

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

PENNY HUDSON

Claimant

and

IWD INVESTIGATIONS & RECOVERY

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HEARING NUMBER: 21B-UI-09900

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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: 96.3-7, 116-136

DECISION

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**:

The Board adds the following to the Findings of Fact:

The exhibits, and the agency claim records which the Administrative Law Judge took official notice of, shows that the Claimant received the following wages in her base period:

Employer	Q1, 2019	Q2, 2019	Q3, 2019	Q4, 2019	Total
AEA 11	20,402.22	20,652.34	21,233.11	20,664.00	\$82,951.67
F. Mango	2,319.14	2,716.20	2,023.86	2,003.20	\$9,062.40

Total Wages: \$92,014.07

Credits (=1/3 wages): \$30,671.36

For every week the Claimant filed for benefits at issue in this case she earned \$1590, but reported no earnings. She was paid benefits on the basis of no wages for the weeks at issue.

The Board adds the following to the Administrative Law Judge's Reasoning and Conclusions of Law:

Under the Cares Act, §2107(a)(4)(B) “the terms and conditions of the State law which apply to claims for regular compensation and to the payment thereof (including terms and conditions relating to availability for work, active search for work, and refusal to accept work) shall apply to claims for pandemic emergency unemployment compensation and the payment thereof, except where otherwise inconsistent with the provisions of this section or with the regulations or operating instructions of the Secretary promulgated to carry out this section” The *Implementing and Operating Instructions for the Pandemic Emergency Unemployment Compensation (PEUC) Program* issued by the Secretary of Labor on April 10, 2020 state:

5. PEUC Weekly Benefit Amount (WBA).

a. Total Unemployment.

- The WBA payable to an individual for a week of total unemployment is equal to the amount of regular compensation (including dependents' allowances) payable to such individual during the applicable benefit year for a week of total unemployment under the applicable state law,

and

- The weekly amount of FPUC under section 2104 of the CARES Act, which is payable for weeks of unemployment ending on or before July 31, 2020. See UIPL 15-20.

b. Partial and Part-Total Unemployment.

- The WBA payable to an individual for a week of partial or part-total unemployment is equal to the amount of regular compensation (including dependents' allowances) payable to such individual during the applicable benefit year for a week of partial or part-total unemployment under the applicable state law,

and

- The weekly amount of FPUC under section 2104 of the CARES Act, which is payable for weeks of unemployment ending on or before July 31, 2020. See UIPL 15-20.

Attachment I to UIPL 17-20, p. I-5 (DOL ETA 4/10/2020).

Given this clear directive from both the federal statute and the applicable operating instructions we turn to “the [Iowa] State law which apply to claims for regular compensation and to the payment thereof...”

The Code of Iowa sets out the calculation for the weekly benefit amount. The weekly benefit amount is “[t]he full amount of benefits a claimant is entitled to receive for a week of total unemployment.” 871 IAC 24.1(13)(c). The weekly benefit amount depends on the number of dependents, but may not exceed a specified state weekly maximum. The Code:

[A]n eligible individual’s weekly benefit amount for a week of total unemployment shall be an amount equal to the following fractions of the individual’s total wages in insured work paid during that quarter of the individual’s base period in which such total wages were highest; the director shall determine annually a maximum weekly benefit amount equal to the following percentages, to vary with the number of dependents, of the statewide average weekly wage paid to employees in insured work...:

If the number of dependents is	The weekly benefit amount shall equal the following fraction of high quarter wages:	Subject to the following maximum percentage of the statewide average weekly wage
0	1/23	53%
1	1/22	55%
2	1/21	57%
3	1/20	60%
4 or more	1/19	65%

Iowa Code §96.3(4)(a). Since the Claimant claimed no dependents claimed her weekly benefit is at most 1/23 of her average weekly wage in her high quarter, and is subject to the 53% maximum of the statewide average weekly wage. The Statewide Average Annual Wage applicable to this claim was \$47,290.57, making the applicable average weekly wage \$909. *See Iowan’s Unemployment and Injury Benefits Increase*, (June 28, 2019) (<https://www.iowaworkforcedevelopment.gov/iowans%E2%80%99-unemployment-and-injury-benefits-increase>). Thus for this Claimant the maximum benefit amount is 53% of \$909, that is, is equal to \$481.

We set out the WBA calculation just to be explicit. Again, the Claimant received the following wages in her base period:

Employer	Q1, 2019	Q2, 2019	Q3, 2019	Q4, 2019	Total
AEA 11	20,402.22	20,652.34	21,233.11	20,664.00	\$82,951.67
F. Mango	2,319.14	2,716.20	2,023.86	2,003.20	\$9,062.40

Total Wages: \$92,014.07

Credits (=1/3 wages): \$30,671.36

Now we can raw figure the weekly benefit amount. Here, the second quarter of 2019 is the high quarter with earnings of \$23,368.54. With one dependent we take a 23rd to get a weekly benefit amount of \$1,016.02. But this is not the Claimant's weekly benefit amount because the Code provides that for no dependents the cap is 53% of the statewide average weekly wage applicable to the claim in question the cap is \$481. Thus based on the high quarter earnings of \$23,368.54, and no dependents, and the Code we automatically generate a weekly benefit amount of \$481. Twenty-six times this amount is \$12,506.00, and since this is less than the credits of \$30,671.36 the Claimant's maximum benefit amount (that is the most in regular benefits she could collect *total*) would be \$12,506.00, or some 38% more than she made in wages at Flying Mango. By calculation she had a weekly benefit amount of \$481, and a maximum benefit amount of \$12,506 and both these figures match what is in the record.

So now let's delete off the Flying Mango wages. The Claimant would then have the following wages in that period:

Employer	Q1, 2019	Q2, 2019	Q3, 2019	Q4, 2019	Total
AEA 11	20,402.22	20,652.34	21,233.11	20,664.00	\$82,951.67

Total Wages: \$82,951.67

Credits (=1/3 wages): \$27,650.56

In this scenario, the third quarter of 2019 is now the high quarter with earnings of \$21,233.11. With no dependents we take a 23rd to get a weekly benefit amount of \$923.18. Again this would not be the Claimant's weekly benefit amount because the Code provides that for no dependents the cap is 53% of the statewide average weekly wage applicable to the claim in question. The cap is still \$481. Thus based on the high quarter earnings of \$21,233.11, no dependents, and the Code we **again** automatically generate a weekly benefit amount of \$481. Twenty-six times this amount is still \$12,506.00, and this still is less than the credits of \$27,650.56. Again the Claimant's maximum benefit amount (that is the most in regular benefits she could collect *total*) would still be \$12,506.00.

So if the Claimant never had wages with Flying Mango her benefit eligibility would be totally unaffected. This is because she earned wages in a steady pattern where her wages with the AEA were, quarter after quarter, 90% of her total wages. Clearly, her regular job was the one at AEA 11, and not the job at Flying Mango. The Flying Mango was supplemental part-time employment. Right off, with little more analysis, once can plainly see that someone is not unemployed if they lost part-time work and keep working the full-time job that supplies 90% of their income.

But, as the above discussion suggests, we are not inclined to rely on the first blush and so we delve into the details of the legal analysis as well.

First off, the assertion that "partial unemployment" means "any decline in earned income whatsoever" is contrary to the law, both its purpose and its text. This term "partial unemployment" is defined by statute. "When the legislature has defined words in a statute — that is, when the legislature has opted to 'act as its own lexicographer' — those definitions bind us." *State v. Coleman*, 907 NW 2d 124, 135 (Iowa 2018) (quoting *State v. Fischer*, 785 N.W.2d 697, 702 (Iowa 2010)). And while the statute must be liberally

construed, this does not come into play when reading plain English. *See e.g. Standard Water Control Sys., Inc. v. Jones*, No. 15-0458, 2016 WL 4543505, at *1 (Iowa Ct. App. Aug. 31, 2016) (“We look no further than the language of the statute when it is unambiguous.”); *Estate of Ryan v. Heritage Trail Assoc.*, 745 N.W.2d 724, 730 (Iowa 2008) (“When the statute’s language is plain and its meaning is clear, we look no further. ... [W]e resort to the rules of statutory construction only when the terms of [a] statute are ambiguous.”); *In re Detention of Fowler*, 784 N.W.2d 184, 187 (Iowa 2010) (“We do not search for meaning beyond the express terms of a statute when the statute is plain and its meaning clear.”); *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 135 (Iowa 2010) (“[T]he principle of liberal construction does not vest th[e] court with an editor’s pen with the power to add or detract from the legislature’s handiwork.”); *Moulton v. Iowa Emp’t Sec. Comm’n*, 239 Iowa 1161, 34 N.W.2d 211, 216 (Iowa 1948) (In unemployment cases “[w]hile the statute under consideration is to be liberally construed in order to effect its beneficent purpose, yet construction should not be carried beyond the limits of its plain legislative intent.”)

Under Iowa law “total unemployment” is simply “[a] week in which an individual performs no work and earns no wages.” 871 IAC 24.1(139)(c). The Iowa Code similarly states that “[a]n individual shall be deemed ‘totally unemployed’ in any week with respect to which no wages are payable to the individual and during which the individual performs no services.” Iowa Code §96.1A(37)(a). Clearly then, an individual is totally unemployed for a given week if they are not doing any work that week and they aren’t getting any pay that week. For no week during which an overpayment is assessed in this case does the Claimant meet this definition.

We now take up the issue of partial unemployment. In Iowa there are two types of this:

37. b. An individual shall be deemed “partially unemployed” in any week in which either of the following apply:

- (1) While employed at the individual’s then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual’s weekly benefit amount plus fifteen dollars.
- (2) The individual, having been separated from the individual’s regular job, earns at odd jobs less than the individual’s weekly benefit amount plus fifteen dollars

Iowa Code §96.1A(37)(b). The first type of partial unemployment is when the claimant remains working for the regular employer but on a schedule reduced from their regular full-time work – in essence a partial layoff. This type of person may collect benefits and is exempt from the job search and availability requirements. Iowa Code §96.4(3) (“This subsection is waived if the individual is deemed partially unemployed, while employed at the individual’s regular job as defined in section 96.1A, subsection 37, paragraph “b”, subparagraph (1)”).

The second type of partial unemployment is basically when a person has lost their job and has only been able to find fill-in work in the interim, or continues working a moonlighting job after loss of the regular job. See 871 IAC 24.1(86). This person must continue to look for full-time work. Odd job unemployment

is more generally known as “part total” unemployment although the Iowa statute uses “partially” for both categories. *E.g. UIPL, 08-98, (DOL ETA 1/12/98)(“ Unemployment Compensation (UC) - Payment Only for Periods of Unemployment”)*. The Iowa Code, however, specifies that the waiver of availability only applies to “section 96.1A, subsection 37, paragraph ‘b,’ subparagraph (1).” Iowa Code §96.4(3). Thus the waiver of availability does not apply to the “odd job,” or “part total,” unemployment described in subparagraph 2.

Both types of partial unemployment require that in order to be partially unemployed the individual earn less than her weekly benefit amount plus \$15. Notably, the regulations of IWD state that “odd job earnings” are “[a]ny earnings which a claimant may have during a week of unemployment as a result of temporary work with an employing unit other than the claimant’s regular employing unit.” 871 IAC 24.1(86). On this record it is clear that AEA 11 is the Claimant’s regular employing unit. This being the case the Claimant was not separated from her regular employer, AEA 11, while she was filing for benefits. The Code would thus require that “[w]hile employed at the individual’s then regular job [AEA 11], the individual works less than the regular full-time week and in which the individual earns less than the individual’s weekly benefit amount plus fifteen dollars.” Iowa Code §96.1A(37)(b). There are two clear requirements: (1) work less than the regular full-time week and (2) make less at the regular job than the WBA plus \$15. During the weeks the Claimant filed she generally did not work less than the regular full-time week at AEA 11. She fails to meet the first criterion during any such week. Further, during *all* the weeks in question the Claimant earned much more than her weekly benefit amount plus \$15 at AEA 11 and so for all the weeks in question she fails to meet the second criterion.

We can even assume that somehow Flying Mango was her regular job. If this were the case the Claimant would be trying to argue that she had “odd job” partial unemployment. But the same requirement of earning less than the WBA plus \$15 still applies to “odd job” unemployment, and the Claimant again fails to meet this requirement for any week. She is thus not partially unemployed for odd job unemployment either.

In addition, the regulations of the department explicitly provide that “[a]n individual who is partially unemployed may earn weekly a sum equal to the individual’s weekly benefit amount plus \$15 before being disqualified for excessive earnings.” 871 IAC 24.18 (“Wage-earnings limitation.”). For every week in question the Claimant earned more than \$496 and thus even if the Claimant were somehow partially unemployed – and she does not meet statutory definitions – the benefits payable under this regulation would be zero.

If this were not enough we can ignore that the Claimant is not partially unemployed, we can ignore that the Claimant’s earnings exceed the earnings cap, and we can just assume for the sake of argument that the Claimant is due a benefit. The issue remains: how much? The Code, again, provides the answer:

An individual who is partially unemployed in any week as defined in section 96.1A, subsection 37, paragraph “b”, and who meets the conditions of eligibility for benefits shall be paid with respect to that week an amount **equal to the individual’s weekly benefit amount less that part of wages payable to the individual with respect to that week in excess of one-fourth of the individual’s weekly benefit amount.** The benefits shall be rounded to the lower multiple of one dollar.

Iowa Code §96.3(3); 871 IAC 24.18 (“If such individual earns less than the individual’s weekly benefit amount plus \$15, the formula for wage deduction shall be a sum equal to the individual’s weekly benefit amount less that part of wages, payable to the individual with respect to that week and rounded to the lower multiple of one dollar, in excess of one-fourth of the individual’s weekly benefit amount.”). So, we start with the WBA. Here it is \$481. We take a quarter (rounded to the nearest dollar), and get \$120. We now get the part of wages exceeding \$120 and take that from \$481 in order to get the benefits payable for that week. This means if the Claimant earned more than $\$481 + \$120 = \$601$ her benefit amount would be zero. To see this directly, say that the Claimant earned \$601 in a week – and she earned more in every week at issue – and calculate her benefit. Her partial benefit is \$481 less the amount by which \$601 exceeds a fourth of \$481. So the benefit due = $\$481 - (\$601 - [\$481 \div 4]) = \$481 - (\$601 - \$120) = \$481 - \$481 = 0$. So even ignoring everything else, the fact that the Claimant earned more than \$601 for every week at issue means she was due no benefit for any week claimed.

Fundamentally, no matter how you slice it the Claimant was making too much during every week she claimed in order to collect any benefits for any week in question. The Claimant is not partially unemployed under state law, or even if she was had a total payable benefit of zero, and therefore had no money coming to her under the PEUC program.

The Claimant requests the Board to waive her PEUC overpayment. The Claimant may apply for a waiver with Iowa Workforce. Such a waiver request is made to Iowa Workforce Development. Instructions for requesting a waiver of this overpayment can be found at <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-overpayment-and-recovery>. The Administrative Law Judge gave more detail at the end of his decision. The Claimant should carefully read and follow all instructions from Iowa Workforce on how to apply for waiver of any federal overpayments, what information to supply. The question of whether the PEUC overpayment will be waived will be determined by the outcome of any application for waiver the Claimant makes to IWD. We express no view on the matter at this time.

James M. Strohman

Ashley R. Koopmans

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