpayment was otherwise directly caused by the knowing actions of the Claimant. In deciding equity and good conscience we consider whether the overpayment was the result of a decision on appeal, and the financial hardship caused by a decision requiring overpayment. *Cf.* 871 IAC 24.50(7) (setting out factors for similar issue under TEUC from 2002). Applying these factors to the totality of the circumstances in this case including that there is no evidence of material misrepresentation causing the overpayment, we find on this individualized basis that any **FPUC and PEUC overpayment** should be waived.

The Employer should note that the Employer will not be charged for any waived FPUC.

DECISION:

The decision of the Administrative Law Judge date January 25, 2021 is **AFFIRMED AS MODIFIED IN THE CLAIMANT'S FAVOR** but with **NO EFFECT ON THE EMPLOYER.**

Any potential overpayment of FPUC benefits, up to the amount of $9,600, and PEUC, up to the amount of 3,393 is hereby waived, and the Claimant has no obligation to pay back those benefits. The Claimant would continue to be obliged to repay any overpayment of state benefits (he collected a total of $2,875), if such an overpayment is imposed in the future, since the law does not permit us to waive a regular state benefit overpayment. However the Claimant has a pending PUA claim, and if approved this would offset any state overpayment if PUA is paid during weeks he collected regular state benefits. Naturally should the Claimant be approved for PUA he will not collect FPUC for weeks he was already paid and for which we waived the FPUC overpayment. The Employer will not be charged for waiver of FPUC or PEUC since they are federally funded benefits.

In all other respects the decision of the Administrative Law Judge is affirmed, but with the additional analysis we provide in Division One. So, while the Claimant has a smaller potential overpayment, the Claimant is still denied regular state benefits until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount provided the claimant is otherwise eligible.

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James M. Strohman

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Ashley R. Koopmans

CONCURRING & DISSENTING OPINION OF MYRON LINN:

I concur in Division I of the majority decision. I respectfully dissent from Division II of the majority decision of the Employment Appeal Board. After careful review of the record, I would not waive any FPUC or PEUC overpayment.

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Myron R. Linn

RRA/fnv