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

AH LWIN

Claimant

and

SWIFT PORK COMPANY

Employer

HEARING NUMBER: 20B-UI-07235

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: 96.4-3

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**.

Claimant submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. There is no sufficient cause why the new and additional information submitted by the Claimant was not presented at hearing. Accordingly none of the new and additional information submitted has been relied upon in making our decision, and none of it has received any weight whatsoever, but rather all of it has been wholly disregarded.

THE BOARD PROVIDES THE FOLLOWING DISCUSSION FOR INFORMATIONAL PURPOSES:

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 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. 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:
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> > 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.
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> 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.* We are directed to none, and are not aware of any such proclamation.

Moreover, the Iowa Supreme Court has instructed as recently as May of this year that "as a general rule, equitable estoppel will not lie against a government agency." *Endress v. Iowa Department of Human Service*, No. 18-1329 (May 29, 2020) (*quoting ABC Disposal Sys*., Inc. v. Dep't of Nat. Res., 681 N.W.2d 596, 607 (Iowa 2004)). The *ABC* case quoted in *Endress* was expounded upon by the Iowa Supreme Court in *Fennelly v. A-1 Machine & Tool Co.*, 728 NW 2d 163, 180 (Iowa 2006) where Justice Cady explained that the required special circumstances that would allow governmental estoppel include that the "party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent." *Fennelly* at 180. Here there is no allegation of wrongful conduct, and so even if we had the power to waive a statute through application of equity, the doctrine is not satisfied.

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 asserts medical reasons not to work at Claimant's job, and the Claimant's 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 the spring 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).

The upshot is that if Claimant can make the necessary PUA showing of a need to be absent from work the Claimant may very well be eligible for PUA for any week. **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. **If** the Claimant can get PUA the Claimant would receive that benefit so long as the Claimant was unavailable because on a leave of absence for COVID reasons. Here that means if the Claimant can submit adequate documentation that he was on a qualifying leave then he would get PUA benefits for that entire period. He could then receive regular state benefits once Claimant is available to work again should he become unemployed 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/PEUC/EB. But putting the Claimant on regular benefits early would use up weeks of regular benefit/PEUC/EB eligibility 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. But the Claimant is back to work, so even this is not going to happen. 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 oral statements made about a few weeks in the spring of 2020 concerning a leave of absence that ended in June of 2020.

As far as the Lost Wages Assistance (LWA) allowing an additional $300 the Claimant has misunderstood the use of federal monies for a state match, and what that means. Notably the match is calculated at the aggregate level and is about whether the state will have to pay money to FEMA or not. It is not about whether claimants will get the extra money. In particular, the Department of Labor instructs:

> As provided in the Presidential Memo, an "eligible claimant" is an individual who: (1) provides self-certification that he or she is unemployed or partially unemployed due to disruptions caused by COVID-19 and (2) receives, for the week of unemployment with respect to which LWA is sought, at least $100 of regular UC **or any of the following UC programs:**
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> …
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> Pandemic Unemployment Assistance (PUA);
>
> ….
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> LWA is not payable to individuals collecting **Disaster** Unemployment Assistance (**D**UA).

UIPL 27-20, (DOLETA August 12, 2020)(emphasis added). Obviously, if PUA could not be used to support payment of the three hundred dollar benefit then it would not be listed as a program whose payments are eligible to be enhanced, and instead would be listed alongside **D**ua as a program that will not support payment. Again, the match is calculated on an aggregate basis (the state must pay in aggregate at least $100 in state moneys since August 1, 2020 for each payment of $300 made in LWA). The remedy for not meeting the match is the State of Iowa owing money to FEMA – not overpaying the individual claimants. UIPL 27-20, Change 1, Attachment I, p. I-6 to I-7 ("If a state falls short of meeting the 25 percent match, it will be liable for paying FEMA the difference."). In fact, since PUA in Iowa always exceeds $100 (the minimum payment in Iowa is $207) those claimants who otherwise would have a WBA under $100 will become eligible for LWA by going on PUA. UIPL, 26-20, attachment 1 (minimum DUA). Plus LWA was not in effect during the weeks in question.

Furthermore, the Claimant here was on apparently on a leave of absence from from March 29 until June 22. If he can prove this was a qualifying Covid-related leave he could get PUA for the entire period. But regular benefits could only run from when he first filed his claim, that is, April 19. Once again going on PUA is superior. Naturally, none of this has anything to do with how we rule today. We only seek to dispel the inaccurate belief that PUA is an inferior benefit. We rule as the law requires us to rule given the facts of the case.

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.'). **This means if the Claimant can get PUA the Claimant would receive the PUA benefit so long as the Claimant is unavailable because on a leave of absence for qualifying COVID reasons. Claimant might then receive regular state benefits if he should become unemployed following his June 22 return.** The denial of regular benefits only applies to the period from April 19 through June 22. If the Claimant can show he is available following June 22 he can once again collect regular state benefits.

The databases we have access to show that the Claimant has **not yet** applied for PUA.

Counsel for Claimant is encouraged to help the Claimant to file a PUA claim. If the Claimant is approved for PUA then any overpayment will be offset, and the Claimant will receive PUA benefits for those weeks his claim was locked for being unavailable due to a qualifying Covid-related reasons, and even possibly further back if the leave started earlier than his original claim date of April 19.

Should the Claimant wish to apply for PUA the 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