

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building, 4TH Floor
Des Moines, Iowa 50319
eab.iowa.gov**

DANYALE D BOARDMAN

Claimant

and

IWD INVESTIGATION & RECOVERY

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HEARING NUMBER: 22B-UI-03759

**EMPLOYMENT APPEAL BOARD
DECISION**

SECTION: 10A.601 Employment Appeal Board Review

DECISION

FINDINGS OF FACT:

Iowa Workforce Development was admitted as a party, through counsel, in this contested case.

REASONING AND CONCLUSIONS OF LAW:

Where the Department is admitted as a party it becomes a “party” to the contested case. 871 IAC 26.2 (“party”). This does not occur merely because the Administrative Law Judge calls a witness from Investigations and Recovery. But where the Department is represented and actively participates as an opponent in the case, including submitting argument and responding to discovery, then it has been admitted as a party. Under the rules of the Department and the provisions of the Iowa Administrative Procedures Act where the Department is admitted as a party in a contested case, and the other party requests an Administrative Law Judge who is not employed by the Department, the matter must be heard and decided by and Administrative Law Judge assigned by the division of administrative hearings in accordance with the provisions of section 10A.801. This did not occur in this matter, and so we must remand to an Administrative Law Judge assigned by the division of administrative hearings in accordance with the provisions of section 10A.801.

Background Information For The Remand:

We set out the basic history and legal framework of this matter for the ease of the parties and the Administrative Law Judge on remand.

Useful background in this case is four kinds of unemployment benefits appearing in the record: (1) Regular state benefits, (2) Pandemic Emergency Unemployment Compensation (PEUC) (3) Federal Pandemic Unemployment Compensation (FPUC) and (4) Lost Wages Assistance (LWA).

Regular benefits are paid under a State program and are paid out from the state fund, and charged to the claimant's base period employers. This is the program that has been in place since 1936.

PEUC benefits are a federal benefit created in three acts passed in 2020 and 2021, namely, the CARES Act in the spring 2020, the *Continued Assistance Act* (CAA) in late December, 2020, and the *American Rescue Plan Act* (ARPA) in the spring of 2021. PEUC basically adds weeks of eligibility to regular benefits, extending them to September 5, 2021 although Iowa ended participation in *all* these federal benefits as of June 12, 2021. Disqualifications that apply to regular benefits also apply to PEUC. The weekly benefit amount is the same as the regular benefit claim that is exhausted.

FPUC is also the result of the *CARES Act*, *CAA*, and *ARPA*. It is extra money that is added onto *any* amount of *any* of the other benefits collected during any week during specified periods. Under the CARES Act \$600 is payable for weeks where another benefit was collected between March 29, 2020 and July 25, 2020. Under the CAA, a smaller FPUC of \$300 per week starts up again and is payable for weeks between December 27, 2020 and on March 13, 2021. See [Change 3, UIPL 15-20](#) (DOL-ETA 1/5/2021). The ARPA extended this to September 6, 2021 but Iowa ended participation as of June 12, 2021. <https://governor.iowa.gov/press-release/iowa-to-end-participation-in-federal-unemployment-benefit-programs%C2%A0citing-strong>.

LWA is an extra \$300 a week provided for by an Executive Order issued by President Donald Trump. [UIPL 27-20](#), p. 1 (DOL-ETA 8/12/2020). Inasmuch as the President has limited power to redirect federal unemployment funds, the LWA funds come from FEMA emergency money. For six weeks in the summer of 2020 an extra \$300 a week in "Lost Wages Assistance" was payable. *Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019* (Presidential Memo 08/08/2020) §4(d)(i)(C) (Lost Wages Assistance). To get the **LWA** boost a claimant had to collect some minimal amount of benefits of another type. The claimant must "receiv[e] 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... Pandemic Emergency Unemployment Compensation (PEUC)." [UIPL 27-20, \(DOLETA August 12, 2020\)](#). So if an individual claimant got \$100 worth of benefits this was sufficient to support the \$300 LWA payment during those six weeks in summer of 2020.

Next, we set out the claim history of this Claimant, including the weeks she filed, and indicating which weeks she was disqualified for by the binding decisions in 21A-UI-22613-JTT, 21A-UI-22614-JTT, and 21A-UI-23019-JTT. Note "BWE" means "benefit week ending" (always a Sunday). We have differently shaded four periods. The first shaded area is where benefits were denied in case 23019 (one week), the second where benefits were allowed in case 23019, the third where benefits were denied in case 22614, and the fourth where benefits were denied in case 22613. It is useful to note when orienting to the timeline, that the Claimant was allowed for those weeks after March 22, 2020 when she reported no wages, and disallowed once she started reporting wages.

3/15/20.....First regular state benefit claim filed. Beginning of regular claim series of 25 consecutive weeks when the Claimant collects regular benefits based on 2020 claim year. For the one week from 3/15/20 through 3/21/20 the Claimant was denied based on being out of the country on vacation. 21A-UI-23019.

3/22/20.....Benefits allowed commencing this week through 6/27/20, a total of 14 weeks. 21A-UI-23019.

6/28/20 (BWE 7/4).....First time in claim series when Claimant reports wages earned during the week. She reports wages for every week she claimed thereafter. Disqualified through 3/13/21 under case 21A-UI-22614.

BWE 9/5/20.....Last week of regular benefits payable on the 2020 claim year. She was paid regular benefits in a total of 25 consecutive weeks. Fourteen are not overpaid.

09/06/20.....Claimant starts on PEUC benefits. She is paid PEUC every week until BWE 03/13/21. She was paid PEUC in a total of 27 consecutive weeks.

BWE 3/13/21.....Last week Claimant collected PEUC.

3/14/21.....Second claim filed. Beginning of regular claim series of 13 consecutive weeks when the Claimant collects regular benefits based on 2021 claim year. Disqualified for this claim series under case 21A-UI-22613.

BWE 6/12/21.....Last week claimed.

Additional Directions on Remand:

At issue in this case first of all, are the overpayments during the first claim week, and the last two shaded periods. The Administrative Law Judge ruled in case 22613 and 22614 that the Claimant was not available for work based on not making herself sufficiently available to her employer in order that she might collect more in unemployment. Also, the Administrative Law Judge ruled in case 21A-UI-23019 that from 3/15/20-3/21/20 the Claimant was not available to work because she was out of the country on vacation. These rulings are binding in this case. *Hensley v. Iowa Dept. of Job Service*, 336 N.W.2d 448 (Iowa 1983); *Kash v. Iowa Dept. of Employment Services, Div. of Job Service*, 476 N.W.2d 82 (Iowa 1991); *Walker v. Iowa Dept. of Job Service*, 351 N.W.2d 802 (Iowa 1984); 871 IAC 24.28; accord *Osaro v. Iowa Dept. Public Health*, No. 15-1051, slip op. at 3 (Iowa App. 6-15-2016) (Doctor did not appeal final agency decision terminating his status

as Medicaid provider but rather reapplied and attempted to litigate the termination in the later proceedings, but the Court cited to claim preclusion and held “we agree with the district court that Dr. Osaro is barred from relitigating the termination decision in this proceeding.”).

In this case the Claimant had a period when she was totally unemployed, that is, was paid zero wages and collected her full benefit amount. This was from 3/15/20 through 6/27/20. For the first claim week the Claimant was disallowed, and thus overpaid, based on being out of the country on vacation for the majority of the work week. 21A-UI-23019. She was *allowed* benefits for the period from 3/22/20 through 6/27/20 and no overpayment attributable to this period is possible.

For every subsequent week during which an overpayment is sought the Claimant reported wages, and so was not totally unemployed. In such an instance the amount of the benefit is calculated according to a formula using earnings during the week and the weekly benefit amount [WBA]. This formula would apply to regular benefits paid under state law, and to PEUC benefits. The formula is:

$$\text{Benefits paid} = \text{WBA} - (\text{Earnings} - \frac{1}{4} \text{WBA}).$$

In this formula no negative numbers are used. Iowa Code §96.3(3). How this works is:

- If your earnings are equal or exceed the earnings cap of WBA+\$15 you get no benefits.
- If your earnings are less than 25% of WBA you get the full WBA.
- If your earnings are between 26% and 99% of WBA you get 125% of the WBA less earnings.
- If your earnings are equal to, or exceed, the WBA you get $\frac{1}{4}$ of the WBA, so long as earnings stay below the earnings cap of WBA plus \$15.

Now had the Claimant reported her wages differently, then the “earnings” portion of the formula would change. The Claimant’s WBA in 2020 was \$108. Her WBA in 2021 was \$113. At no point is it alleged that she earned as much as her WBA, and certainly not her WBA plus \$15.

Yet because of the availability disqualifications the Claimant was overpaid for *all* the benefits she collected from 6/28/20 through BWE 6/12/21. Since she at no time is alleged to have made more than the earnings limit (her weekly benefit amount plus \$15), the full amount of this overpayment is not caused by any supposed underreporting of wages. Had all she done is underreport wages the regular and PEUC overpayments would be significantly smaller. For example, during the weeks where the Claimant reported \$48 a week she got \$87 a week in benefits, then if she had reported \$104 (and we recognize the doubt about this figure) she would have gotten only \$31 a week – but not nothing. For weeks, in both claim years, where the Claimant reported \$96 rather than \$104, the difference in benefit payment was \$8 a week. So, we cannot take 15% of the full overpayment based on the idea of fraudulent underreporting of earnings since any such underreporting did not cause the full overpayment. If fraudulent overpayment is found any penalty *based on that underreporting* must be based on the difference between what the Claimant received in benefits and what she would have received with accurate reporting.

Moreover, since FPUC is payable on even \$1 of benefits, **none** of the FPUC overpayment was caused by underreporting of earnings. Also, even with the smaller numbers the Claimant was not paid \$100 of benefits during any week of the LWA period. But Workforce still paid LWA, even though that law requires a minimum of \$100 in *other* benefits before LWA can be paid. This was an error by IWD. There is no proof that IWD's error would have not occurred had the wage report been different, so the LWA payment was also not caused by any supposed misrepresentation in the earnings amount. Furthermore, LWA is governed by FEMA, not by Iowa Workforce, state law, or the Department of Labor. There appears to be no provision for a 15% penalty in the FEMA law, and no one cites us to any such provision. *See generally* https://www.fema.gov/sites/default/files/documents/fema_supplemental-lost-wages-payments-under-other-needs-assistance_022022.pdf.

Other than the first week when the Claimant was on vacation, where the issues seem fairly straightforward, the focus on remand should be on the Claimant not being available to work to the Employer. For all but that first week, the issue is the reason the Claimant was disqualified in cases 22613 and 22614. The key "fraud" issue on remand will be whether the Claimant made fraudulently false statements about her availability which caused her to be overpaid benefits. The basic disqualification in this case is based on the idea that the Claimant could have worked more for the Employer but refused to expand her schedule to the one she had had during the base period. This is not uncommon. We have seen before cases where a Claimant asked to have a schedule reduction, or was moved involuntarily to a part-time schedule but then chose to remain part-time later on. Such Claimants are often denied under the "same hours and wages" provision. The idea is that because the wage reduction is voluntary the Claimant is not partially unemployed, and therefore the Claimant does not satisfy the partially unemployed exception to availability. The remand must thus must address whether the Claimant committed misrepresentation or fraud *when she filed her weekly claims*.

We think it is inadequate to address this issue just to say the Claimant certified she was available, but she was not, and so there must be misrepresentation. In a case, for example, where a Claimant is laid up in the hospital for weeks and certifies availability then the contents of the certification is so at odds with the reality that an inference of misrepresentation may be justified. But here it is not clear that a job-attached claimant who reports wages, and who would thus be partially unemployed in most cases, would end up saying something false. Again, as background, one who is partially unemployed is exempt from the availability requirement. We think it is important to know how this exemption affects the filing of weekly claims. If, for example, the weekly claim system asks if you are job attached, and on an affirmative response then asks what your earnings were, and then if the earnings are small enough the system skips the availability question because of the exemption, then there would be no opportunity to make a false statement. So we need to know *what questions* were asked of the Claimant which the Department alleges a false response to. What we are trying to drill down to is whether it is alleged the Claimant falsely responded to a question seeking concrete information, or to some query seeking a legal conclusion that may be subject to interpretation. For example, saying "no" to "Are additional hours available with your regular employer" is one thing, but saying "yes" to "Are you partially unemployed because you are job attached and earning less than \$[WBA+15]?" may be something else. Since a remand is required anyway, we would like to see this level of detail from the hearing: *what specifically did Claimant say that is alleged to be false?*

Legal Standards

There is some confusion in this matter on the legal standards applicable to the fraud/misrepresentation allegation. Since they may be slightly different depending on the case we give some guidance here.

Regular Benefit Fraud – For this case there are several provisions that apply. Case 03766 deals with a claim lock that prevents payment of benefits so long as certain overpayments are outstanding. The Code section states that this claim lock applies, until repayment is made, “if the department finds that an individual has received benefits by reason of *misrepresentation* pursuant to section 96.16.” Iowa Code §96.5(13) (emphasis added). So if the a §96.16 misrepresentation finding is satisfied in cases 03759, 03760 and 03764 then so long as the specified moneys remain unrepaid the result in case 03766 would follow. For those three regular benefit cases the key provision is §96.16(4). As set out by Administrative Law Judge Duffelmeyer, that subsection has paragraph “a” that talks about “nondisclosure or misrepresentation.” That paragraph states that the claimant would have to repay the full amount of benefits and allows additional enforcement methods, but does not assess 15%. Paragraph “b” talks about “a fraudulent overpayment” and authorizes the 15% penalty. Further paragraph “b” states that the 15% penalty “shall not be deducted from any future benefits...” And as ALJ Duffelmeyer explained, the rules of the department has the following definitions:

“Fraud” means the intentional misuse of facts or truth to obtain or increase unemployment insurance benefits for oneself or another or to avoid the verification and payment of employment security taxes; a false representation of a matter of fact, whether by statement or by conduct, by false or misleading statements or allegations; or by the concealment or failure to disclose that which should have been disclosed, which deceives and is intended to deceive another so that they, or the department, shall not act upon it to their, or its, legal injury.

“Fraudulent activity” means actions based on or in the spirit of fraud.

...

“Misrepresentation” means to give misleading or deceiving information to or omit material information; to present or represent in a manner at odds with the truth.

871 IAC 25.1. This definition of “fraud” is somewhat complex, and confusing. Assuming that it is meant to be tabulated at the semicolons, then it would include “intentional misuse of facts... to obtain or increase unemployment insurance benefits”, “a false representation [by] false or misleading statements,” and also “concealment or failure to disclose...which deceives and is intended to deceive.” The problem is that “a false representation” may mean no more than “untrue.” If this were the case this second prong would simply swallow the other two. But as the *Oxford English Dictionary* explains the word “false” has two primary meanings. One is “contrary to what is true, erroneous” and the other is “mendacious, deceitful, treacherous.” Both these primary meanings have existed side-by-side for about as long as the word has been in English. Since, as we noted, a meaning of “untrue” would make the rest of the rule surplusage we take “false” in the definition of “fraud” to mean “mendacious, deceitful.” This approach is also consistent with interpreting words in context (“*noscitur a sociis*”), and with the basic idea that “fraud” encompasses more than the mere fact of inaccuracy. This gloss, moreover, is consistent with the administrative penalty provisions not directly at issue in these cases. Iowa Code §96.5(8)(“with intent to defraud by obtaining any benefits not due under this chapter, willfully and knowingly made a false statement or misrepresentation, or willfully and knowingly failed to disclose a material fact”); 871 IAC 25.9(2) (“deliberate falsification for the purpose of obtaining or increasing unemployment insurance benefits”).

Having clarified “fraud” we examine “misrepresentation.” This definition could cover just saying something that is inaccurate. To “omit material information” may occur all the time in good faith. The same is true of presenting something at odds with the truth. Given the use of “misleading” and “deceiving” in the definition of misrepresentation, we think that the definition means to describe acting intentionally with knowledge of the inaccuracy of the representation or omission. Unintentional, or good faith misunderstandings, would not be misrepresentation.

Putting this together with the statute we tend to agree with the Administrative Law Judge that a misrepresentation can authorize a lien under Iowa Code §96.16(4)(a) and also a claim lock under Code §96.5(13), which uses the word “misrepresentation.” The 15% penalty is limited to cases of “a fraudulent overpayment.” To the extent that the definitions of “fraud” and “misrepresentation” differ in the Iowa Code, then different effects may follow. While this seems awkward we have to make some distinction between the two if we are to give effect to the different words use in the statute, and the use of different definitions in the regulations. As we read the definitions, and in light of the usual requirements in criminal fraud actions, it seem that the main difference would be that for misrepresentation there need only be scienter, *i.e.* knowledge of falsity, but for fraud there must be *in addition* the specific intent to deceive in order to enhance benefit rights. We do not so rule at this time, but set out this analysis for guidance on remand.

PEUC & FPUC Fraud: Thankfully, the standard here is easier to locate. “Eligibility 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. State law determines the criteria for establishing a fraud determination within the UC programs.” https://wdr.doleta.gov/directives/attach/UIPL/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 again interpret “false information” to indicate mendacity not merely inaccuracy. We think this definition thus is consistent with how we described fraud above – the two key elements being knowledge of the falsity and specific intent to deceive the agency so as to receive more benefits.

LWA Fraud: As noted above we cannot find where FEMA authorizes a 15% penalty for LWA fraud, and unless some citation can be found on remand (and we expressly permit this issue to be litigated on remand) this would mean a 15% LWA penalty is improper.

Finally, we note again that the disqualification for the remainder of a benefit year under Iowa Code §96.5(8) does not appear to be involved in any of the decisions under appeal. Iowa Code §98.5(8)(“Administrative penalty”; 871 IAC 25.1 (“Administrative penalty”).

DECISION:

The decision of the administrative law judge dated May 10, 2022 is not vacated and remains in force unless and until an administrative law judge makes a differing determination pursuant to this remand. This matter is remanded to an administrative law judge employed by the Department of Inspections and Appeals, and assigned by the division of administrative hearings in accordance with the provisions of section 10A.801. This presiding officer is to be what is commonly referred to as a “central panel” administrative law judge and **not** an administrative law judge who is an employee of Iowa Workforce Development.

The administrative law judge shall conduct a hearing following due notice. After the hearing, the administrative law judge shall issue a decision which provides the parties appeal rights. This decision of the administrative law judge shall be based upon that evidence, including testimony and exhibits, which is admitted in the new hearing, and may not be based on evidence adduced during the first hearing unless that evidence from the first hearing is explicitly made part of the record during the second hearing, which may be done by agreement of parties or otherwise.

James M. Strohman

Ashley R. Koopmans

Myron R. Linn

RRA/fnv