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

IN RE CLAIM OF **FREDERICK HOUWEN** Claimant	**HEARING NUMBER:** 22B-UI-11400 **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-A

D E C I S I O N
ON REMAND

BENEFITS ARE DENIED

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 with the following modifications**.

The Board adds the following to the Findings of Fact:

The evidence demonstrates that the Claimant **did not** have a legitimate business in 2019 and 2020 as he asserts in his testimony and in his application for benefits.

The Board adds the following analysis to the Reasoning and Conclusions of Law:

Arguments Rejected or Not Raised To The District Court: The Claimant makes a number

of arguments concerning aspects of the original hearing. Arguments which either could have been raised before the district court originally, or which were raised and rejected, we will not consider. They are no longer open questions. The District court specially addressed and rejected the arguments that "(1) Houwen did not receive a fair and unbiased hearing before the Agency; (2) it was an abuse of discretion for the ALJ to deny the continuance; [and] (3) res judicata applies as to the initial determination of eligibility of benefits." *Decision of District Court*, p. 9. The disposition of these issues was adverse to the Claimant, the Claimant filed no appeal, and the decision is now final and binding. *E.g. United Fire v. District Ct. For Sioux Cty.*, 612 NW 2d 101, 104 (Iowa 2000)(law of the case); *Gail v. Western Convenience Stores*, 434 NW 2d 862, 863 (Iowa 1989); *Comes v. Microsoft Corp*., 709 N.W.2d 114, 118 (Iowa 2006). Further issues that could have been raised, but which were not, are also not for review on this remand.

On the question of failure to develop the record, the district court considered these very arguments, and remanded only as we have previously described in our *Order Regarding Consideration of Evidence*. The Claimant has been given opportunity to supply us with his description of "what he argues this evidence proves, how the claimed lack of a computer/cell phone affected his ability to access proof of this business, how the evidence was obtained by the Claimant, [and] how it relates to his business…" *Order Regarding Consideration of Evidence*. In response, the Claimant asserts that "it has been more than a year since Houwen used the free accounts or logins for those accounts as any of that information was left on his laptop and cellphone which was destroyed…" We thus considered the evidence, and his discussion of it, but the rest of the supposed "failure to develop the record" was heard and rejected in the appeal to district court. We note we also consider the banking records, as instructed, but that is not additional evidence, rather it was admitted in previous proceedings. We, of course, consider the entire record, all the argument, and statements from the Claimant in response to the *Order Regarding Consideration of Evidence* as described in that *Order*.

PUA Eligibility & Fraud

It is the duty of the Board, as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa

Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). We also note that the three Members of this Board each listens to the digital recording of this hearing and each has equal access to factors such as tone of voice, hesitancy in responding, etc. as the Administrative Law Judge. The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above, and the Board's collective common sense and experience. We do not find credible the Claimant's testimony that he ran a business for five months that consisted of getting people to pay him $60 to use his house for small events.

In addition to what we list above, several factors specific to this case affect our determination.

First, and foremost, this business makes no innate sense. It is just not credible that people pay this claimant to do something they could do at home for free (and which is the traditional way to host a small party among friends), or that they could do in a bar or a restaurant, or a library, or a park shelter, or a coffeeshop, or a book store, etc. etc. for free or for much less than $60. For example, if, as Claimant asserts, it's four people just sitting around enjoying each other's company, with no food or drink service, then they could just sit at a table in a bar for the price of a drink or snack – or at anyone's abode. In making this assessment, we note that the Claimant's assertions about this business are from *before the pandemic*, when all such places were open. He asserts that when his putative competition was open, he had customers. Thus, his claim is that people were paying him $60 for this accommodation at a time when they had many more conventional, traditional, and cheaper, options. The nature of the claimed business makes little sense, and is not credible even without considering any other factors. Second, the business in question has nothing other than what the Petitioner himself generated to substantiate it. No food license, no zoning variance, no home-business permits, no vendor bills, no evidence that sales tax was collected, no evidence of advertising, no statements from clients, and no accounting ledgers. At most, we have people paying him $60 for *something*. We have considered the bank records as ordered by the district court. Those records were admitted as exhibits previously, and so we did consider them previously. But the court ordered us to consider them again, and we do so again. We also consider the tax returns and Chime transactions. But the tax records are unsigned and undated – completely consistent with something produced after the fact. (Cert. Rec. at p. 53-65; p. 95-97). We note that taxes were due after the Petitioner filed his PUA claim on April 7. Plus, the tax records show an income of $12,500 (but only a gain of $550). This is a nice round figure. But the Petitioner's evidence was that he charged $60, and this is the figure shown in the Chime record. Of course, $12,500 is not divisible by $60. And the bank records from 2019 come nowhere near $12,500 in income. So the Claimant produced very poor records – the records he chose to produce aren't missing, just fishy. Now we **have** considered the insurance claim, including **all** documents we were ordered to consider, and the Claimant's argument that he lost all the records on his laptop and his cellphone. We remain unconvinced that this explains the total lack of things like the names of customers, his Facebook postings, his Craigslist postings, or his twitter postings. (Cert. Rec. at p. 158 [use of Facebook, Craigslist

and Twitter to advertise]). It is not credible that his access to digital accounts disappeared with the damage to his electronic devices. Third, the email addresses supplied by the Claimant raise questions for the reasons described by the investigator, but questions of legitimacy are also raised by the domains involved. The Claimant gives 145 email addresses, by our count. (Cert. Rec. at p. 87-89). Of these 100, or about 69%, are all from the same domain: xmail.com. Then 28 (about 19%) are from zmail.com, and 15 are from cmail.com, hmail.com, jmail.com, qmail.com and tmail.com. The other two are from "qmail.cuny.tv" and "bc.tv." None are from Gmail, Yahoo, Outlook, Hotmail, or AOl. A single domain accounting for such a heavy predominance of the domains, while the more popular email domains are totally absent, casts doubt on whether the emails are sent from permanent email addresses for legitimate business purposes. And if they are from disposable email accounts, why would such a predominance of customers choose that method just so they can have a small TV-watching get together? Fourth, the sum of $12,500 would indicate (fractionally over) 208 sixty-dollar transactions in 2019. (Cert. Rec. at p. 58). The Claimant asserts he operated for a total of 5 months, two in 2019. So he has over two-hundred transactions involving parties of a minimum of four people. That is a lot of people to have no names or other identifying information (aside from the emails we have discussed). It is not credible that the Claimant had eight hundred people over to his house in a two-month period (a period including Christmas and New Year's Eve), but supplies us with no one's name, and has no other record except for banking records that come nowhere near this number of transactions. Fifth, if all the Claimant's electronic records were destroyed, where does the blank unsigned tax return from 2020 (2019 tax year) come from? And why does he have Chime summary records for almost all of 2019 & 2020 if his access was destroyed? And how did he have the specific accounting figures he used to fill out that tax return? We asked for explanation of what was lost, and what was retained, but all we got was "it has been more than a year since Houwen used the free accounts or logins for those accounts as any of that information was left on his laptop and cellphone which was destroyed…" This is insufficient to convince us given these issues. Thus, even accepting that the derecho destroyed electronic devices belonging to the Claimant, we still do not find credible his claim of running an in-home event-hosting business in 2019-2020. On balance, we do not find credible that the Claimant had a legitimate business as he described in his testimony, his filings, and in his application for benefits.

We note that in making our credibility assessment, the credibility of the investigator is of minimal importance. We do find the investigator credible on those points we rely on him for. These are primarily the course of proceedings, the investigator's interactions with the Claimant, and what the investigator uncovered regarding the necessity of licenses, permits, and the like. The investigator's opinion, one way or the other, on whether the Claimant lied to get benefits we give no weight or consideration. The determination of whether the Claimant is lying is the ultimate question we have to answer in the fraud case, and the opinion of the investigator on that issue is not even a consideration. In the same vein, the fact that the investigation was launched by an anonymous tip has no significance. However it was launched, whether by tip or random audit, the investigation was launched and evidence was taken at hearing. We review the record developed at that hearing, and on remand from the Court (as described in the *Order Regarding Consideration of Evidence*).

We do not consider or give any weight to the statements made by the anonymous tipster. The *only* role of the tip was as the impetus for the proceedings. The tipster's information receives no weight from us, and is wholly disregarded by us, at this stage of the proceedings.

Just to be one hundred percent clear: we have reviewed all the evidence in the record, and also the evidence directed by the district court for us to review. We agree with the Administrative Law Judge that the Claimant's testimony that he was running a legitimate business out of his home in 2019 and early 2020 is **not** credible. We find that the Claimant lied about this having a legitimate business for the express purpose of fraudulently collecting Pandemic Unemployment Assistance, and the attendant federal benefits.

Under federal law "[e]ligibility fraud occurs when benefits or services are acquired as a result of false information being provided with the intent to receive benefits for which an individual would not otherwise be eligible." *UIPL 20-21, Change 1*, p. 7 (DOLETA 2/7/2022) https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2022/UIPL_20-21_Change_1_acc.pdf. "[T]he state must apply a minimum 15 percent monetary penalty to an overpayment when the state determines, in accordance with their state UC law, that such a payment was made due to fraud. States must apply the same monetary penalty to CARES Act UC programs as it does to the regular UC program." *Id*. Given the use of "with the intent," we interpret "false information" in the description of eligibility fraud to indicate mendacity not merely inaccuracy. We think this definition requires two key elements: (1) knowledge of the falsity and (2) specific intent to deceive the agency so as to receive benefits. We find these elements have been shown by the evidence in this case.

As a result, the Claimant is overpaid $10,759.00 for the 52 weeks ending March 27, 2021 as set out by the Administrative Law Judge, and is also assessed a 15% penalty on that amount as we previously ruled.

Alternate Ruling On PUA Eligibility

Even if we found the Claimant credible – which we do not – still the Claimant would not be eligible for PUA benefits.

In response to our order on remand, this Claimant describes his business as "small-event home space rental" that "provided a venue location for small gatherings" that "provided amenities such as wide-screen TVs, a kitchen, and yard space." *Claimant Argument on Remand*, 4/24/23. This is consistent with his testimony. He does not describe any services that he himself provided. We do find the Claimant not credible, and thus it is apparent that the likely reason for this description is that Claimant is trying to explain away lack of a food license etc once this issue was raised by Mr. Noonan. And the question of whether his home has the necessary permission for short-term commercial rental also casts doubt on credibility of his description. But for the purposes of present analysis we assume, without deciding, that the Claimant indeed was supplying no personal services and was merely renting event space which included passive amenities like a yard. This is not PUA covered activity. Landlords, arenas, stadiums, and innkeepers are not self-employed

individuals simply because they rent out space. *See In re Claim of Nadine Oliver*, 21B-DUA-01015 (EAB 3/19/2021) (landlord who lost renters not eligible for PUA since even though "an owner may provide incidental services as part of the lease agreement, … rent is paid primarily in return for the right of possession, and not for incidentals like fixing the plumbing, etc.").

The Pandemic *Unemployment* Assistance benefit is not a business insurance policy. It is not a grant along the lines of the Paycheck Protect Program. PUA is a benefit for **workers**, not just business owners or investors. Thus in order to be eligible for PUA on the grounds of being a self-employed individual one must meet the regulatory definition. The guidance, which is based on the applicable federal regulations, states:

> "Self-employed individuals" as defined in 20 C.F.R 625.2(n) means individuals whose primary reliance for income is on the **performance of services** in the individual's own business, or on the individual's own farm. These individuals include independent contractors, gig economy workers, and workers for certain religious entities.

UIPL 16-20, Attachment I (operating instructions), p. I-3 (DOL ETA 4/5/2020); *accord* 20 C.F.R. 625.2(n)("Self-employed individual means an individual whose primary reliance for income is on the performance of services in the individual's own business, or on the individual's own farm."). Receiving income from the provision of services is required to be self-employed. And it is loss or reduction of this self-employed income, if caused by covered reasons, which is required in order to get the PUA benefit. Thus in change 4, the DOL explains "[s]elf-employed individuals (including independent contractors and gig workers) who experienced a significant diminution of their customary or usual **services** because of the COVID-19 public health emergency, even absent a suspension of **services**, may self-certify...." *UIPL 16-20, Change 4, Attachment I* p. I-8 (DOL ETA 1/8/2021) (emphasis added). The diminution has to be in services provided by the self-employed individual, not simply in the number of customers seeking to rent. The Claimant eschews the provision any such personal services, both in argument to us post-remand and in his testimony.

The requirement of receiving the money in question primarily for **performance of services** means that a downturn in investment or passive income, including rental payments, would not constitute a loss or reduction in services in self-employment. Not only does the definition refer to services but, given the widespread loss of rental income resulting from the pandemic, such an allowance would very significantly increase the coverage of this benefit which is clearly intended to replace lost income that had been received from performing labor. If the Claimant's argument flew then every hotel and motel owner that experienced a downturn in occupancy during the Pandemic – *i.e.* all of them - would be eligible for PUA. This is absurd, and inconsistent with the words of the federal regulation and guidance. So the additional reason the Claimant was not eligible for PUA is that he lacked attachment to the *workforce* – either as an employee, or as a self-employed person (including as an independent contractor). Thus *even if* we believed the Claimant's description of his putative business he would not be PUA eligible (although he would owe

no additional 15% for fraud). On this alternate analysis the PUA denial is affirmed, and the PUA overpayment of $10,759.00 for the 52 weeks ending March 27, 2021 stands on this alternate basis even if there had been no fraud proven.

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James M. Strohman

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Ashley R. Koopmans

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Myron R. Linn

RRA/fnv