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State of Wisconsin

**Labor and Industry Review Commission**

April 9, 2015

JANELL KNUTSON, CHAIR  
UNEMPLOYMENT INSURANCE ADVISORY COUNCIL  
201 E. WASHINGTON AVE.  
P.O. BOX 8942  
MADISON WI 53708

RECEIVED  
2015 APR 13 AM 8:51  
LEGAL COUNSEL

Re: Potential Legal Problems/Red Flags Noted with Proposed UI Law Changes

Dear Ms. Knutson:

In various meetings with Department of Workforce Development (DWD) officials over the past year or so, the commission was asked to share its expertise by reviewing law change proposals and flagging any potential legal problems. In response to these requests, the commissioners have asked the commission staff attorneys to review some of the current UI law change proposals, and to identify areas of concern or "red flags" with the proposed draft language.

No red flags were noted for DWD proposal D15-05 (Holding Managing Partners of [LLPs] Personally Liable for the Contributions Owed by the LLP). No red flags were noted for DWD proposal D15-06 (Appeals Modernization), although it appears that there will be numerous statutory and rule changes yet to be provided for the proposal.

Legal red flags *were* identified for two DWD proposals: DWD 15-01 (Social Security Disability Income and UI Benefits), and DWD 15-08 (Definition of Concealment). Attached are explanations of the legal red flags identified.

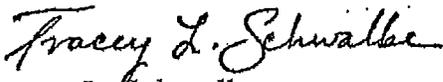
The comments in the attached documents do not address any of the policy reasons for the various proposals and should not be interpreted to suggest how the commission may decide any issue that comes before it. We are providing these comments so DWD, the UIAC, and the Legislature can consider potential legal issues raised by the proposals in order to make informed decisions. The appropriate commission staff attorneys can be made available to respond to questions, and will be happy to make available any of the referenced documents, decisions, or briefs.

Janell Knutson, Chair  
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On another matter, although there is no current proposal to change the worker classification law, the commission reviewed the recent report on the Detection and Prevention of Fraud in the UI Program presented at the March 19, 2015, UIAC meeting, and notes again problems with the website that the commission has alerted DWD to on several occasions. The report indicates on page 11 that the website has had 184,508 hits from unique internet protocol addresses during 2014. As we indicated in 2013, there is incorrect information on the website. In November 2013 the commission staff spent a great deal of time to help you with the website and on November 13, 2013, we provided you with updates and corrections to the information on the website. In June 2014, we expressed our concern to the DWD administration that these changes had not yet been made and that there were still problems with the information on the website. In June and September 2014, we again contacted the DWD administration to follow up on making the information on the website accurate. Our most recent response from DWD from October 2014 was that the DWD administration was waiting for the website staff to make the updates and corrections.

As of today, almost six months later, and almost 18 months after we notified you that the website had inaccurate information, these inaccuracies still have not been corrected. We are concerned that, although there are many hits to the website, employers and employees are getting inaccurate information when they access the website. We strongly encourage you to make the updates and changes to the website first identified in 2013. If your staff needs further assistance to update the information with additional cases, please let me know.

Sincerely,



Tracey L. Schwalbe  
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Enclosures

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## DWD PROPOSAL D15-01 – LEGAL RED FLAGS

### Social Security Disability Insurance (SSDI) and UI Benefits

In 2013 Wis. Act 36, the Legislature enacted Wis. Stat. § 108.04(12)(f), which provides in relevant part:

**108.04(12)(f) 1.** Any individual who actually receives social security disability insurance benefits under 42 USC ch. 7 subch. II in a given week is ineligible for benefits paid or payable in that same week under this chapter.

The commission was first called upon to interpret this statutory language in *In re: Gary Kluczynski*, UI Dec. Hearing No. 14400214AP (LIRC May 30, 2014)(copy attached). The commission is bound by the rules for interpreting statutes that require statutes to be read plainly, giving meaning to every word, but not adding words to a statute to give it a certain meaning. If the language of a statute is clear and unambiguous, resort to legislative history is unnecessary and even can be improper.<sup>1</sup>

The commission interpreted the plain meaning of the statute that states any individual who “actually receives” Social Security Disability Insurance (SSDI) benefits “in a given week” is ineligible for unemployment benefits “in that same week” and found there was no ambiguity in the statutory language. Giving each word its ordinary meaning, and ignoring no words and not adding any words, the commission found that the plain meaning of the statute makes a claimant ineligible for benefits only in a week the claimant “actually receives” SSDI benefits. In other words, duplicate payments of UI and SSDI benefits were prohibited in the same week the claimant received the SSDI benefit. This was

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<sup>1</sup> Although the UIAC passed a resolution regarding the law after the law was enacted, courts have traditionally looked with disfavor on such after-the-fact pronouncements of legislative intent, even from legislators themselves. Indeed, the court has held that it is error to permit a legislator to offer testimony in a court proceeding as to the Legislature’s intention. *Cartwright v. Sharpe*, 40 Wis. 2d 494, 508, 162 N.W.2d 5 (1968). Along the same lines, the Supreme Court has said that “members of the Legislature have no more rights to construe one of its enactments retrospectively than has any other private person.” *Id.*, 40 Wis. 2d at 508-09, *Northern Trust Co. v. Snyder*, 113 Wis. 516, 530, 89 N.W. 460 (1902). Indeed, the Supreme Court in *Northern Trust Co.* added that it is “too elementary to justify [the court] in referring to authority on the question, that a legislative body is not permitted under any circumstances to declare what its intention was on a former occasion so as to affect past transactions.” *Id.* at page 530. And beyond that, “it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.” *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 52, 271 Wis. 2d 633, 681 N.W.2d 110. For it is the law that governs, not the intent of the lawgiver and people may intend what they will but it is only the laws that are enacted that are binding. *Kalal*, ¶ 52.

consistent with the presumption of eligibility of UI benefits in chapter 108 and the judicial doctrine to read disqualification provisions narrowly.

Although DWD argued to the commission that the statute should be read to mean that claimants are ineligible "in every week in a month for which a claimant receives SSDI benefits," the commission could not make that finding under the rules of statutory construction because it would add words to the plain language of the statute. The commission explained this at length in the *Kluczynski* decision.

The commission had indicated to the DWD that if they thought the intent of the statute was something other than was expressly stated in the statutory language, this was likely just a drafting error and the UIAC could adopt a law change in the next bill cycle.<sup>2</sup> In the meantime, claimants should not be denied UI benefits except for the week they actually receive an SSDI payment.<sup>3</sup> The DWD has now drafted new proposed language for this disqualification in DWD Proposal 15-01.

In general, the proposed language does appear to categorically deny UI claimants who are SSDI recipients from being eligible for UI for any week in any month the claimant receives SSDI benefits, except for the situations involving partial benefits in a month covered in § 108.04(12)(f)1.(a)-(c).<sup>4</sup> The provisions for the exceptions for partial benefits in a month help to illustrate the prudence of the commission's interpretation, and now show a better understanding by DWD of the SSDI program.

### **THE PROPOSAL PRESENTS DUE PROCESS, EQUAL PROTECTION, AND DISCRIMINATION CONCERNS.**

The absolute ban on receiving any UI benefits by an otherwise qualified claimant does raise *red flags* of potential due process, equal protection, and discrimination concerns. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) prohibits disability discrimination by any program receiving federal financial assistance, and Title II of the Americans with Disabilities Act

<sup>2</sup> It appears that, given the statutory language, as well as the proposed revision to that language, the drafters of the original language did not take into account, or were unaware of, the fact that UI benefits are paid weekly but SSDI benefits are paid monthly.

<sup>3</sup> Higher authority decisions of LIRC are binding on the lower appeal tribunals. See DOL ET Handbook No. 382, Handbook for Measuring UI Lower Authority Appeals Quality, *A Guide to [UI] Benefit Appeals Principles and Procedures*.

<sup>4</sup> The amended § 108.04(12)(f)1. operates by looking at what month a week is "in" and may need clarification. Can a "week" (as already defined in § 108.02(27) as being a calendar week) be said to be "in" a month when only some of the days of that week are "in" that month? This is not necessarily clear in the language. If this is why DWD included the word "entire" in the proposed language, it may be more clearly stated: "...Except as provided in subd. a. to c., an individual is eligible for benefits under this chapter for each week *in or partly in* the calendar month in which a social security disability insurance payment is issued to the individual..."

(ADA) of 1990 (42 U.S.C. § 12101) prohibits discrimination on the basis of disability by public entities. The ADA protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by state and local governments. These provisions are enforced by the U.S. Department of Justice (DOJ), and they may allow for private causes of action for redress. States are not immune under the eleventh amendment to the U.S. Constitution from an action in federal or state court for violations of these laws. We note the **red flag** that the proposed language may subject the State of Wisconsin to actions by otherwise qualified individuals claiming disability discrimination under Section 504 of the Rehabilitation Act of 1973 or Title II of the ADA.<sup>5</sup>

The proposal for an absolute ban on receiving UI benefits if a claimant receives SSDI benefits is different than the federal proposal that recently circulated that provides for a dollar-for-dollar benefit reduction of UI benefits for each dollar of SSDI benefits received for a week.<sup>6</sup> The federal proposal asserts that it eliminates duplicate payments covering the same period a beneficiary is out of work, while still providing a base level of support. Wisconsin previously had a dollar-for-dollar offset for receipt of Social Security benefits as a "pension payment" under Wis. Stat. § 108.05(7)(a); that offset was eliminated in 2001 Wis. Act 35. Such a dollar-for-dollar pension offset, up to 100% of the benefit entitlement, is allowed for federal conformity purposes under § 3304(a)(15) FUTA,<sup>7</sup> and may not raise the same type of discrimination concerns for violations of the Rehabilitation Act or the ADA.

#### **THE PROPOSED LANGUAGE CONFLICTS WITH THE STATED LEGISLATIVE INTENT.**

There is also a **red flag** in an apparent conflict in the language as drafted and the stated legislative intent. Section 108.04(12)(f)3. in the proposed draft language states that the legislature intends to prevent the payment of duplicative government benefits for the replacement of lost earnings or income. The statement of legislative intent is inconsistent with and potentially in conflict with the proposed statutory language to provide for an absolute bar of UI benefits upon receipt of SSDI benefits. The absolute ban on receipt of SSDI

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<sup>5</sup> For instance, the statement "regardless of an individual's ability to work" in proposed § 108.04(12)(f)2. suggests that otherwise qualified claimants who are able to work like any other qualified claimant, may be denied all benefits *solely* due to their disability.

<sup>6</sup> The current DWD proposal for a complete ban on UI benefits if someone is receiving SSDI benefits is also inconsistent with how the DWD deals with duplicate SSDI benefit payments in other programs, such as worker's compensation benefits, which are offset by SSDI benefits with a "reverse offset." See Wis. Stat. § 102.44(5). We note a **red flag** that this may cause confusion for some parties and lead to unnecessary appeals.

<sup>7</sup> Although this offset is allowed under FUTA, according to the 2014 Comparison of State Unemployment Insurance Laws, only two states offset benefits under the Social Security program, and they do so by 50%.

benefits does not allow for replacement of lost earnings or income as stated in the statement of legislative intent. This is a **red flag** because courts may have difficulty interpreting the law as drafted to be consistent with the stated legislative intent.

The legislative intent statement regarding prevention of duplicate payments suggests an intent more along the lines of the federal proposal for dollar-for-dollar offsets to prevent duplicate payments, rather than the total denial of benefits in the DWD proposal. As the commission noted in the *Kluczynski* case, "SSDI is based on earnings over a career, and is funded in part by employee contributions; UI is based on earnings within a year-long base period, and is funded by employer contributions within the base period. The two programs have completely different schedules of benefits. An individual could be entitled to a very low monthly SSDI payment due to low career earnings, such as \$100 per month, which could be far less than what the individual would receive in unemployment benefits. Nevertheless, the department proposes that the statute in question be interpreted as barring that individual from any unemployment eligibility on the belief that the claimant would be collecting 'double' benefits. There is no assurance whatsoever that an individual would be spared the economic hazards of unemployment, and therefore would be outside the set of individuals intended to be helped by the unemployment insurance law, simply by virtue of his or her receipt of SSDI."

STATE OF WISCONSIN  
LABOR AND INDUSTRY REVIEW COMMISSION  
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GARY D KLUCZYNSKI, Employee  
1301 E OKLAHOMA AVE  
MILWAUKEE WI 53207-2456

UNEMPLOYMENT INSURANCE  
DECISION

Soc. Sec. No. \*\*\*-\*\*-8500  
Hearing No. 14400214AP

Dated and mailed:

**MAY 30 2014**

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**SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL**

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An administrative law judge (ALJ) for the Division of Unemployment Insurance of the Department of Workforce Development (department) issued an appeal tribunal decision in this matter. The department filed a timely petition for review.

The commission has considered the petition and the position of the department and it has reviewed the evidence submitted to the ALJ. Based on its review, the commission makes the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

As of week 2 of 2014 (the week beginning January 5, 2014), a claimant is required to inform the department whether he or she is receiving social security disability insurance (SSDI) benefits under 42 U.S.C. Chapter 7, Subchapter II. The newly enacted Wisconsin statute, at Wis. Stat. § 108.04(2)(h), requires a claimant to provide this information when the claimant first files a claim for unemployment insurance (UI) benefits and during each subsequent week the claimant files for UI benefits. The weekly claim certification form now asks the claimant the following question: "Are you receiving any Disability Benefits from Social Security this week?"

In week 2 of 2014, the claimant initiated a claim for unemployment insurance benefits and informed the department that he was receiving SSDI benefits. The claimant receives SSDI in a check directly deposited on or about the third of every month.

The claimant is able to work with reasonable accommodations and most recently worked for a restaurant and lounge before being discharged on or about December 31, 2013 (week 1). The claimant received an SSDI payment on January 3, 2014 (week 1). He received another SSDI payment in week 6 of 2014.

The issue is whether and in which week(s) the claimant, because of the receipt of SSDI benefits, is ineligible for unemployment insurance benefits under Wis. Stat. § 108.04(12)(f).

Wis. Stat. § 108.04(12)(f)<sup>1</sup>, provides the following:

(f) .1. Any individual who actually receives social security disability insurance benefits under 42 USC ch. 7 subch. II in a given week is ineligible for benefits paid or payable in that same week under this chapter.

2. Information that the department receives or acquires from the federal social security administration that an individual is receiving social security disability insurance benefits under 42 USC ch. 7 subch. II in a given week is considered conclusive, absent clear and convincing evidence that the information was erroneous.

In resolving this issue, the commission must determine the relevant statute's meaning under the required statutory analysis set out in *State ex rel. Kalal v. Circuit Court of Dane Cnty.*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. In that case, the Supreme Court held that when determining the meaning of a statute, "[the] legislative history need not be and is not consulted except to resolve an ambiguity in the statutory language..." *Id.* ¶ 51. Rather, statutory construction starts, where possible, by ascertaining the plain meaning of the words of the statute. If the meaning of a statute is plain, the analysis ordinarily stops. *Seider v. O'Connell*, 2000 WI 76, 236 Wis. 2d 211, 232, 612 N.W.2d 659; *Kalal*, ¶ 45.

In determining a statute's plain meaning, the language is read to give reasonable effect to every word, in order to avoid surplusage. *State v. Martin*, 162 Wis. 2d 883, 894, 470 N.W.2d 900 (1991). The court in *Kalal*, ¶ 48, emphasized that the scope, context and purpose are "perfectly relevant to a plain meaning interpretation of an unambiguous statute as long as the scope, context and purpose are ascertainable from the text and structure itself..." Thus, in determining the plain meaning of a statute, its "scope, context and purpose" must be examined within the confines of the statute and act itself. See *Kalal*, ¶¶ 44-52; *Teschendorf v. State Farm*, 2006 WI 89, 293 Wis. 2d 123, 134-135, 717 N.W.2d 258. Where the statutory language is unambiguous, or where its plain meaning does not render absurd results, there is no need to consult extrinsic sources of interpretation, such as legislative history. *Kalal*, ¶ 51; *Teschendorf*, ¶ 12.

When interpreting the unemployment insurance law, it should be "liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status." *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 62, 330 N.W.2d 169 (1983).

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<sup>1</sup> Wis. Stat. § 108.04(12)(f), along with Wis. Stat. § 108.04(2)(h), was enacted July 5, 2013, and first applied with respect to determinations issued or appealed on January 5, 2014. 2013 Wis. Act 36 § 238(9).

Consistent with its purpose, the law presumes employees to be eligible unless disqualified by a specific provision of the law:

ELIGIBILITY. An employee shall be deemed "eligible" for benefits for any given week of the employee's unemployment unless the employee is disqualified by a specific provision of this chapter from receiving benefits for such week of unemployment, and shall be deemed "ineligible" for any week to which such a disqualification applies.

Wis. Stat. § 108.02(11). In contrast, disqualification provisions of the statute must be strictly construed. *Boynon Cab Co. v. Neubeck and Industrial Commission*, 237 Wis. 249, 259, 296 N.W. 636 (1941) (misconduct provision disqualifying claimants should be read strictly). The statute at issue in this case is a disqualification provision, and therefore must be strictly construed.

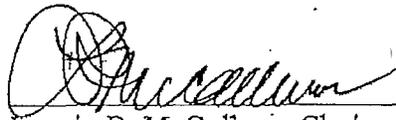
The statute at issue plainly states that any individual who "actually receives" SSDI benefits "in a given week" is ineligible for unemployment benefits "in that same week." There is no ambiguity in the wording of the statute. When giving each word its ordinary meaning, and ignoring no words, the plain meaning of the statute requires ineligibility for unemployment benefits only in those weeks that the claimant actually receives SSDI benefits. In construing or interpreting a statute, the commission cannot disregard the plain, clear words of the statute. *Kalal*, ¶ 46.

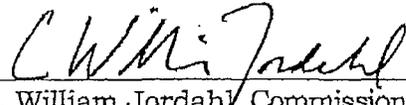
Therefore, the commission finds that the claimant is ineligible for unemployment insurance benefits only in the weeks he actually receives SSDI under 42 U.S.C. Chapter 7, Subchapter II, here, week 6 of 2014, and any other week he actually receives SSDI under 42 U.S.C. Chapter 7, Subchapter II. The claimant is eligible for unemployment insurance benefits in weeks 2 through 5 and §§ weeks 7 through 9 of 2014, as well as any other week that he does not actually receive SSDI under 42 U.S.C. Chapter 7, Subchapter II, if he is otherwise qualified.

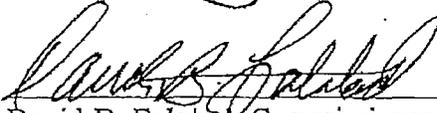
#### DECISION

The appeal tribunal decision is affirmed. Accordingly, the claimant is eligible for unemployment insurance benefits in weeks 2 through 5 and 7 through 9 of 2014, as well as any other week that he does not actually receive SSDI benefits, if he is otherwise qualified.

BY THE COMMISSION:

  
Laurie R. McCallum, Chairperson

  
C. William Jordahl, Commissioner

  
David B. Falstad, Commissioner

#### MEMORANDUM OPINION

The department petitioned for commission review of this matter. The commission now addresses the arguments raised by the department in its petition.

*The Plain Meaning of the Statute Limits Benefit Ineligibility to the Week SSDI is Actually Received*

The commission starts, as case law instructs, with the words of the statute. Wis. Stat. § 108.04(12)(f)1., provides:

Any individual who actually receives social security disability insurance benefits under 42 USC ch. 7 subch. II in a given week is ineligible for benefits paid or payable in that same week under this chapter.

There are no specially defined words in the provision. Words critical to the meaning of the provision, such as “actually,” “in a given week,” and “in that same week,” when given their common, ordinary meaning, all point to a single interpretation—that ineligibility for UI benefits occurs only in one *given week*—the week when SSDI is *actually* received.

The department offers what it suggests is the plain meaning of the statute: that an individual who receives SSDI is ineligible for UI benefits for the duration of the month in which he or she receives SSDI. The department argues that because the claimant receives SSDI benefits in a monthly check, the statutory meaning of “actually receives SSDI benefits” is that the claimant “is receiving benefits every week of the month,” and therefore the claimant is ineligible for every week the claimant claims UI benefits in a month that the claimant receives an SSDI check.

However, the department’s interpretation requires the commission to give the word “actually” its opposite meaning. Rather than finding that a claimant is ineligible when the claimant “actually receives” SSDI benefits, the department would have

the commission interpret “actually receives” to mean “constructively receives SSDI benefits on a weekly basis.” Thus, the department’s analysis requires giving meaning beyond the plain and ordinary meaning of “in a given week” and “in that same week” to mean “in a given month” and “in any week in that same month.” In other words, the meaning offered by the department may only be reached by violating the principles of statutory construction to give words their common, ordinary meaning, to give effect to each word, and to fit the words in context with related statutes.

Statutory purpose or scope is sometimes part of the statutory text. *State ex rel. Kalal v. Circuit Court of Dane Cnty.*, 2004 WI 58, 271 Wis. 2d 633, ¶ 49, 681 N.W.2d. The department asserts that the statute’s purpose was to make individuals ineligible for unemployment benefits “while receiving SSDI.” The assumption behind the department’s assertion of legislative purpose is that since SSDI is a benefit program for people who are “unable to work,” those individuals who receive SSDI should be continuously ineligible for benefits under the unemployment insurance program, where recipients must be able and available for work<sup>2</sup>—otherwise recipients would be “double-dipping.” However, no statement of that purpose is contained in the statutory text, so it would not be appropriate to accept the department’s assertion of this as the statute’s unstated purpose.

Instead of attempting to square its interpretation of the statute with standard principles, by which eligibility is presumed and disqualification provisions are strictly construed, the department promotes its interpretation as fulfilling a legislative purpose, not expressed anywhere in Wisconsin’s unemployment law, to prevent individuals on SSDI from “double dipping,” i.e., receiving unemployment benefits during their period of eligibility for SSDI. The double-dipping argument is based on the idea that the group of individuals eligible for SSDI and the group eligible for UI are mutually exclusive—those on SSDI are unable to work, and those eligible for UI have to be able to work and available for work. Therefore, the department argues, an individual may be eligible for one or the other, but should not be eligible for both.

The first problem with the department’s asserted statutory purpose is that the statute contains no statement suggesting that ongoing SSDI recipients who received UI benefits presented a problem that called for the creation of automatic ongoing ineligibility. Certainly for most, if not all, UI claimants who receive SSDI, a question will arise on a case-by-case basis concerning their ability to work and their availability for work. The two provisions, Wis. Stat. §§ 108.04(2)(h) and 108.04(12)(f)2., dealing with reporting ongoing receipt of SSDI involve the department’s collection of information regarding SSDI, but nothing in the wording

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<sup>2</sup> The commission has rendered decisions, when applying Wis. Admin. Code § DWD 128.01(3), affirming an individual’s ability to work under the UI law while simultaneously being eligible for SSDI. See, e.g., *Kouimelis v. Denny’s Restaurant* 6318, UI Dec. Hearing No. 12201489EC (LIRC Dec. 4, 2012); *In re Perkins*, UI Dec. Hearing No. 11605816MW (LIRC Jan. 11, 2012); *McDonald v. Bestech Tool Corp.*, UI Dec. Hearing No. 08608578WB (LIRC Mar. 26, 2009).

or context of these new statutory provisions suggests that the prevailing standards for adjudicating ability and availability were inadequate and needed to be replaced by an ongoing automatic ineligibility.

Second, the department's argument ignores the fact that SSDI recipients may still work under certain circumstances. The Social Security Administration (SSA) awards benefits to individuals who are severely impaired due to a serious and long-term medical condition and are unable to perform substantial gainful work as specially defined in the Social Security Act. The act contains the following language:

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

42 USC § 423(d)(2)A. An individual may qualify for SSDI because work within his or her ability does not exist "in significant numbers" in the national economy, even though there may be work the individual can do "in the immediate area in which he lives," there may be "a specific job vacancy for him," or "he would be hired if he applied for work." In other words, an individual can look for work, and be able to do work, without it affecting his or her eligibility for SSDI. In fact, the SSA allows SSDI recipients to perform work for a trial period. 42 U.S.C. § 422(c); 20 C.F.R. § 404.1592. Also, the SSA encourages SSDI recipients to maintain connection to the labor market by offering vocational rehabilitation services through its Ticket to Work program. 42 U.S.C. § 1320b-19; 20 C.F.R. Part 411.

Indeed the department, through its own rules, encourages disabled people to remain connected to the labor market by holding out the possibility that they could receive UI benefits. Department rules on ability to work and availability for work clearly contemplate that a disabled individual may nevertheless be considered able and available for purposes of UI eligibility. Wisconsin Administrative Code § DWD 128.01(3) provides that a claimant with a physical or psychological restriction can maintain an attachment to the labor market if he or she can engage in "some" substantial gainful employment (not necessarily in "significant numbers"), and shall not be considered unavailable for work solely because of an inability to work "provided the individual is available for suitable work for the number of hours the individual is able to work." Wis. Admin. Code § DWD 128.01(4). To some extent, the department's double-dipping argument is at

cross purposes with its own current administrative rules regarding ability to work and availability for work.

Finally, the department's double-dipping argument lacks mathematical validity. There is no relationship between the calculation of SSDI benefits and UI benefits, much less a one-to-one correspondence. SSDI is based on earnings over a career, and is funded in part by employee contributions; UI is based on earnings within a year-long base period, and is funded by employer contributions within the base period. The two programs have completely different schedules of benefits. An individual could be entitled to a very low monthly SSDI payment due to low career earnings, such as \$100 per month, which could be far less than what the individual would receive in unemployment benefits. Nevertheless, the department proposes that the statute in question be interpreted as barring that individual from any unemployment eligibility on the belief that the claimant would be collecting "double" benefits. There is no assurance whatsoever that an individual would be spared the economic hazards of unemployment, and therefore would be outside the set of individuals intended to be helped by the unemployment insurance law, simply by virtue of his or her receipt of SSDI.

The department also argues that the relevant statute's plain meaning can be ascertained by reading it in context with the newly enacted Wis. Stat. § 108.04(2)(h), which requires claimants to report SSDI benefits in every week the claimant files for UI benefits. Wis. Stat. § 108.04(2)(h), provides:

A claimant shall, when the claimant first files a claim for benefits under this chapter and during each subsequent week the claimant files for benefits under this chapter, inform the department whether he or she is *receiving* social security disability insurance benefits under 42 USC ch. 7 subch. II (Emphasis added.)

This provision uses the present progressive tense, the tense that indicates continuing action. By using the present progressive, and not attaching it to phrases that limit the time period in question, the legislature addressed the ongoing receipt of SSDI for reporting purposes.

However, in Wis. Stat. § 108.04(12)(f)1., the legislature used the simple present tense "receives," preceded by the word "actually," and used the limiting phrases "in a given week" coupled with "in that same week." This departure from the language used in Wis. Stat. § 108.04(2)(h), passed simultaneously with the statute in question, reinforces the idea that UI ineligibility was intended to be limited to the week that SSDI was received.

The difference in the wording of the statutory sections actually favors the opposite conclusion than that offered by the department. Since the legislature clearly demonstrated the ability to draft language that imposed a continuing requirement on an SSDI recipient to report SSDI while claiming UI on a weekly basis, it could have placed the same continuing ineligibility on a claimant claiming UI benefits in

subsection (12)(f)1. The fact the legislature did not do so strongly suggests that it did not intend to impose a continuous ineligibility of UI benefits under Wis. Stat. § 108.04(12)(f)1.

The department also argues that the legislature's only interest in having claimants who are SSDI recipients continuously report their receipt of SSDI was to make sure they were kept ineligible on a continuing basis. As noted, however, there is no such statement of purpose in the statute, and there may have been a number of other reasons that the legislature wanted the department to know about claimants' ongoing receipt of SSDI benefits, for instance, to alert the department to potential concealment and able and available issues, or to identify claimants who may be in need of special vocational services.

There is nothing necessarily inconsistent with the legislature's requiring a claimant to continually report the status of being a recipient of SSDI, while at the same time disallowing the claimant's eligibility for benefits only in the week an SSDI payment is actually received. Therefore, the department's statutory purpose argument also fails.

#### *The Statute is Not Ambiguous*

The department argues in the alternative that the statute is ambiguous because it is capable of being understood by reasonably well-informed persons in two or more senses and that extrinsic sources such as the Unemployment Insurance Advisory Council (UIAC) minutes should be reviewed. However, "[s]tatutory interpretation involves the ascertainment of meaning, not a search for ambiguity." *Kala*, ¶ 47. The plain meaning of the language used in the statute renders individuals actually receiving SSDI "in a given week" ineligible for benefits paid or payable in "that same week." To read the statute in any other way is searching for an ambiguity not reflected in the statute's language and its plain meaning.

#### *The Plain Meaning of the Statute Does Not Render an Absurd Result*

The department argues that the plain meaning of Wis. Stat. § 108.04(12)(f)1., which requires a denial of UI only in the week the claimant actually received SSDI, yields an absurd or unreasonable result not intended by the legislature. The department asserts that the ALJ's reliance on Wis. Stat. § 108.05(7) to deny benefits for only one week in which the SSDI payment is received is "an anomalous, indeed absurd result." Consequently, the department argues that extrinsic sources may be consulted.

As set out above, the plain meaning of Wis. Stat. § 108.04(12)(f)1. is evident from the wording of the statute itself. Simply because the department disagrees with that meaning does not make it absurd. Further, the ALJ's reliance on Wis. Stat.

§ 108.05(7) Pension Payments when applying the statute at hand also does not render an absurd result.

Wis. Stat. § 108.05(7)(d) provides for an allocation of a claimant's pension (other than a pension under the Social Security Act) to the weeks for which UI benefits are claimed. The unemployment insurance law has a provision, Wis. Stat. § 108.05(7)(d), explaining how a claimant's receipt of a pension (other than a pension under the Social Security Act) is *allocated* to weeks for which UI benefits are claimed and provides the following:

1. If a pension payment is not paid on a weekly basis, the department shall allocate and attribute the payment to specific weeks in accordance with subd. 2. if the payment is actually or constructively received on a periodic basis...
2. The department shall allocate a pension payment that is actually or constructively received on a periodic basis by allocating to each week the fraction of the payment attributable to that week.

The legislature could have repeated language in an existing related statute if it wanted to convey the idea that receipt of a monthly check was to be allocated to all the weeks of a month. The department however argues that there was no need for the legislature to make reference to allocation in the new SSDI provision, because that provision *categorically* made recipients of SSDI ineligible for unemployment benefits, no matter what the amount of the individual's SSDI check, while the benefit calculation provisions with respect to pension payments function merely to offset UI benefits that would otherwise be payable.<sup>3</sup> However, this argument undermines the department's argument that the purpose of Wis. Stat. § 108.04(12)(f)1. is to prevent "double dipping" and fails to explain why the statute did not make it explicit that receipt of SSDI once per month is *deemed to be* (if not "allocated" to be) in every week of the month.

The department argues against drawing any inferences based on the legislature's use of allocations with respect to pension payments. The commission, however, concludes that the ALJ's reference to those sections merely points out that the legislature could have used allocation language if it had wanted to do so, and could have used language clearly creating a continuing ineligibility if it had wanted to do so, as opposed to an ineligibility in a "given week," or "that same week."

In sum, the commission concludes that Wis. Stat. § 108.04(12)(f)1. is unambiguous and that its plain meaning does not provide a continuing bar to UI

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<sup>3</sup> Department's Petition, I. B. p. 5: "A weekly allocation is not necessary for SSDI because when the claimant is receiving SSDI, the claimant is simply ineligible for any unemployment insurance benefits."

eligibility for SSDI recipients who claim weekly UI benefits. Rather, the plain meaning of the statute renders an individual who actually receives SSDI benefits in a given week ineligible for UI benefits paid or payable in that same week. Further, this statute's plain meaning does not render an absurd result and the commission, therefore, did not consider any extrinsic evidence<sup>4</sup> such as legislative history or the documents attached to the department's affidavit.

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<sup>4</sup> The department attached documents to the Bureau of Legal Affairs (BOLA) Director's affidavit, included with its petition for commission review. These documents, numbered one through twelve, include meeting minutes of the Unemployment Insurance Advisory Council (UIAC); an analysis of the proposed UI law change, one dated October 16, 2012, and another dated April, 2, 2013, an e-mail from the Wisconsin Legislative Reference Bureau regarding the proposed statute, dated March 7, 2013; a letter from the Wisconsin Legislature dated April 1, 2013; an analysis of this April 1 letter by BOLA; and finally, UIAC meeting minutes reflecting the council's adoption of a resolution stating the intent of the newly enacted Wis. Stat. § 108.04(12)(f) to disqualify weekly UI claims to SSDI recipients. Other than the UIAC resolution adopted on February 20, 2014, nearly eight months after the law was enacted on July 5, 2013, the documents lack any specific discussion supporting the department's position that receipt of SSDI on a particular day in a given month would result in ineligibility for UI during all the weeks claimed by the claimant. Indeed, it would seem the belated resolution would not have been necessary if the actual legislative history supported the department's interpretation of the statute. The commission respects the UIAC and its process in recommending legislation for the UI program. It is not appropriate, however, when legislation is unambiguous, for the commission to consider the after-the-fact resolution of the UIAC as to what it intended to recommend to the legislature. Not only is this not a statement of the legislature's intent, it does not reflect the plain meaning of the statutory language enacted by the legislature.

## **DWD PROPOSAL D15-08 – LEGAL RED FLAGS**

### **Definition of Concealment**

In DWD Proposal D15-08, DWD proposes to amend the current definition of “conceal” to eliminate the element of intent. DWD also proposes to create a presumption that a claimant misled the department if the claimant provided any incorrect information to the department in response to the department’s questions in the benefit claims process. We note that the budget bill, SB21/AB21, also proposes to increase penalties for fraud and concealment, including criminal penalties ranging from a Class A misdemeanor to a Class G felony, depending on the value of the benefits obtained.

### **THE PROPOSAL’S PRESUMPTION OF FRAUD CREATES DUE PROCESS CONCERNS.**

We initially note our concern and a *red flag* that eliminating the scienter requirement for concealment, or the requirement that a claimant must have *intended* to conceal, and creating a presumption of concealment, essentially creates a “guilty until proven innocent” provision in the UI law with potential criminal consequences. This raises a potential due process issue that may not survive judicial scrutiny. More specific to the UI program, the proposal to create a presumption of fraud, and therefore a presumption of ineligibility, is contrary to the presumption of UI benefit eligibility stated in Wis. Stat. § 108.02(11).

### **THE PROPOSAL DOES MUCH MORE THAN “CLARIFY” THE LAW; IT NEGATES DECADES OF THE STATE’S COMMON LAW ON THE ISSUE OF WHAT CONSTITUTES CONCEALMENT FOR PURPOSES OF UI FRAUD.**

The Description of [the] Proposed Change indicates that the change “clarifies” the law, while the Policy Effects of Proposed Changes indicates that the proposal “clarifies what constitutes an act of concealment,” and the Administrative Impact states the proposal “clarifies what constitutes an act of concealment and will provide for more consistent determinations by adjudicators, the appeal tribunal and the commission.” These statements that the proposal merely “clarifies” the law are inaccurate.

The proposal does not “clarify” the current law; it negates decades of the state’s common law with regard to what constitutes concealment for purposes of unemployment insurance fraud. A history of the interpretation of the fraud and concealment provisions has been included as an attachment to this document.

## **THE PROPOSAL MISCHARACTERIZES LIRC'S DECISIONS AS NARROWING THE CONCEALMENT LAW.**

The current relevant applicable statutes in Wis. Stat. § 108.04 provide:

**(11) FRAUDULENT CLAIMS. (a)** If a claimant, in filing his or her application for benefits or claim for any week, conceals any material fact relating to his or her eligibility for benefits, the claimant is ineligible for benefits...

**(g)** For purposes of this subsection, "conceal" means to intentionally mislead or defraud the department by withholding or hiding information or making a false statement or misrepresentation.

The DWD proposal states that the appeal tribunals and commission "have interpreted the definition of concealment more narrowly than originally intended."<sup>1</sup> The proposal also states that the law change will provide for more consistent determinations by adjudicators, the appeal tribunals, and the commission. However, this is inaccurate.

The DWD has recently brought a series of lawsuits against LIRC on the concealment issue. In all of these cases, the courts have agreed with LIRC's findings that the claimants did not conceal work and wages from the DWD when they filed their claims. In all but one case,<sup>2</sup> the courts have simply affirmed the commission's decisions. Although DWD now tries to portray the recent commission decisions as a departure from prior cases, the courts have not agreed. Indeed, Judge James R. Kieffer of the Waukesha County Circuit Court specifically responded to this assertion and stated:

The Commission's legal determination in this case, in the opinion of this court, satisfy [sic] all the conditions for applying the great weight deference standard. The Commission is charged with the duty of administering Section 108.04(11) of the Wisconsin Statutes. The Commission's interpretation of the unemployment concealment law is also one of longstanding and the Commission used its decades of expertise and specialized knowledge in forming its interpretation. The

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<sup>1</sup> The proposal misstates the original intent of the definition of "conceal" in 2007 Wis. Act 59. This is explained in detail in the attached History of the Legal Interpretation of UI Concealment in Wisconsin.

<sup>2</sup> In *DWD v. LIRC and Adam G. Stroede*, Case No. 14CV1911 (Wis. Cir. Ct. Dane Cnty. Dec. 29, 2014), Dane County Judge Peter C. Anderson offered to simply affirm LIRC's decision or to remand the matter to have the commission restate its decision. The judge noted that a remand was "an unnecessary exercise"; however, DWD requested the remand despite being told that the outcome of the case would not change. With the exception of Judge Anderson's hypothetical example of a "kooky anarchist" who may possibly apply for unemployment insurance benefits for a purpose other than to receive benefits, the courts have virtually uniformly agreed that the commission's interpretation of the law is reasonable and not contrary to the clear meaning of the statute.

expertise and specialized knowledge the Commission has gained since 1946 led to the Commission's holding in 1992 that concealment requires the intent to receive benefits to which the individual knows he or she is not entitled. Over the years the Commission has also consistently held that concealment requires an intent on the part of the claimant to obtain benefits to which the claimant would otherwise not be entitled.

At times the Commission was persuaded that a claimant's failure to report work, wages or a material fact was the result of an honest mistake made in good faith and concealment was not found in those cases. On the other hand at other times the Commission was not so convinced. The Commission has dealt with facts showing confusion and honest mistakes in failing to provide relevant information to the Department. The Commission has consistently stated over several decades that an act of concealment under Section 108.04(11) of the Wisconsin Statutes will be found only for willful acts of concealment not due to ignorance or lack of knowledge and not where a claimant makes an honest mistake.

A definition of "conceal" was first included in the state's unemployment insurance law by virtue of 2007 Wisconsin Act 59. This Act created Section 108.04(11)(g) that provides for purposes of a fraudulent claim subsection, the term "conceal" means to intentionally mislead or defraud the Department by withholding or hiding information or making a false statement or misrepresentation. In creating this definition the legislature rather than choosing to impose strict liability on claimants for any incorrect information, simply clarified that for a claim to be fraudulent, the claimant must have intentionally, that is consciously and affirmatively, failed to disclose material information to the Department. Consequently, in addition to presenting evidence that the claimant answered a question on his weekly claim certification incorrectly, the Department must present sufficient evidence, direct or indirect, from which fraudulent intent may be inferred.

**The Department's assertion that the Commission's interpretation and application of the term "concealed" changed in 2014 and now departs dramatically from its earlier decisions, in the opinion of this court, is lacking merit.** While the Commission in 2014 began articulating its analysis of cases involving concealment and the applicable law, the Commission did so at the specific request of the Department.

\* \* \*

**This court concludes also that the Commission's reading of the concealment statute is reasonable. ...The Commission's reading is also fully consistent with statutory definition of concealment created in Wisconsin Act 59 from 2007....<sup>3</sup>**

Rather than "clarifying" what constitutes concealment, the removal of the word "intentionally" from the statutory definition changes more than 50 years of consistent interpretation of what constitutes "concealment" by the commission and the courts, and the codification of the element of intent by the Wisconsin Legislature in 2007.

**THE PROPOSAL MISSTATES THE ORIGINAL INTENT OF THE DEFINITION OF "CONCEAL."**

The definition of "conceal" adopted in 2007 is found in Wis. Stat. § 108.04(11)(g):

**(g)** For purposes of this subsection, "conceal" means to intentionally mislead or defraud the department by withholding or hiding information or making a false statement or misrepresentation.

Nothing in the history of the adoption of § 108.04(11)(g) suggests that the commission's longstanding interpretation was either unreasonable or incorrect.<sup>4</sup> With 2007 Wisconsin Act 59 (2007 Senate Bill 431), the Legislature created the definition of concealment and increased the penalties therefor, but neither the Legislative Reference Bureau (LRB) analysis nor the Legislative Council Memo even suggests that another purpose of the act was to broaden the longstanding commission interpretation of what it means to conceal. With 2011 Wisconsin Act 198 (2011 Senate Bill 219), the Legislature again increased the penalties for concealment but, again, nothing suggests that a purpose of the act was to broaden the commission's longstanding interpretation. With Wisconsin Act 236 (2011 Senate Bill 417), the Legislature again increased the penalties for concealment; again, there is nothing about broadening the commission's longstanding interpretation.

A purpose of the law changes at the time was to increase the deterrent effect of the concealment law. Not only is there no indication that the Council's or Legislature's intent of the law was to eliminate the element of wrongful intent and expand the definition of "conceal," *the department's own analyses of the proposed law change, D07-03 and D07-03A suggest that that was not the department's intent.* Those documents state that the definition for "conceal" will

<sup>3</sup> *DWD v. LIRC and Chad R. Maurer*, Case No. 14CV427 (Wis. Cir. Ct. Waukesha Cnty. Mar. 17, 2015) Transcript of Oral Ruling dated February 23, 2015, Honorable James R. Kieffer presiding, p. 12-16; emphases added.

<sup>4</sup> See *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 69, 271 Wis. 2d 633, 681 N.W.2d 110 (Abrahamson, C.J., concurring)(nonexhaustive list of various forms of "history" that have been and will be helpful in interpreting a statute).

“provide greater equity for individuals suspected of and determined to have filed fraudulent claims” (R.69, 92, 106). It is not equitable to those individuals, however, to do away with the wrongful intent element of concealment.

Indeed, *the department's own fiscal analysis in D07-03A supports the commission's reading of the legislation.* At the time of its enactment, the commission had consistently been penalizing only those whom it had found to have the intent to gain benefits they knew they were not entitled to receive. If the commission's decades-long reading of the concealment statute were too narrow, if the purpose of the definition were to increase the size of the group of claimants who now were going to be guilty of concealment, such an expansion would have been accounted for in the department's fiscal analysis of the bill, in the form of increased revenues and benefit reductions that necessarily would result from the expansion. There was no such accounting. The fiscal analysis addressed only one group of claimants: those who now would be completely ineligible for benefits in a week in which they committed an act of concealment of wages.<sup>5</sup> The fiscal analysis did not address any increase in the number of individuals who were going to be found guilty of concealment, because expanding the definition of concealment was not the intent of the legislation.<sup>6</sup>

**THE PROPOSAL IS CONTRARY TO INFORMATION GIVEN TO CLAIMANTS, CONTRARY TO DIRECTION GIVEN TO ADJUDICATORS, AND CONTRARY TO DOL MEASURES FOR FRAUD.**

If the proposed statutory language is enacted, any incorrect answer to a question and any failure to provide relevant information (whether expressly asked for or not) could be considered fraud. This new definition is not only contrary to decades of commission and court decisions, as noted above, it is also contrary to what the department itself has long held fraud to be.

We note a ***red flag*** that the proposed statutory language, rather than “clarifying” the law, will in fact be different from other department information provided to claimants, and may instead lead to further confusion. For instance, the annual report prepared by the department and furnished to the council under § 108.14(1), summarizing the department's activities related to the detection and prosecution of UI fraud, explains that a “UI claimant commits

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<sup>5</sup> In addition to increasing the penalties for acts of concealment, Act 59 also created Wis. Stat. § 108.05(3)(d), by operation of which a claimant is completely ineligible for benefits for any week in which the claimant concealed wages. Prior thereto, a claimant could be eligible for partial benefits in a week notwithstanding the claimant's concealment of wages in that week.

<sup>6</sup> ***Fiscal:*** In 2005 forfeitures were imposed on approximately 4,600 claimants. Estimated overpayments to these claimants were \$3.9 million, of which \$1.2 million was recovered through March 2007. Overpayments under the proposal would rise to \$4.7 million as part weeks for which the claimant is overpaid as a result of concealment would be considered a full week overpaid. However, recoveries are not estimated to rise, leaving a net due of \$3.5 million in contrast to \$2.7 million under current law.”

fraud by providing false or inaccurate information to the department when filing a claim for UI benefits in an effort to obtain monies to which they are not entitled." Similarly, the department's website at <http://dwd.wisconsin.gov/ui/> under the heading "What is Unemployment Insurance Fraud?" informs a claimant that he or she is committing fraud "if you knowingly collect benefits based on false or inaccurate information that you intentionally provided when you filed your claim." See, also, *UI Handbooks for Claimants*, 2003, 2006, 2007, 2015: "You could be penalized if you give false information to get benefits."

The proposal also presents a ***red flag*** because it is contrary to the direction given to adjudicators to decide fraud issues. The department's *Disputed Claims Manual* on the topic of fraud instructs adjudicators to establish why the claimant failed to report wages.

When an investigation establishes a claimant has given us false answers **we must determine the claimant's intent.** We must decide if this was **an innocent mistake or done on purpose** or with such careless disregard of the claiming process as to amount to **an intentional act.**<sup>7</sup>

Because the proposed language effectively removes the element of intent from the definition of conceal, there may be no way to differentiate between non-fraud overpayments and fraud overpayments.

Another ***red flag*** is that the DWD proposal may be at odds with the U.S. Department of Labor's interpretation of fraud and concealment. DOL identifies errors and abuse in UI programs by way of the Benefit Accuracy Measurement (BAM) program administered by the Employment and Training Administration (ETA). The department must report on a quarterly basis, in addition to other performance measures, fraud and non-fraud overpayments. BAM defines fraud overpayments as overpayments for which material facts to the determination of payment of a claim are found to be **knowingly misrepresented or concealed (i.e., willful misrepresentation)** by the claimant **in order to obtain benefits** to which the individual is not legally entitled. On the other hand, non-fraud overpayments are those which are not due to willful misrepresentation.<sup>8</sup>

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<sup>7</sup> *Disputed Claims Manual*, Department of Workforce Development, Division of Unemployment Insurance, Fraud, Sec. II, Part C. Available at <http://dwdworkweb/ui/manuals/dc/fraud.htm> (emphasis added).

<sup>8</sup> UI Reports Handbook No. 401, ETA 227 (emphasis added).

**THE PROPOSAL COULD RESULT IN FRAUD PENALTIES FOR HONEST MISTAKES.**

The department proposes to keep the rest of the (11) FRAUDULENT CLAIMS subsection in place, but change (g) to:

(g) For purposes of this subsection, "conceal" means to mislead the department by withholding or hiding information or making a false statement or misrepresentation. "Conceal" does not require an intent or design to receive benefits to which the claimant knows he or she is not entitled.

and add:

(h) As a condition of eligibility for benefits under this chapter, a claimant has a duty of care to provide an accurate and complete response to each department inquiry. In response to the department's questions in the benefit claims process, a claimant's false statement or representation creates a rebuttable presumption that the claimant misled the department. A claimant may rebut the presumption by competent evidence that the claimant did not mislead the department. Competent evidence does not include evidence that a claimant provided false or misleading answers due to any of the following:

1. A claimant's failure to read or follow instructions or other communications by the department related to a claim.
2. A claimant's reliance on the statements or representations of persons other than a department employee authorized to provide unemployment insurance advice to claimants regarding the current claim.
3. A claimant's limitation or disability, where the claimant has not brought such limitation or disability to the attention of a department employee authorized to provide service to claimants before issuance of the initial determination and has not provided competent evidence of the disability or limitation.

We note that the Proposer's Reason for the Change includes a statement that the "revised definition will not result in a finding of concealment as a result of an honest mistake or inadvertence." However, this presents another red flag because that statement is contrary to the actual proposed draft language.

Under the draft language DWD specifically *would* find someone to have concealed information based on honest mistakes. For example, a claimant with a learning disability trying to maneuver the department's numerous and sometimes complex questions in the benefit claims process who answered incorrectly would be found to have concealed information and committed fraud – and be subject to forfeitures and severe criminal penalties – if the person did not first bring their limitations or disability to the attention of a department

employee under proposed § 108.04(11)(h)3. If a claimant is filing a claim online, it is not clear how they would be able to do so. Their honest mistake in failing to read or understand what was required of them would mean they would be found to have concealed information. In many of the recent cases filed by DWD against LIRC, LIRC found that claimants made honest mistakes, but the DWD appealed and sought to impose concealment penalties on the claimants in any event.

The proposed law requires people with cognitive limitations or disabilities to provide “competent evidence” of their disability or limitation to a department employee before a determination is issued. If they have not done so, they may be found to have concealed even if they made an honest mistake. We note a **red flag** that this may result in increased appeals. In many of these cases with cognitively disabled claimants that the commission has reviewed, the claimants were confused by the questions but were reluctant to provide this potentially humiliating information. It was only at the hearing level that they brought this up when they did not understand why they were denied benefits or were accused of fraud and they were questioned specifically about this.

#### **THE PROPOSAL DOES NOT PREVENT IMPROPER PAYMENTS BEFORE THEY OCCUR.**

In the several lawsuits filed by DWD against LIRC on these issues, the courts that have issued decisions to date have sided with LIRC. Many of these cases are directly the result of problems in the way the department asks questions of claimants – not with the definition of concealment.

In October 2012, the department changed its **simple “Did you work?”** question on the weekly claim form to **“During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?”** One judge called this benefit claims question “a gobbledegook question” and suggested that the DWD change its script; he noted that “It’s got two or’s in it, and it switches from past tense to future tense.....it’s pretty standard for government but it’s certainly not the simplest – I wouldn’t call it a simple yes or no question.”<sup>9</sup>

The compound question causes confusion for claimants, particularly cognitively disabled ones, because in trying to grasp the numerous parts to the question they often miss the “work” part of the question. Under the proposal, a claimant who was legitimately confused by the department’s grammatically challenging question could be found to have concealed information in that they failed to read or follow instructions. Under the proposed statutory language, it will not matter that the claimant provided incorrect information unintentionally, inadvertently, or unknowingly.

<sup>9</sup> *DWD v. LIRC and Adam G. Stroede*, Case No. 14CV1911 (Wis. Cir. Ct. Dane Cnty. Dec. 12, 2014) Transcript of Oral Ruling, pp. 5, 19.

As a ***red flag***, we note that the proposed change does nothing to prevent improper payments before they occur and still does not respond to the U.S. DOL's call to action on UI fraud. The DOL identified unreported or under-reported earnings by claimants as the primary cause of overpayments and, as part of an immediate call to action, encouraged states *to rid claim certification forms and telephone scripts of two-part questions because they cause confusion which leads to improper payments.*<sup>10</sup> A significant number of the fraud cases that are appealed to the commission involved claimants confused by the question.

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<sup>10</sup> Unemployment Insurance Program Letter (UIPL) No. 19-11, *National Effort to Reduce Improper Payments in the Unemployment Insurance (UI) Program*, June 19, 2011. The U.S. DOL's Employment and Training Administration interprets federal law requirements pertaining to UI as part of its role in the administration of the federal-state unemployment insurance program. These interpretations are issued in UIPLs to state employment agencies. As agents of the federal government, states must follow the operating instructions and guidance provided in UIPLs. See *DWD v. LIRC*, 2006 WI App 241, ¶ 2, 297 Wis. 2d 546, 725 N.W.2d 304.

## HISTORY OF THE LEGAL INTERPRETATION OF UI CONCEALMENT IN WISCONSIN

Since 1959, the Wisconsin Supreme Court has stated that concealment consists of a suppression of a fact and implies a purpose or design.<sup>1</sup> In 1963, a Wisconsin circuit court expressly noted that this was how the commission had been interpreting the statute regarding fraud in unemployment insurance cases:

The commission in its past interpretation of this statute has determined that the action of the claimant must be a wilful act of concealment and one not due to lack of knowledge or ignorance. Also it is conceded that active concealment consists of a suppression of a fact and implies a purpose or design.<sup>2</sup>

The commission already had, as of 1963, a history of requiring that wrongful intent be shown in order to establish concealment under the UI program.<sup>3</sup> The expertise and specialized knowledge the commission had gained to that point – and would gain over the next three decades – led to its holding in 1992 that concealment requires the intent to receive benefits to which the individual knows he or she is not entitled.<sup>4</sup> The language of this legal standard, that concealment requires an intent to gain benefits the claimant knows he or she is not entitled to, itself goes back at least to 1982, when the Rock County Circuit Court stated that a forfeiture could be imposed only for a willful act of concealment and that “there must be intent on the part of a claimant to receive benefits to which he or she knows they are not entitled.”<sup>5</sup> The commission derived the standard it enunciated in its 1992 *Willingham* decision from *Kamuchey*, from *Krueger*, and from the expertise the commission had gained over the previous decades.

The commission had to formally revisit the general issue of concealment in 2011.<sup>6</sup> When the department learns that a claimant has given an incorrect answer to a question related to the claimant’s eligibility for benefits, the department will inquire of the claimant why he or she did so. The department got into the practice of inferring wrongful intent on the part of a claimant when

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<sup>1</sup> *Kamuchey v. Trzesniewski*, 8 Wis. 2d 94, 99, 98 N.W.2d 403 (1959), citing 23 Am Jur., Fraud and Deceit, p. 851, sec. 77.

<sup>2</sup> *Donahue v. Indus. Comm’n*, slip op. at 3, No. 111-269 (Wis. Cir. Ct. Dane Cnty. Aug. 13, 1963).

<sup>3</sup> The commission’s interpretation of the concealment law is very longstanding, as noted in the Unemployment Compensation Digest (1976 W.U.C.D.), showing summaries of commission decisions in UI fraud cases back to 1946.

<sup>4</sup> *In re Kevin T. Willingham*, UI Dec. Hearing No. 91609604MW (LIRC June 5, 1992).

<sup>5</sup> See *Krueger v. LIRC*, slip op. at 5, No. 81-CV-559A (Wis. Cir. Ct. Rock Cnty. Dec. 3, 1982).

<sup>6</sup> See *Holloway v. Mahler Enterprises Inc.*, UI Dec. Hearing No. 11606291MW (LIRC Nov. 4, 2011)(copy attached).

the claimant failed to respond to that inquiry. This practice was unfair, and it led to *Holloway*. There the commission held that, absent evidence that a claimant's failure to respond was intentional, an inference of wrongful intent could not be drawn from that failure. In its analysis of the matter, the commission again considered *Kamuchey*. It considered *Donahue*, and it also considered *No.59-A-1488*,<sup>7</sup> a case in which the department concluded that concealment had not been established. There, the department held that the claimant's failure to have reported certain leave pay was not the result of any intentional plan to withhold information for any fraudulent purpose, and the department itself cited the Supreme Court's decision in *Kamuchey*. In *Holloway*, the commission also considered that the § 108.04(11)(g) definition of concealment is fully consistent with the idea that concealment requires the wrongful purpose or design the Supreme Court demanded in *Kamuchey*.

Between *Willingham* and *Holloway*, and continuing after *Holloway*, the commission consistently analyzed cases under the standard that concealment requires an intent to gain benefits the claimant knows he or she is not entitled to receive and rendered decisions in concealment cases<sup>8</sup>:

- *In re Candace K. Pitts*, UI Dec. Hearing No. 95000045DV (May 25, 1995);
- *In re Abel M. Rodriguez*, UI Dec. Hearing No. 99600259MW (Apr. 22, 1999);
- *In re Joseph W. Hein*, UI Dec. Hearing No. 00605374MW (Dec. 13, 2001);
- *In re Rudy J. Mundinac*, UI Dec. Hearing No. 02006240BO (Feb. 12, 2003);
- *In re Keith Stewart*, UI Dec. Hearing No. 05000736MD (LIRC, June 22, 2005);
- *In re Brenda P. Mortensen*, UI Dec. Hearing No. 05002751JV (Dec. 14, 2005);
- *In re Jessie J. Coleman*, UI Dec. Hearing No. 08003806MD (LIRC Dec. 23, 2008);
- *In re Jacquelynne L. Barret*, UI Dec. Hearing no. 09604217MW (LIRC Sept. 30, 2009);
- *In re Chris M. Janesky*, UI Dec. Hearing No. 09401876MN (Oct. 16, 2009);
- *In re Scott G. Lynch*, UI Dec. Hearing No. 10404406AP (LIRC Mar. 11, 2011);
- *In re Kristi Bartmann*, UI Dec. Hearing No. 10006053MD (LIRC May 13, 2011);
- *Holloway v. Mahler Enterprises Inc.*, UI Dec. Hearing No. 11606291MW (LIRC Nov. 4, 2011);
- *In re Mark Seidel*, UI Dec. Hearing No. 11605862MW (LIRC Feb. 17, 2012);
- *Karandjeff v. Community Living Alliance Inc.* UI Dec. Hearing No. 11611430MW (LIRC June 20, 2012);
- *In re Leonard Miszewski*, UI Dec. Hearing No. 12401605AP (Nov. 30, 2012);
- *In re Steven R. Meyer*, UI Dec. Hearing No. 12610125MW (Apr. 30, 2013);

<sup>7</sup> 1976 W.U.C.D. BR at 23-24 (App.64-65).

<sup>8</sup> These commission decisions are available on the commission's website. These are not the only commission decisions regarding UI fraud; the commission only puts decisions on its website that develop the law.

- *Meyer v. Joseph T. Ryerson & Son Inc.*, UI Dec. Hearing No. 12610125MW (LIRC April 30, 2013);
- *In re Mary Bickler*, UI Dec. Hearing No. 13602436MW (LIRC Nov. 1, 2013);
- *In re Sandra K. Parr*, UI Dec. Hearing No. 13604808MW (LIRC Nov. 1, 2013);
- *Laack v. Laack's Tavern & Hall*, UI Dec. Hearing Nos. 13402515AP (LIRC Nov. 27, 2013);
- *Henning v. Visiting Angels*, UI Dec. Hearing Nos. 13606277MW & 13606278MW (LIRC Jan. 9, 2014);
- *Harris v. Arandell Corp.*, UI Dec. Hearing No. 13606536MW (LIRC Jan. 9, 2014);
- *Suchowski v. Golden County Foods, Inc.*, UI Dec. Hearing Nos. 13202496EC & 13202497EC (LIRC Jan. 9, 2014);
- *Bilton v. H&R Block Eastern Enterprises, Inc.*, UI Dec. Hearing Nos. 13605766MW & 13605682MW (LIRC Jan. 9, 2014);
- *Wozniak v. US Special Delivery, Inc.*, UI Dec. Hearing Nos. 13606949MW & 13606950MW (LIRC Jan. 17, 2014);
- *Chao v. Eagle Movers, Inc.*, UI Dec. Hearing Nos. 13607069MW & 13607071MW (LIRC Jan. 17, 2014);
- *Haebig v. News Publishing Co., Inc., of Mt. Horeb*, UI Dec. Hearing Nos. 13000911MD & 13000912MD (LIRC Jan. 31, 2014);
- *In re David T. Mumm*, UI Dec. Hearing No. 13003988MD (LIRC Feb. 28, 2014);
- *Thomas v. Independence First, Inc.*, UI Dec. Hearing No. 13609613MW (LIRC Mar. 4, 2014);
- *In re Jacqueline Tyler*, UI Dec. Hearing No. 13609813MW (LIRC Mar. 6, 2014);
- *Haase v. Schroeder Solutions, Inc.*, UI Dec. Hearing Nos. 14601114MW-14601116MW (LIRC Apr. 25, 2014);
- *McCleton v. Olson Carpet Tile & Design LLC*; UI Dec. Hearing Nos. 136094MW & 13609473MW (LIRC Apr. 30, 2014);
- *Hollett v. Douglas C. Shaffer*, UI Dec. Hearing Nos. 13003690MW & 130003691MW (LIRC May 8, 2014);
- *Wallenkamp v. Arby's Restaurants*, UI Dec. Hearing Nos. 13607281MW & 13607282MW (LIRC May 15, 2014);
- *In re Martin R. Lash*, UI Dec. Hearing No. 13403269AP (LIRC May 30, 2014);
- *Van de Loo v. Bemis Mfg. Co.*, UI Dec. Hearing Nos. 13403969AP & 13403970AP (LIRC May 30, 2014);
- *Johnson v. RGIS LLC*, UI Dec. Hearing Nos. 13609623MW, 13609624MW & 13609975MW (LIRC July 15, 2014);
- *Brown v. Milwaukee Branch of NAACP*, UI Dec. Hearing Nos. 14601711MW & 14601712MW (LIRC July 15, 2014);
- *Perlongo v. Joey's Seafood & Grill*, UI Dec. Hearing Nos. 13610060MW & 13610061MW (LIRC July 22, 2014);
- *Smith v. Journal Sentinel, Inc.*, UI Dec. Hearing No. 13610174MW (LIRC July 31, 2014);

- *In re William Shoch*, UI Dec. Hearing Nos. 14200752EC-14200757EC (LIRC July 31, 2014);
- *Fera v. South East Cable LLC*, UI Dec. Hearing No. 13607275MW (LIRC July 31, 2014);
- *Terry v. Jane Schapiro*, UI Dec. Hearing Nos. 146019871MW & 14601972MW (LIRC Sept. 12, 2014); and
- *Lambert v. Waunakee Manor Health Care Center*, UI Dec. Hearing Nos. 14000936MD & 14000937MD (LIRC Sept. 19, 2014).

This line of cases establishes that the commission has both held and consistently applied a wrongful intent standard over the last several decades. A copy of a recent decision showing the commission's analysis is attached.

The commission's decisions in this area are also regularly reviewed by Wisconsin circuit courts which have affirmed the requirement of wrongful intent to meet the burden of proving fraud. In addition to *Donahue* and *Krueger, supra*, there are numerous other court cases in which the courts have reviewed the commission's application of the wrongful intent standard:

- *Thornton v. LIRC*, Case No. 81CV93 (Wis. Cir. Ct. Forest Cnty. July 6, 1983);
- *Lubow v. LIRC*, Case No. 91CV427 (Wis. Cir. Ct. Washington Cnty. Jan. 30, 1992);
- *Till v. LIRC*, Case No. 97CV1492 (Wis. Cir. Ct. Waukesha Cnty. Jan. 29, 1998);
- *Thielen v. LIRC*, Case No. 05CV10382 (Wis. Cir. Ct. Milwaukee Cnty. Mar. 30, 2006);
- *Terry v. LIRC*, Case No. 08CV8448 (Wis. Cir. Ct. Milwaukee Cnty. Dec. 4, 2008);
- *DWD v. LIRC and Adam G. Stroede*, Case No. 14CV1911 (Wis. Cir. Ct. Dane Cnty. Dec. 29, 2014);
- *DWD v. LIRC and Lisa A. Hollett*, Case No. 14CV331 (Wis. Cir. Ct. Sauk Cnty. Jan. 22, 2015);
- *DWD v. LIRC and Martin R. Lash*, Case No. 14CV98 (Wis. Cir. Ct. Door Cnty. Feb. 13, 2015);
- *DWD v. LIRC and Nikki L. Wallenkamp*, Case No. 14CV6402 (Wis. Cir. Ct. Milwaukee Cnty. Feb. 23, 2015);
- *DWD v. LIRC and Robert D. Vasquez*, Case No. 14CV9013 (Wis. Cir. Ct. Milwaukee Cnty. Mar. 16, 2015); and
- *DWD v. LIRC and Chad R. Maurer*, Case No. 14CV427 (Wis. Cir. Ct. Waukesha Cnty. Mar. 17, 2015).

In all of the recent cases brought by DWD against LIRC on this issue, the courts have agreed that the claimants did not conceal work and wages from the

DWD when they filed their claims. In all but one case,<sup>9</sup> the courts have simply affirmed the commission's decisions. Although DWD tried to portray the recent commission decisions as a departure from prior cases, courts have not agreed. Indeed, Judge James R. Kieffer of the Waukesha County Circuit Court specifically responded to this assertion and stated:

The Commission's legal determination in this case, in the opinion of this court, satisfy [sic] all the conditions for applying the great weight deference standard. The Commission is charged with the duty of administering Section 108.04(11) of the Wisconsin Statutes. The Commission's interpretation of the unemployment concealment law is also one of longstanding and the Commission used its decades of expertise and specialized knowledge in forming its interpretation. The expertise and specialized knowledge the Commission has gained since 1946 led to the Commission's holding in 1992 that concealment requires the intent to receive benefits to which the individual knows he or she is not entitled. Over the years the Commission has also consistently held that concealment requires an intent on the part of the claimant to obtain benefits to which the claimant would otherwise not be entitled.

At times the Commission was persuaded that a claimant's failure to report work, wages or a material fact was the result of an honest mistake made in good faith and concealment was not found in those cases. On the other hand at other times the Commission was not so convinced. The Commission has dealt with facts showing confusion and honest mistakes in failing to provide relevant information to the Department. The Commission has consistently stated over several decades that an act of concealment under Section 108.04(11) of the Wisconsin Statutes will be found only for willful acts of concealment not due to ignorance or lack of knowledge and not where a claimant makes an honest mistake.

A definition of "conceal" was first included in the state's unemployment insurance law by virtue of 2007 Wisconsin Act 59. This Act created Section 108.04(11)(g) that provides for purposes of a fraudulent claim subsection, the term "conceal" means to

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<sup>9</sup> In the *DWD v. LIRC and Adam G. Stroede* case, *supra*, Dane County Judge Anderson offered to simply affirm LIRC's decision or remand it to have the commission restate its decision. The judge noted that a remand was "an unnecessary exercise"; however, DWD requested the remand despite being told that the outcome of the case would not change. With the exception of Judge Anderson's hypothetical of a "kooky anarchist" who may possibly apply for unemployment insurance benefits for a purpose other than to receive benefits, the courts have also agreed that the commission's interpretation of the law is reasonable and not contrary to the clear meaning of the statute.

intentionally mislead or defraud the Department by withholding or hiding information or making a false statement or misrepresentation. In creating this definition the legislature rather than choosing to impose strict liability on claimants for any incorrect information, simply clarified that for a claim to be fraudulent, the claimant must have intentionally, that is consciously and affirmatively, failed to disclose material information to the Department. Consequently, in addition to presenting evidence that the claimant answered a question on his weekly claim certification incorrectly, the Department must present sufficient evidence, direct or indirect, from which fraudulent intent may be inferred.

**The Department's assertion that the Commission's interpretation and application of the term "concealed" changed in 2014 and now departs dramatically from its earlier decisions, in the opinion of this court, is lacking merit.** While the Commission in 2014 began articulating its analysis of cases involving concealment and the applicable law, the Commission did so at the specific request of the Department.

\* \* \*

**This court concludes also that the Commission's reading of the concealment statute is reasonable. ...The Commission's reading is also fully consistent with statutory definition of concealment created in Wisconsin Act 59 from 2007....**<sup>10</sup>

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<sup>10</sup> *DWD v. LIRC and Chad R. Maurer*, Case No. 14CV427 (Wis. Cir. Ct. Waukesha Cnty. Mar. 17, 2015) Transcript of Oral Ruling dated February 23, 2015, Honorable James R. Kieffer presiding, p. 12-16; emphases added.

STATE OF WISCONSIN  
LABOR AND INDUSTRY REVIEW COMMISSION  
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

LASHANDA S HOLLOWAY, Claimant  
8975 N 85TH ST APT 104  
MILWAUKEE WI 53224-2132

UNEMPLOYMENT INSURANCE  
DECISION

Soc. Sec. No. \*\*\*-\*\*-3232  
Hearing No. 11606292MW

**Dated and mailed:**

**NOV 04 2011**

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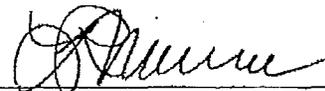
**ORDER**

Pursuant to authority granted in Wis. Stat. § 108.09(6)(c), the commission sets aside the July 14, 2011 appeal tribunal decision and June 11, 2011 amended determination in this matter. The commission remands the matter to the Department of Workforce Development for re-investigation of and re-determination on whether the claimant concealed a quit from Mahler Enterprises, Inc.

BY THE COMMISSION:

  
Robert Glaser, Chairperson

  
Ann L. Crump, Commissioner

  
Laurie R. McCallum, Commissioner

NOTE: The Wisconsin Industrial Commission was the predecessor to both the Department of Workforce Development and the Labor and Industry Review Commission. The Industrial Commission held as early as 1959 that concealment involved an "intentional plan to withhold information for [a] fraudulent purpose." Case No. 59-A-1488, 1976 Wisconsin Unemployment Compensation Digest BR 335: OVERPAYMENT – FRAUD, pp. BR 23-24. In so reasoning, the tribunal cited *Kamuchey v. Trzesniewski*, 8 Wis. 2d 94, 99, 98 N.W.2d 403 (1959) ("Active concealment consists of a suppression of a fact and implies a purpose or design."). Court recognition of this position of the commission in the unemployment compensation context occurred as early as 1963, in *Donahue v. Industrial Comm'n*, slip op. at 3, Case No. 111-269 (Wis. Cir. Ct. Dane Co., Aug. 13, 1963) ("The commission in its past interpretation of this statute has determined that the action of the claimant must be a willful act of concealment and one not due to lack of knowledge or ignorance. Also it is conceded that active concealment consists of a suppression of a fact and implies a purpose or design."). The *Kamuchey* reasoning that concealment implies purpose or design thus has been part of the unemployment law of concealment for more than 50 years.

The Labor and Industry Review Commission has regularly reaffirmed this principle over the last two decades. See, e.g., *In re Willingham*, slip op. at 2, UI Dec. Hearing No. 91609602MW (LIRC June 5, 1992) ("There must be the intent to receive benefits to which the individual knows he or she is not entitled."); *In re Greta S. Jenkins*, slip op. at 3, UI Dec. Hearing No. 92602768MW (LIRC July 8, 1992) ("There must be the intent to receive benefits to which the individual knows he or she is not entitled."); *In re Joseph D. Siegel*, slip op. at 4, UI Dec. Hearing No. 95003803MD (LIRC Aug. 23, 1996) ("There must be the intent to receive benefits to which the individual knows he or she is not entitled."); and *In re Nestor Gutierrez*, slip op. at 2, UI Dec. Hearing No. 00005766MD (LIRC July 19, 2002) ("There must be the intent to receive benefits to which the individual knows he or she is not entitled.").

In 2007, with presumed knowledge of this interpretation, the Legislature enacted Wis. Stat. § 108.04(11)(g), which defines "conceal" to mean "to intentionally mislead or defraud the department by withholding or hiding information or making a false statement or misrepresentation." The plain language notions of "intentionally misleading" and "defrauding" are consistent with the idea that concealment involves the wrongful purpose or design the court deemed necessary in *Kamuchey*. From this background, what it means to intentionally mislead or defraud may be stated simply: it means the claimant is trying to get away with something the claimant knows he or she should not be getting away with. In most unemployment insurance cases where the issue is concealment, what the claimant will be alleged to have tried to get away with, is gaining unemployment benefits to

which the claimant knows he or she is not entitled. By contrast, where a claimant's incorrect answer to a material question is due to ignorance or mistake, it will not be the case that the claimant is trying to get away with something, and that claimant will not be guilty of concealment. See, e.g., *In re Scott G. Lynch*, UI Dec. Hearing No. 10404405AP (LIRC Mar. 11, 2011) (unlikely that claimant, had he intended to conceal earned wages, would have reported the work and part of the wages to the department; more likely that he simply misinterpreted information he received from the department); *In re Joseph W. Hein, Jr.*, UI Dec. Hearing No. 00605374MW (LIRC Dec. 13, 2001) (incorrect answers due to mistaken interpretation of information from the department is not concealment) and Case No. 59-A-1829, 1976 Wisconsin Unemployment Compensation Digest, BR 23 (where claimant reported cash earnings, but did not report the \$45 monthly rent discount he received in exchange for maintenance work because he did not think the discount was wages he had to report, there was no concealment).

In the present case, the department's legal conclusion of concealment on the claimant's part was based solely upon the claimant's failure to respond to or dispute the information available to the department. In the civil context, an adverse inference may be drawn from one's intentional failure to answer a question (here, the claimant's failure to respond to department inquiry). See, e.g., *Grognet v. Fox Valley Trucking Service*, 45 Wis. 2d 235, 239, 172 N.W.2d 812 (1969). The evidence does not establish, though, that the claimant's failure to respond was intentional.

The department has the burden of proof to establish concealment, see *In re Lynch, supra*, and as a form of fraud, concealment "must be proven by clear and satisfactory evidence," a higher degree of proof than in ordinary civil cases. *Kamuchey v. Trzesniewski*, 8 Wis. 2d 94, 98. The evidence before the department did not meet this standard.

STATE OF WISCONSIN  
LABOR AND INDUSTRY REVIEW COMMISSION  
P O BOX 8126, MADISON, WI 53708-8126  
<http://dwd.wisconsin.gov/lirc/>

LISA A HOLLETT, Employee  
S2124 PINE VIEW CT  
BARABOO WI 53913-8700

UNEMPLOYMENT INSURANCE  
DECISION

Soc. Sec. No. \*\*\*-\*\*-7767  
Hearing Nos. 13003690MW  
and 13003691MW

DOUGLAS C SHAFFER, Employer  
C/O IRIS FINANCIAL SERVICES  
2020 W WELLS ST  
MILWAUKEE WI 53233-2720

**Dated and mailed:**

**MAY 08 2014**

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**SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL**

On November 8, 2013, an administrative law judge (ALJ) for the Division of Unemployment Insurance of the Department of Workforce Development (department) issued two appeal tribunal decisions in this matter.

- In Hearing No. 13003690MW, the ALJ held that, in weeks 45 of 2012 through 5 of 2013, the employee worked and earned wages and concealed that work and those wages from the department on her weekly claim certifications. As a result, the employee was overpaid benefits in the amount of \$2,172.00, that she was required to repay, and she was assessed a concealment overpayment penalty of \$325.80.
- In Hearing No. 13003691MW, the ALJ held that, in weeks 45 of 2012 through 5 of 2013, the employee concealed work and wages from the department on her weekly claim certifications. As a result, in addition to the penalty assessed in Hearing No. 13003690MW, the employee's future benefit amounts were reduced by \$4,076.00 for benefits and weeks that become payable in the six-year period ending September 21, 2019.

The employee filed a timely petition for commission review. The commission considered the petition, reviewed the evidence submitted to the ALJ, and issued a decision on February 7, 2014, reversing the appeal tribunal decisions.

Within 28 days after that decision was mailed to the parties, the department filed a Request for Reconsideration. Pursuant to its authority under Wis. Stat. § 108.09(6)(b) and (d), the commission set aside its February 7, 2014, decision for purposes of reconsideration.

The commission now makes the following:

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

A de novo hearing before an ALJ sitting as an appeal tribunal for the department was held by telephone on November 6, 2013. The employer's fiscal agent and the employee appeared. During their testimony, several documents were marked by the ALJ as Exhibits 1 through 6, which were later received into evidence. No one appeared at the hearing to testify on behalf of the department.

#### *Facts Adduced at Hearing*

Exhibit 2, an "ADJUDICATORS PRELIMINARY CLAIMANT REPORT," is a report summarizing the employee's unemployment claiming history. This report shows that:

- The employee had claimed and received unemployment insurance benefits for various weeks in 2007, 2009, and 2010. She reported having earned wages in many weeks in 2007 and received partial benefits.<sup>1</sup>
- The employee next initiated a claim for unemployment benefits on November 9, 2012 (week 45), and reported a layoff from White Rose Inns. She filed claims for weeks 45 of 2012 through 10 of 2013 and received weekly benefits of \$181 beginning in week 46 of 2012.<sup>2</sup>

After an individual files a new claim for unemployment benefits, several documents are mailed out automatically from the department's computer system. Among those documents are a claim confirmation, work search instructions, and, until June 20, 2013, a *Handbook for Claimants*.<sup>3</sup> Exhibit 4 consists of three FORMS SENT INQUIRY SCREENS, which list unemployment documents sent to the employee and to her former employers. Exhibit 4 shows that the employee was most recently mailed a Claim Confirmation with Work Search Requirements, FORM TYPE 10148, on November 10, 2012. Exhibit 3 is a copy of the *Handbook for Claimants* with a revision date of October 2012.

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<sup>1</sup> This information is reflected in Part D, the "PAYMENT HISTORY" sections for "VNC 49/06" and "VNC 08/09." Specifically, the wages reported by the employee (claimant) are listed under the "REMARKS" column for "VNC 49/06." The wording of Question No. 4 on the weekly claim certification at this time was the department's "old" wording, "Did you work?", which was in effect through week 42 of 2012. Effective with claims filed for week 43 of 2012, the question changed to "During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?" See UI Disputed Claims Manual Update, UID No. 12-26, Oct. 31, 2012.

<sup>2</sup> This information is reflected in Part D, the "PAYMENT HISTORY" section for "VNC 45/12." Benefits were not paid for week 45 of 2012, as that was the employee's waiting period. See Wis. Stat. § 108.04(3).

<sup>3</sup> The *Handbook for Claimants* is also known as a Form UCB-10. Effective June 20, 2013, claimants are sent a flyer, directing them to access the handbook online, rather than an actual handbook. See UID No. 13-12 (June 18, 2013).

When the employee opened her claim in week 45 of 2012, she was providing supportive and personal care services in her home to Douglas Shaffer, an elderly man with disabilities. The employee had been caring for Mr. Shaffer since week 23 of 2012. Mr. Shaffer used a fiscal agent, Iris Financial Services, to pay for the services he received. The employee was paid \$12.07 per hour for personal care and \$9 per hour for supportive care services. Mr. Shaffer died on February 1, 2013 (week 5).

The employer's fiscal agent reported that the employee earned wages for the care she provided to Mr. Shaffer as follows:

Week	Hours worked	Wages earned
46/12	29	\$300.91
47/12	31.5	\$315.74
48/12	29.5	\$300.80
49/12	33	\$333.84
50/12	35	\$357.98
51/12	28	\$284.26
52/12	28	\$284.26
1/13	36	\$357.98
2/13	36	\$357.98
3/13	28	\$284.26
4/13	28	\$284.26
5/13	20	\$203.02

Exhibit 5 shows that the employee, when completing her weekly claims certification for unemployment benefits for weeks 45 of 2012 through 5 of 2013, answered "No" to Question No. 4, "During the week, did you work or did you receive or will you receive sick pay, bonus pay, or commission?" The employee completed her claims using the department's telephone Interactive Voice Response (IVR) system.

The department detected the discrepancy between wages reported by the employer's fiscal agent for the employee and the employee's claims history. A department adjudicator interviewed the employee by telephone concerning the discrepancy on September 20, 2013. Exhibit 6 is the adjudicator's summary of the interview. The ALJ asked the employee whether Exhibit 6 was an accurate summary of the employee's statement to the adjudicator. The employee testified that Exhibit 6 did not reflect her exact verbiage and seemed to be edited. She could not remember exactly what verbiage she used when speaking with the adjudicator.<sup>4</sup>

The employee has a bachelor's degree. She read the *Handbook for Claimants* that she received but explained to the ALJ that reading it and understanding it are two different things. The employee further explained that she answered "No" to Question

<sup>4</sup> It is noted that the employee would not have given "a statement" to an adjudicator. Rather, during an interview, an adjudicator asks a claimant a series of questions and summarizes the claimant's answers to those questions. Exhibit 6 is not a verbatim record of what was said by the adjudicator or the employee.

No. 4, because she believed that the question applied to the employer from which she had been laid off (White Rose Inns). The employee believed that she was receiving unemployment benefits from that employer to replace some of the income that she had lost as a result of the layoff. In addition, the employee did not consider caring for Mr. Shaffer in her home to be "work." She did not call the department with questions, because she thought that she was providing accurate information and was filing her claims correctly. When the employee was informed that she had misinterpreted the reporting requirements, she mailed a check for \$2,076.00 to the department to reimburse the department for the benefits she had been paid while Mr. Shaffer was alive.

#### *Issues*

The issues to be decided are whether the employee worked and earned wages in weeks 45 of 2012 through 5 of 2013, whether she concealed her work and wages for those weeks, whether she received benefits to which she was not entitled and which she must repay, and whether any concealment penalties or future benefit reductions must be assessed.

#### *Standards and Burden of Proof of Concealment*

Claimants who file for unemployment insurance benefits are responsible for correctly and completely reporting information for each week they claim benefits, because benefits are initially paid based on the information claimants provide. Claimants who conceal information from the department when filing for benefits may be subject to overpayments and penalties. For unemployment insurance purposes, conceal means "to intentionally mislead or defraud the department by withholding or hiding information or making a false statement or misrepresentation."<sup>5</sup>

A claimant who conceals work performed or wages earned when filing a weekly claim certification is ineligible to receive benefits for the week claimed.<sup>6</sup> In addition, a claimant who conceals work performed, wages earned, or another material fact concerning benefits eligibility when filing a weekly claim certification is ineligible for benefits in an amount equivalent to two, four, or eight times the claimant's weekly benefit rate for each act of concealment.<sup>7</sup> This ineligibility is applied against benefits and weeks of eligibility for which the claimant would otherwise be eligible after the week of concealment.<sup>8</sup> Furthermore, consistent with federal directives, the department assesses a penalty against the claimant in an amount equal to 15 percent of the benefits erroneously paid to the claimant as a result of one or more acts of concealment.<sup>9</sup>

<sup>5</sup> Wis. Stat. § 108.04(11)(g).

<sup>6</sup> Wis. Stat. § 108.05(3)(d).

<sup>7</sup> Wis. Stat. § 108.04(11)(a), (b) and (be).

<sup>8</sup> Wis. Stat. § 108.04(11)(bm).

<sup>9</sup> Wis. Stat. § 108.04(11)(bh).

A claimant is presumed eligible for unemployment insurance benefits, and the party resisting payment must prove disqualification.<sup>10</sup> The burden to establish that a claimant concealed information is on the department.<sup>11</sup> As a form of fraud, concealment must be proven by clear, satisfactory, and convincing evidence.<sup>12</sup>

The unemployment insurance law must be "liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status."<sup>13</sup> Laws imposing forfeitures, by contrast, must be strictly construed to narrow the range of acts that will lead to the harsh result of a forfeiture.<sup>14</sup> As a result, concealment will not be found where a claimant makes an honest mistake or misinterprets information received from the department.<sup>15</sup> Concealment requires an intent or design to receive benefits to which the claimant knows he or she is not entitled.<sup>16</sup>

The existence of fraud in the form of concealment must be resolved on a case-by-case basis. Because direct proof of a claimant's intent is rarely available, fraud may be proven by indirect (circumstantial) evidence and reasonable inferences drawn from the facts. There is a rebuttable presumption that parties intend the natural consequences of their actions.<sup>17</sup>

### *Analysis*

In any case where concealment is an issue, the commission first determines whether there is sufficient direct evidence of concealment, such as an admission by the claimant, to conclude that the claimant intended to mislead or defraud the department to receive benefits to which the claimant knew he or she was not entitled. If there is not sufficient direct evidence of concealment, the commission then looks to see whether there is sufficient *indirect* evidence from which the commission can infer an intent on behalf of the claimant to mislead or defraud the department in order to receive benefits to which the claimant knew he or she was not

<sup>10</sup> Wis. Stat. §108.02(11); *Kansas City Star Co. v. DILHR*, 60 Wis. 2d 591, 602, 211 N.W.2d 488 (1973).

<sup>11</sup> *In re Scott Lynch*, UI Dec. Hearing No. 10404406AP (LIRC Mar. 11, 2011); *Holloway v. Mahler Enter., Inc.*, UI Dec. Hearing No. J1606291MW (LIRC Nov. 4, 2011).

<sup>12</sup> *Kamuchey v. Trzesniewski*, 8 Wis. 2d 94, 98, 98 N.W.2d 403 (1959); *Schroeder v. Drees*, 1 Wis. 2d 106, 112, 83 N.W.2d 707 (1957).

<sup>13</sup> *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 62, 330 N.W.2d 169 (1983).

<sup>14</sup> *Liberty Loan Corp. & Affiliates v. Eis*, 69 Wis. 2d 642, 649, 230 N.W.2d 617 (1975).

<sup>15</sup> *In re Joseph Hein, Jr.*, UI Dec. Hearing No. 00605374MW (LIRC Dec. 13, 2001); *In re Scott Lynch*, *supra*.

<sup>16</sup> *Karandjeff v. Cmty. Living Alliance Inc.*, UI Dec. Hearing No. 11611430MW (LIRC June 20, 2012); *Holloway v. Mahler*, *supra*, and the cases cited therein; *In re Nestor Gutierrez*, UI Dec. Hearing No. 00005766MD (LIRC July 19, 2002).

<sup>17</sup> *Krueger v. LIRC & Gen. Motors Assembly Div.*, No. 81-CV-559A (Wis. Cir. Ct. Rock Cnty. Dec. 3, 1982). *See, also, Muller v. State*, 94 Wis. 2d 450, 469, 289 N.W.2d 570 (1980) (when there are no circumstances to prevent or rebut the presumption, the law presumes that a reasonable person intends all the natural, probable, and usual consequences of his deliberate acts).

entitled. Few cases contain direct evidence of concealment; most cases must rely on indirect evidence and the inferences that can be drawn from that evidence to establish concealment.

Review of the indirect evidence generally involves the following inquiry:

1. Did the claimant file a claim for each week at issue?
2. Did the claimant provide incorrect information to the department in filing the claim?
3. Were benefits improperly paid to the claimant as a result of the incorrect information?
4. Do the circumstances create an inference that the claimant intentionally provided incorrect information in order to obtain benefits to which the claimant was not entitled?

Generally, in analyzing whether a claimant obtained benefits to which he or she was not entitled and should be required to repay, only questions (1), (2), and (3) are relevant. However, in analyzing whether a claimant engaged in concealment, which requires a showing by clear and convincing evidence that a claimant intentionally misled or defrauded the department in order to obtain benefits to which the claimant knew he or she was not entitled, and which results in the imposition of a monetary penalty over and above the repayment of benefits, question (4) must be answered as well. An inference of concealment is not created by a mere showing that a claimant provided an incorrect answer when filing a claim.

If the evidence presented by the department does not suggest that the claimant intentionally provided an incorrect answer in order to obtain benefits to which the claimant knew he or she was not entitled, the inquiry ends. No concealment will be found.<sup>18</sup>

If the department presents sufficient evidence to create a reasonable inference that the claimant intended to mislead or defraud the department in order to receive benefits to which the claimant knew he or she was not entitled, the inquiry next turns to whether the explanation offered by the claimant for his or her actions successfully overcomes this inference.

This analysis is case specific, but the factors that may be considered are whether the claimant acted as a reasonable person filing for unemployment insurance benefits or whether the claimant acted in a wilful or reckless disregard of his or her responsibilities as a claimant when filing a claim. If the claimant establishes that it is more probable than not that he or she has made an honest mistake or good faith error in judgment, no concealment will be found. However, the claimant still will be required to repay the benefits which were overpaid. If the claimant fails to establish an honest mistake or good faith error in judgment, the inference of concealment drawn from the evidence remains and the commission will find concealment.

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<sup>18</sup> *In re Leonard Miszewski*, UI Dec. Hearing No. 12401605AP (LIRC Nov. 30, 2012).

### *Application*

Exhibit 5 establishes that the employee filed weekly claims certifications for weeks 45 of 2012 through 5 of 2013. On those certifications, the employee answered "No" each week to Question No. 4, which asks "During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?" Exhibit 1, together with the testimony of the employer's fiscal agent and the employee, establish that the employee did, in fact, work and earn wages in each of those weeks. The employee did not dispute the hours and wages reported by the employer's fiscal agent. Thus, the record supports a finding that the employee filed claim certifications for weeks 45 of 2012 through 5 of 2013 and that she provided incorrect information on those claims.

Claimants who earn wages in any given week may be eligible for partial unemployment benefits pursuant to Wis. Stat. § 108.05(3). However, in this case, the employee would not be eligible for benefits for weeks in which she worked more than 32 hours, pursuant to Wis. Stat. § 108.05(3)(c), or in which her wages exceeded \$300, based on her weekly benefit rate of \$181 and application of the partial benefits formula found at Wis. Stat. § 108.05(3)(a). Because the employee received full unemployment benefits for weeks 46 of 2012 through 5 of 2013, the record establishes that benefits were improperly paid to the employee as a result of the incorrect information she provided to the department.

The next step is to determine whether the circumstances in this case allow the commission to draw a reasonable inference that the claimant intentionally provided incorrect information in order to obtain benefits to which she was not entitled. The employee was sent a *Handbook for Claimants* on November 10, 2012. She received the handbook and read it. She has a bachelor's degree. The employee had also been sent earlier versions of the handbook.

Although past commission decisions have referenced a presumption of intent based upon receipt of the *Handbook for Claimants* and an incorrect answer to Question No. 4 on the weekly claim certification, this is no longer sufficient evidence from which to infer an intent to mislead or defraud the department. Past commission decisions involved a different, much simpler Question No. 4 ("Did you work?") and the fact that hardcopy handbooks were sent with initial claims and often at other points during the claims process. The current form of Question No. 4, which asks "During the week, did you work or did you or will you receive sick pay, bonus pay or commission?", contains more than one question and, as such, is more susceptible to misinterpretation. An inference of intent to mislead or defraud the department cannot be made where the only evidence is that the claimant answered a compound question incorrectly.

In this case, the employee had had prior filing experience, had reported wages she earned on her weekly claim certifications, albeit in response to a simpler Question No. 4, and had received partial benefits. The employee has a post-secondary education and has received multiple copies of the *Handbook for Claimants*. The

October 2012 handbook noted a disqualification for claimants working 32 or more hours in a week. In three of the weeks at issue, the employee worked more than 32 hours. From this evidence, it could be reasonably inferred that the employee intended to receive benefits to which she knew she was not entitled when she failed to report her work and wages for weeks 46 of 2012 through 5 of 2013.

The final step, therefore, is to determine whether the employee rebutted, through affirmative proof of good faith on her part, the inference that she intended to mislead or defraud the department.<sup>19</sup> The employee testified that, when filing her weekly claim certifications, she believed that the questions asked of her related only to the employer from which she had been laid off. It was the layoff which caused the employee to initiate a claim for benefits. The employee did not report the services she performed for Mr. Shaffer as work, because she did not consider caring for Mr. Shaffer in her home as a job. The employee did not consult the *Handbook for Claimants* or call the department to speak with a claims specialist because she thought that she was responding correctly and providing accurate information.

The ALJ rejected the employee's testimony that that she was confused by Question No. 4 and that she did not consider the services she provided to the employer to be "work" in the unemployment insurance context. The ALJ found that the question to which the employee "gave a false answer was simple, straightforward, and not easily susceptible to misinterpretation." The ALJ also found that the employee was an experienced filer, one who should have contacted a department representative or reviewed her *Handbook for Claimants* for guidance. When consulted concerning her personal impressions of the material witnesses, the ALJ stated that she had "no independent recollection of any demeanor impressions" that she could impart to the commission.

The commission finds that the employee's testimony that she was confused and did not intend to defraud the department credible. The employee established that she made an honest mistake in believing that she was filing for benefits "against" her previous employer, which had laid her off and caused her unemployment, and that the questions on the weekly claim certifications referred to that employment. Although the employee's belief was incorrect, her misunderstanding of how the unemployment insurance program operates is not uncommon.<sup>20</sup>

In addition, the employee did not think of the care she provided to Mr. Shaffer in her home as a job. Under the circumstances, this is not unreasonable.<sup>21</sup> The employee's

<sup>19</sup> See, e.g., *In re Henry A Warner*, UI Hearing No. S9100679MW (LIRC July 16, 1993).

<sup>20</sup> See, e.g., *Thomas v. IndependenceFirst Inc.*, UI Dec. Hearing No. 13609613MW (LIRC March 4, 2014); *Haebig v. News Publishing Co. Inc. of Mt. Horeb*, UI Dec. Hearing Nos. 13000910MD, 13000911MD, and 13000912MD (Jan. 31, 2014); *In re Mortensen*, UI Dec. Hearing No. 05002751JV (LIRC Dec. 14, 2005); and *In re Hein, Jr.*, UI Dec. Hearing No. 00605374MW (LIRC Dec. 13, 2001).

<sup>21</sup> See *Karandjeff v. Cmty. Living Alliance Inc.*, UI Dec. Hearing No. 11611430MW (LIRC June 20, 2012)(employee, who was providing care in her home to her adult son with disabilities, did not

work history was comprised of work outside the home. It did not involve caring for individuals in the employee's own home. A first-time failure to report non-conventional work has long been found not to evince an intent to conceal.<sup>22</sup>

Moreover, contrary to the ALJ's finding, Question No. 4 in its current incarnation is not simple and straightforward. While the department's former "Did you work?" version may have been straightforward and not easily susceptible to misinterpretation,<sup>23</sup> the department's current version presents at least two distinct, alternative questions within one compound question. There are inherent dangers in inviting a "Yes" or "No" answer to a compound question, because it is often not possible to be certain to which part, or parts, a single response applies.<sup>24</sup> This is especially true when a claimant files claims by telephone, where the last question heard is not "Did you work?" When the answer to a compound question relates to the substantive issues and the ultimate outcome in a case, as it does here, the commission will not infer an intent on the part of the claimant to mislead or defraud the department because both the question and the answer can be misunderstood.<sup>25</sup>

Additionally, concerning the ALJ's finding that the employee should have consulted the *Handbook for Claimants* for guidance, it is not clear that the employee, even with a bachelor's degree, would have understood by reviewing the booklet that she erred on her first weekly claim certification and repeated the same error week after week. In the shaded areas on pages 5 and 6 of the booklet, the department lists the questions that claimants are asked weekly. For most questions, the department instructs claimants to "Answer 'Yes' if ..." However, for Question No. 4, the "During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?" question, claimants are not instructed to "Answer 'Yes' if they worked for *any* employer during the week." In fact, claimants are not instructed *at all* as to how to answer the question. Instead, following the question it states, "If yes, you will be asked if you worked for or receive/will receive sick pay, bonus pay or commission from more than one employer during the week." When a claimant believes that the correct answer to Question No. 4 is "No," the information provided thereafter on p. 6 of the *Handbook for Claimants* appears to be inapplicable.

The commission finds that it is somewhat illogical for the department to expect a claimant who believes that she is responding correctly to the questions asked of her on the weekly claims certification to call a claims specialist. If a claimant makes an

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understand that her services, which she had been performing for 23 years, were considered "work" for unemployment insurance purposes).

<sup>22</sup> See, e.g., *Wisconsin Unemployment Compensation Manual*, Vol. 4, Part III, Chap. 3, "Fraud," January 1993.

<sup>23</sup> See, e.g., *Candace K. Pitts*, UI Dec. Hearing No. 95000045DV (LIRC May 25, 1995).

<sup>24</sup> See, e.g., *Atunnise v. Mukasey*, 523 F.3d 320, 834 (7th Cir. 2008), citing 81 Am. Jur. 2d Witnesses § 714 (2008) (the vice of the compound question is generally recognized; a question which embraces several questions is improper).

<sup>25</sup> *Handbook for Measuring Unemployment Insurance Lower Authority Appeals Quality*, ET Handbook No. 382 (3<sup>rd</sup> Ed.), U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance, p. 22 (March 2011).

honest mistake and is therefore unaware that a mistake has been made, then the claimant would not reasonably think that there is a need to contact the department.

Finally, the fact that the employee filed for, and received, partial unemployment benefits in the past, most recently in 2007, does not preclude a finding that the employee was confused by the claims process in 2013. Several things about the claims process, including the wording of Question No. 4 on the weekly claim certification, changed between 2007 and 2013. In addition, there is nothing in the record to suggest that the employee was providing in-home personal care services or performing other non-conventional work when she filed claims for unemployment benefits in the past. The commission finds it more reasonable to infer that, because the employee properly reported work and wages in the past, she would have reported her services to Mr. Shaffer to the department if she knew such services were "work" under the unemployment insurance law.

Accordingly, upon review of the entire record, the commission concludes that the employee honestly misunderstood her obligations and benefit rights under the unemployment insurance law and, as a result, failed to provide accurate information to the department on her weekly claim certifications. The employee received benefits to which she was not entitled, but, in filing claims for those benefits, she lacked the fraudulent intent essential to support a finding of concealment.

Because the employee did not conceal work performed and wages earned in weeks 45 of 2012 through 5 of 2013, she is entitled to partial benefits in some of those weeks, pursuant to Wis. Stat. § 108.05(3). The employee is not eligible for benefits for weeks in which she worked more than 32 hours, pursuant to Wis. Stat. § 108.05(3)(c), or in which her wages exceeded \$300, based on her weekly benefit rate of \$181 and application of the partial benefits formula. Wis. Stat. § 108.05(3)(a).

The employee's benefit entitlement, and corresponding overpayment, is as follows:

Week	Hours worked	Wages earned	Benefits paid	Benefits due	Overpayment
45/12	Waiting week		\$0	\$0	\$0
46/12	29	\$300.91	\$181	\$0	\$181
47/12	31.5	\$315.74	\$181	\$0	\$181
48/12	29.5	\$300.80	\$181	\$0	\$181
49/12	33	Hours +	\$181	\$0	\$181
50/12	35	Hours +	\$181	\$0	\$181
51/12	28	\$284.26	\$181	\$10	\$171
52/12	28	\$284.26	\$181	\$10	\$171
1/13	36	Hours +	\$181	\$0	\$181
2/13	36	Hours +	\$181	\$0	\$181
3/13	28	\$284.26	\$181	\$10	\$171
4/13	28	\$284.26	\$181	\$10	\$171
5/13	20	\$203.02	\$181	\$65	\$116
	<b>Total</b>	<b>Overpayment</b>			<b>\$2,067</b>

The commission therefore finds that, in weeks 45 of 2012 through 5 of 2013, the employee worked and earned wages, but she did not conceal from the department the work performed and the wages earned in those weeks, within the meaning of Wis. Stat. § 108.04(11).

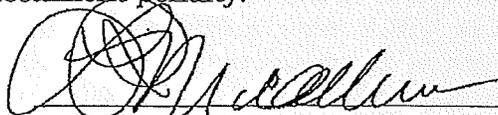
The commission further finds that the employee was entitled to partial benefits, pursuant to Wis. Stat. § 108.05(3)(c), of \$10.00 for weeks 51 and 52 of 2012 and for weeks 3 and 4 of 2013 and of \$65.00 for week 5 of 2013.

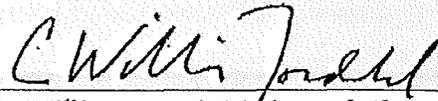
The commission further finds that the employee's failure to report work and wages on her weekly claim certifications for weeks 45 of 2012 through 5 of 2013, while not fraudulent, prevents waiver of recovery of the overpayment, under Wis. Stat. § 108.22(8)(c). The employee must repay the amount of \$2,067.00 to the department.<sup>26</sup>

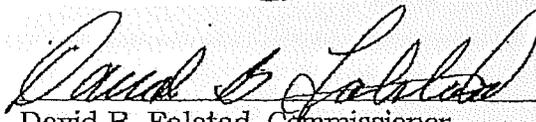
#### DECISION

The appeal tribunal decisions are modified as to the amount of the employee's overpayment and, as modified, affirmed in part and reversed in part. Accordingly, the employee is entitled to partial unemployment benefits for weeks 51 and 52 of 2012 and for weeks 3 through 5 of 2013, as set forth above. As a result of this decision, the employee is required to repay the benefits she received in error, but the amount of the overpayment is reduced from \$2,172.00 to \$2,067.00. Also as a result of this decision, the employee's unemployment insurance benefit amount shall not be reduced, and there is no concealment penalty.

BY THE COMMISSION:

  
Laurie R. McCallum, Chairperson

  
C. William Jordahl, Commissioner

  
David B. Falstad, Commissioner

#### MEMORANDUM OPINION

The department requested that the commission reconsider its original decision issued on February 7, 2014, involving the employee. The commission agreed to do so and set its decision aside. The commission now addresses the arguments raised

<sup>26</sup> The employee testified that she has already repaid the department \$2,076.00, although it is not clear from the record how she arrived at that amount.

by the department in its request for reconsideration, to the extent they relate to these cases.<sup>27</sup>

The department argued that the commission erred in failing to consult with the administrative law judge (ALJ) who held the hearing in these cases concerning the employee's demeanor and credibility. Although the commission does not agree that it is required to consult with an ALJ in every case in which it reverses an appeal tribunal decision, it did so here. The ALJ had "no independent recollection of any demeanor impressions" to impart to the commission. For the reasons expressed in its decision, *supra* at pp. 8-10, the commission determined that the employee was credible.

The department also argued that the compound nature of Question No. 4, which was formerly "Did you work?" and is now "During the week, did you work or did you receive or will you receive sick pay, bonus pay, or commission?", is not confusing. The department argued that Question No. 4 can be distinguished from the complex compound question at issue in *Atunnise v. Mukasey*, 523 F.3d 320, 834 (7th Cir. 2008),<sup>28</sup> because Question No. 4 poses "two rather simple *related* questions." Thus, the department argued, it is reasonable to infer that answering "No" to Question No. 4, when the claimant should have answered "Yes," is sufficient to establish an intent to mislead or deceive as the question clearly is related to benefit eligibility. The commission disagrees.

An administrative hearing is not a hearing pursuant to an order to show cause. Once the department presents evidence showing that a claimant answered a question incorrectly on a weekly claims certification, the burden of proof is not shifted onto the claimant to prove that his or her incorrect answer was not fraudulent. The burden of proof remains with the department at all times.

In the past, when a claimant answered "No" to the "Did you work?" question, absent credible evidence to the contrary, the commission was more willing to infer that a claimant, who was, in fact, working, intended to mislead or defraud the department. However, now that the "Did you work?" question is asked in conjunction with questions about various forms of past or future remuneration, the commission is unwilling to infer concealment when the claimant answers "No" but was, in fact, working. As noted in *Appeals Principles and Procedures*, published by the U.S. Department of Labor's Employment and Training Administration (ETA), "compound questions should never be asked if the answer relates to the substantive issues and the ultimate outcome. A compound question is a question that asks more than one

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<sup>27</sup> The commission did not consider the affidavits the department submitted with its request for reconsideration; the information presented therein was not new or recently developed. A hearing will not be scheduled for the submission of additional evidence.

<sup>28</sup> The department properly pointed out that the commission's original decision contained the wrong case name and citation to support its view of the compound nature of the question. The citation has been corrected.

question, each of which requires a separate answer. Questions should be related to one point only, so that neither the question nor the answer will be misunderstood.<sup>29</sup>

The commission is not alone in finding compound questions like the department's Question No. 4 a potential source of misunderstanding by claimants. In June 2011, the U.S. Department of Labor strongly encouraged states to review the wording of their continued claims certification form and telephone script to assess whether any questions or language should be made clearer to ensure claimants understand what is being asked. The following example was given:

- If the certification form or script contains a two-part question such as:
  - *Did you work and earn wages during the week?*
- Two separate questions could be asked instead, such as:
  - *Did you perform any work during the week?*
  - *If you worked, what was the amount of wages you earned during the week (report wages earned whether or not these wages have been paid)?<sup>30</sup>*

This suggestion to rid claim certification forms and telephone scripts of two-part questions was part of an immediate call to action by the U.S. Department of Labor to all state administrators to develop state-specific strategies to bring down the improper payment rate in unemployment insurance benefits programs. The call to action was communicated in Unemployment Insurance Program Letter (UIPL) No. 19-11, titled *National Effort to Reduce Improper Payments in the Unemployment Insurance (UI) Program*.<sup>31</sup> It was recognized that the best way to effectively reduce the improper payment rate is to prevent improper payments before they occur. The U.S. Department of Labor identified unreported or under-reported earnings by claimants as the primary cause of overpayments.

Yet, in spite of the call to action, sixteen months later, in October 2012, the department did exactly the opposite of what the U.S. Department of Labor suggested

<sup>29</sup> *Handbook for Measuring Unemployment Insurance Lower Authority Appeals Quality, Third Edition*, U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance, March 2011, Appendix B: Appeals Principles and Procedures, pp. 4-5.

<sup>30</sup> UIPL No. 19-11, U.S. Department of Labor, Employment and Training Administration, June 10, 2011, pp. 4-7.

<sup>31</sup> The U.S. Department of Labor's Employment and Training Administration interprets federal law requirements pertaining to unemployment insurance as part of its role in the administration of the federal-state unemployment insurance program. These interpretations are issued in Unemployment Insurance Program Letters (UIPLs) to state employment agencies. As agents of the federal government, states must follow the operating instructions and guidance provided in UIPLs. See *DWD v. LIRC*, 2006 WI App 241, ¶ 2, 297 Wis. 2d 546, 725 N.W.2d 304.

it do. The department took a relatively simple, straightforward question, one not easily susceptible to misinterpretation -- "Did you work?" -- and created a compound question -- "During the week, did you work or did you receive or will you receive vacation pay, bonus pay or commission?" In doing so, the department created an identified cause of misunderstanding by claimants and a known source of improper payments. Question No. 4 was not made clearer to ensure claimants understood what was being asked; it was made more complex and confusing. At the same time, the department also increased the penalties for concealment.

It must be noted that there are times in which claimants can be, and have been, confused by even the simple "Did you work?" question. In *Thornton v. DILHR*, No. 81-CV-93 (Wis. Cir. Ct. Forest Cnty. July 6, 1983), for example, the claimant was alleged to have concealed work performed because he did not report on his weekly claims that he assisted his wife with her job duties as the operator of a tavern. The judge distinguished Thornton's factual situation from that in another concealment case, where the employee had filed claims for unemployment benefits while working full-time in her regular job,<sup>32</sup> and stated:

The basic facts are found not to constitute a grounds for reasonable inference that Mr. Thornton intentionally concealed any facts relative to working. ... The Court is completely satisfied under the provisions of 108.04(11), statutes, forfeiture of future benefits may not be imposed against a claimant who makes an honest mistake and this Court will find that, if the accommodation and services that were offered by Mr. Thornton to his wife in the operation of the tavern did in fact constitute employment, reading the question that was posed to him in his application, did he do any work and answering the same no, constitutes a reasonable and honest mistake because in reading the language work, a man who's used to operating heavy equipment is not going to consider housekeeping duties as work. He is going to consider work as being that kind of effort that he ordinarily exerted in order to make the wage he was ordinarily accustomed to receiving.

*Thornton v. DILHR*, No. 81-CV-93 (Wis. Cir. Ct. Forest Cnty. July 6, 1983), pp. 3-4.

Furthermore, any confusion with Question No. 4, which asks "During the week, did you work or did you receive or will you receive vacation pay, bonus pay or commission?", is not, as alleged by the department, removed when a claimant files online and sees the question, as opposed to a claimant who files by telephone and hears the question. According to a research study done by the U.S. Department of Education and the National Institute of Literacy, as of April 2013, 14 percent of adults in the United States (32 million people) cannot read and 21 percent of adults

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<sup>32</sup> *Krueger v. LIRC & General Motors Assembly Div.*, No. 81-CV-559 (Wis. Cir. Ct. Rock Cnty. Dec. 3, 1982).

read below a 5<sup>th</sup> grade level.<sup>33</sup> In this case, however, the employee filed her claims using the department's telephone IVR system.

Finally, the department argues that it cannot administratively apply the commission's factor of a "fundamental misunderstanding of the UI Program." The department asks "what level of understanding of the program is required" and argues that a claimant's understanding is not even relevant to a claimant's intent in answering a simple question such as "Did you work?" The commission, again, disagrees.

First, the department's question about work is no longer simple. Second, the department's assertions of insurmountable administrative difficulties in ascertaining a claimant's understanding of the unemployment insurance program, as well as the department's need to do so, are belied by its own training manual.

The department's *Disputed Claims Manual*, on the topic of fraud, instructs adjudicators to establish why the claimant failed to report wages.

When an investigation establishes a claimant has given us false answers we must determine the claimant's intent. We must decide if this was an innocent mistake or done on purpose or with such careless disregard of the claiming process as to amount to an intentional act.<sup>34</sup>

Adjudicators are advised that a thorough review of the claim record is required prior to interviewing a claimant concerning an allegation of concealment. Adjudicators are instructed that they must make a reasonable attempt to obtain the relevant information from the claimant. Among the considerations are:

- Does the claimant understand the allegation?
- Why did the claimant fail to report the wages or material fact(s)?
- Did the claimant understand correct filing procedures?
- Did the claimant receive a handbook?
- What is the claimant's educational level?<sup>35</sup>

In the past, adjudicators were instructed to find no intent (1) if there were conflicting answers on an initial or continued claim which clearly establish the claimant was confused or that the claimant did not understand what was being asked or answered; (2) if there was first-time, non-conventional work; (3) if correct information was given to the claimant by agency personnel but the circumstances and facts establish that confusion or a misunderstanding reasonably occurred; (4) if the claimant has a history of mental or physical illness which, when facts are documented, explain the claimant's unintentional concealment; and (5) if a review of

<sup>33</sup> See <http://www.statisticbrain.com/number-of-american-adults-who-cant-read/>.

<sup>34</sup> *Disputed Claims Manual*, Department of Workforce Development, Division of Unemployment Insurance, Fraud, Sec. II, Part C. Available at <http://dwdworkweb/uibmanuals/dc/fraud.htm>.

<sup>35</sup> *Id.*, Sec. IV, Part V.

prior and/or later claimant records show the claimant properly and accurately reported work and wages or answered questions, an omission, for example, of partial work and wages, supports a finding that an honest mistake was made. An omission could involve more than one employer.<sup>36</sup>

As explained in the commission's decision, *supra*, the employee in this case misunderstood her obligations and benefit rights under the unemployment insurance law. As a result, she did not provide accurate information to the department on her weekly claim certifications and received benefits to which she was not entitled. However, the employee did not have the fraudulent intent essential to support a finding of concealment. Therefore, while she is required to repay the benefits she received in error, and apparently has already done so, an additional overpayment penalty and a reduction of future benefits will not be imposed.

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<sup>36</sup> *Wisconsin Unemployment Compensation Manual*, Vol. 4, Part II, Chap. 3, "Fraud," January 1993.

