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

MARILEE R TORRES	:	
	:	**HEARING NUMBER:** 20B-UI-04761
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
THE SHERWIN-WILLIAMS CO	:	
	:	
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, 24.23-10

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. 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**.

First of all, 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.") 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. If the state law has no such flexibility, the federal government cannot create it. But even setting this aside, the flexibility cited by the Claimant does not assist in this case. 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. See UIPL 23-20 (DOLETA 5/11/20)("EUISSA emergency temporary flexibility provision does not apply to the 'able to work' and 'available to work' provisions of Section 303(a)(12) of the [Social Security Act]."); *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.")

The able and available requirement is an indispensable and defining part of the unemployment system. Without this requirement the unemployment benefit system becomes a form of disability insurance. The Employment Security system is not designed for this, and the tax-supported fund could not be maintained on that basis. Webpages and public statements do not alter statutes, and nor can equity confer upon an agency *ultra vires* powers that it does not have. *See Brakke v. Iowa Dept. Natural Resources*, 897 N.W.2d 522, 533-34 (Iowa 2017) ("An agency possesses no common law or inherent powers…The power of the agency is limited to the power granted by statute….Likewise, a court may not ignore the clear language of a statute and impose its own ideas through the guise of construction, even if it is the best way to promote public welfare and achieve a desirable result."); *accord Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877, 881 (Iowa 1979).

The due process argument of the Claimant is similarly without merit. Just at first blush, what would the Claimant have done if the statements he cites were not made? What was Claimant induced to do? Claimant applied for benefits. So, if the statements are not made, and Claimant did not apply for benefits, then Claimant would have gotten no benefits at all. This means if Claimant pays back the benefits received, and which Claimant says Claimant never would have asked for, then Claimant has not been deprived of property by the supposed lack of due process which induced Claimant to apply for and receive the money. The Claimant's situation must be contrasted with those who complain that they did not know what they were supposed to do in order to maintain their ability to collect benefits. In *Brumley v. IDJS*, 292 N.W.2d 126 (Iowa 1980) a teacher was laid off and was paid benefits while she looked for teaching jobs over the summer. When the school year started she continued to look only for teaching jobs. But in October the agency decided, without telling Ms. Brumley, that just looking for teaching jobs was no longer good enough. When she appealed her denial, the Court reversed based on the agency regulation that referred to a warning that must be given before the job search requirement is changed. *Brumley* at 129. The problem in *Brumley* was that Ms. Brumley was never informed that she had to expand her job search. She thus continued what had been an adequate search without any way of knowing that it was then considered inadequate. Most critically if Ms. Brumley had been warned to expand her search then she could have done so and thus made herself eligible for benefits. Here the Claimant herself asserts strong medical reasons not to work at her job, and her medical condition would not be better if people in state government had made different statements. Unlike Ms. Brumley there was nothing the Claimant could have done differently back in March in order to maintain eligibility. Fundamentally, we cannot see how applying the law as written, and as understood for 80 years, could deny due process.

However, we point out to the Claimant that although the Claimant is denied benefits under state unemployment law, **this does not bar receipt of certain special pandemic related benefits**. In fact, being ineligible from state unemployment benefits is a prerequisite to these benefits. Of particular interest to the Claimant is Pandemic Unemployment Assistance [PUA]. That law is a sort of disability benefit, and it provides benefits to persons who are unavailable for work due to certain pandemic related reasons. Such persons may be able to collect PUA during any week this situation persists, going back to February 8, 2020 (for a maximum of 39 weeks). The federal Department of Labor has instructed that **eligible persons would include**:

> 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.

UIPL 16-20, Attachment 1, p. I-5
(https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_Attachment_1.pdf).

It is further our understanding that federal law requires all PUA claims to be backdated to as early as February 8, depending on when the applicant's self-quarantine began. The upshot is that if Claimant can make the necessary PUA showing of a need for self-quarantine Claimant may very well be eligible for PUA for any week such a quarantine was or is in place, and so he has wisely decided to pursue this avenue of federal benefits through Iowa Workforce. **Our ruling today is no bar to PUA.**

The Claimant should note well that PUA is not a lesser benefit. PUA, by law, is set to equal the Claimant's state weekly benefit amount, and the same $600 in FPUC is payable on PUA. PUA is an alternate benefit designed for people who do in-person work, but whose medical condition is such that they have been advised to self-quarantine.

The databases we have access to show that the Claimant has applied for PUA and that the determination is pending with a telework notation. Since one must be available for work to collect regular benefits, and unavailable for COVID reasons to collect PUA, and since PUA is designated the benefit of last resort, regular benefits and PUA are mutually exclusive. These two benefits never overlap. This why the Department of Labor requires that "[i]n 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." *UIPL 16-20, Attachment 1*, p. I-9. This means that it is likely that at least part of the delay in processing the Claimant's pending PUA claim is that Workforce is awaiting the outcome of this appeal.

Notably today we have made a decision that denies regular unemployment, but allows regular benefits once the Claimant offers to return to work, but is rejected. 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."). 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 receive regular state benefits once she is available to work again. 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/PECU/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 remain unemployed in 2021, 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 in spring 2020 is if the Claimant remains unavailable to work in 2021, and there is no congressional extension of the PUA benefit. And even this assumes that somehow an "estoppel" argument would justify allowing an unavailable-for-work claimant to continue to collect regular benefits/PEUC/EB into 2021 based on statements made about a few weeks in the spring of 2020. 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.

Meanwhile, the Employer should note it can avoid charges by bringing the Claimant back to work at the end of the COVID leave. Of course, none of this is why we affirm the Administrative Law Judge today. We affirm the Administrative Law Judge because under Iowa's Employment Security Law the Claimant is plainly not able and available for work during the time covered by the Administrative Law Judge's ruling. Iowa Code §96.4.

On the issue of telework, if we found that the Claimant was available for telework, we would have found her available for work, and granted regular state benefits. But we find she is not able and available for work. We expect that this disposition will guide the pending PUA determination of the issue of telework.

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Ashley R. Koopmans

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James M. Strohman

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Myron R. Linn

RRA/fnv