Message: PROCESS FOR HANDLING § 96.3-7-b CASES

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:32:14 PM
Item ID:	40861419
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Mark History:

No reviewing has been done

Policies:

No Policies attached

PROCESS FOR HANDLING § 96.3-7-b CASES

From Wise, Steve [IWD] **Date** Wednesday, August 21, 2013 7:49 AM

To Hillary, Teresa [IWD]; Lewis, Devon [IWD]; Wilkinson, Michael [IWD]; Eklund, David [IWD]

Cc

96.5-7-b AGREEMENT BETWEEN UI DIVISION AND UI APPEALS.doc (54 Kb HTML) REFERENCE CODE 41C.doc (46 Kb HTML)

Below and attached is the process I understand was agreed to. I want to get this out to ALJs ASAP because I had cases yesterday where the issue of participation in the hearing had been added and the fact-finding information was sent to the parties. I know others have had cases like this as well because I got questions on this yesterday. I have also attached some proposed language Appeals will use in cases where the participation issue is addressed. Let me know if you have questions.

OVERVIEW OF AGREEMENT BETWEEN UI DIVISION AND UI APPEALS AND PROCESS FOR HANDLING § 96.3-7-b CASES

During the fact-finding interview, fact finder will make a determination on whether the employer participated in the fact finding interview or not. This will be noted on Notice of UI Fact-finding Interview page (SIR). A check box will be created for this along with one that designates the employer as a base-period employer. UI Division will share a copy of the revised Notice so we can readily pick this out.

For an **Employer Appeal** of a **Decision Granting Benefits** to the claimant in a **Separation Case**.

1. If the **Separation Decision** was issued after **July 2, 2013, or later**, the process depends on whether the employer was a **Base-Period Employer or not.**

2. If the employer was a **Base Period Employer.**
   a. The issue will be the separation issues of discharge and quit and "Whether the claimant was overpaid" and normal Law §§ 96.5-2-a, 96.5-1, & 96.3-7. **Plus:** "Should benefits be repaid by claimant or charged to the employer due to employer's participation in the fact finding? Law § 96.3-7 & 871 IAC 24.50-7.
   b. Administrative file does not have to be sent out unless requested by a party.

c. During intake, the first page of the Notice of UI Fact-finding Interview on ERIC for the reference number being appealed should be printed out for the ALJ since it has information about whether the employer is a base-period employer and who participated in the hearing. This is where Claims is supposed to put the check boxes for participation or non-participation.

d. During the hearing, the ALJ will check the Notice of UI Fact-finding Interview and ERIC for the decision in question for employer participation and ask the parties about participation.

   i. If the employer agrees that it did not participate in the fact-finding interview and ALJ reverses the decision granting benefits creating an overpayment—ALJ issues decision that (1) the claimant was overpaid benefits but (2) the claimant is not required to repay those benefits and (3) the employer is not relieved of benefit charges because the employer failed to participate.

   ii. If the claimant and employer agree that the employer participated in the fact-finding interview and ALJ reverses the decision granting benefits creating an overpayment—ALJ issues decision that (1) the claimant was overpaid benefits and (2) the claimant is required to repay the benefits because the employer participated.

   iii. If the parties the claimant and employer do not agree that the employer participated in the fact-finding interview and there is no proper way to resolve the issue without sending out the fact-finding documents to the parties—ALJ issues decision (1) that the claimant was overpaid benefits and (2) remanding the issue of whether the employer participated and whether benefits should be repaid by claimant or charged to the employer due to employer's participation in the fact finding

3. If the employer was a **Non-Base Period Employer**.

   a. Keep in mind that charges to the employer's account are not involved in these type of cases where there is an overpayment.

   b. The issue will be as now the separation issues of discharge and quit and "Whether the claimant was overpaid and normal Law §§, 96.5-2-a, 96.5-1, & 96.3-7. **Plus:** Should benefits be repaid by claimant due to employer's participation in the fact finding? Law § 96.3-7 and 871 IAC 24.50-7.

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4. If the **Separation Decision** was issued **July 1, 2013, or before** there is no change in what is being done (these will be few and far between now).
   a. The issue will be as now the separation issues of discharge and quit and "Whether the claimant was overpaid" and normal Law §§ 96.5-2-a, 96.5-1, & 96.3-7.
   b. Administrative file does not have to be sent out unless requested by a party.
   c. These cases **do not** involve the issue of whether the employer is to be charged for the overpayment.
   d. ALJ can remand as before on the issue of amount of the overpayment and whether repayment of the overpayment is required.

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REFERENCE CODE 41C-1

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the claimant did not receive benefits due to fraud and willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer's account remains subject to charge for the overpaid benefits.

REFERENCE CODE 41C-2

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the finding interview, the claimant is required to repay the overpayment and the employer's account will not be charged for benefits.

Message: RE: PROCESS FOR HANDLING § 96.3-7-b CASES

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:32:14 PM
Item ID:	40861421
Policy Action:	Not Specified

Mark History:

No reviewing has been done

Policies:

No Policies attached

RE: PROCESS FOR HANDLING § 96.3-7-b CASES

From Wise, Steve [IWD] **Date** Wednesday, August 21, 2013 8:30 AM
To Lewis, Devon [IWD]
Cc

Changes agreed to.

From: Lewis, Devon [IWD]
Sent: Wednesday, August 21, 2013 8:30 AM
To: Wise, Steve [IWD]
Subject: RE: PROCESS FOR HANDLING § 96.3-7-b CASES

Suggested changes highlighted.
Issued July 2 or later?
Remove 'Keep in mind that'

Excellent explanation and outline, Steve! Thank you

From: Wise, Steve [IWD]
Sent: Wednesday, August 21, 2013 7:49 AM
To: Hillary, Teresa [IWD]; Lewis, Devon [IWD]; Wilkinson, Michael [IWD]; Eklund, David [IWD]
Subject: PROCESS FOR HANDLING § 96.3-7-b CASES

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Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:32:14 PM
Item ID:	40861423
Policy Action:	Not Specified

Mark History:

No reviewing has been done

Policies:

No Policies attached

RE: PROCESS FOR HANDLING § 96.3-7-b CASES

From Wise, Steve [IWD] **Date** Wednesday, August 21, 2013 9:15 AM
To Hillary, Teresa [IWD]
Cc Lewis, Devon [IWD]

My opinion is if the participation issue was listed on the hearing notice and the party fails to participate in the appeal hearing, they have lost their opportunity to argue about whether the employer did or did not participate. Again, if the employer participation issue is unclear from looking at the fact-finding, I am going to remand.

From: Hillary, Teresa [IWD]
Sent: Wednesday, August 21, 2013 8:37 AM
To: Wise, Steve [IWD]
Cc: Lewis, Devon [IWD]
Subject: RE: PROCESS FOR HANDLING § 96.3-7-b CASES

I think it looks good. I too had my first OP case with the new issues on it yesterday. My cl did not participate in the hearing. My facts were the classic and #2 on your example. I have the ff notes and am going to make a decn re: participation since it is clear to me. When one party does not participate in our hearing, I am not automatically considering that 'disagreement" on the participation issue. I want to make sure I'm on the right page with the policy. So I'm am reversing the separation case, requiring repayment by the claimant and relieving the Er of charges.

Let me know if I'm wrong,

Teresa K. Hillary
Iowa Workforce Development
1000 E Grand Avenue
Des Moines IA 50319

Phone: 515.725.2683
FAX: 515.242.5144

From: Wise, Steve [IWD]
Sent: Wednesday, August 21, 2013 7:49 AM

To: Hillary, Teresa [IWD]; Lewis, Devon [IWD]; Wilkinson, Michael [IWD]; Eklund, David [IWD]
Subject: PROCESS FOR HANDLING § 96.3-7-b CASES

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Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:32:14 PM
Item ID:	40861426
Policy Action:	Not Specified

Mark History:
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Policies:
No Policies attached

RE: PROCESS FOR HANDLING § 96.3-7-b CASES

From Wise, Steve [IWD]
Date Wednesday, August 21, 2013 10:19 AM
To Wilkinson, Michael [IWD]; Hillary, Teresa [IWD]; Lewis, Devon [IWD]; Eklund, David [IWD]; West, Ryan [IWD]
Cc

UIPL_2_12_Chg1_Att.pdf (90 Kb HTML)

The program letter I have sent out before has information on page 4 about how reimbursing employer are to be handled.

From: Wilkinson, Michael [IWD]
Sent: Wednesday, August 21, 2013 10:10 AM
To: Wise, Steve [IWD]; Hillary, Teresa [IWD]; Lewis, Devon [IWD]; Eklund, David [IWD]; West, Ryan [IWD]
Subject: FW: PROCESS FOR HANDLING § 96.3-7-b CASES

Steve, thank you for putting this together. I have made a few edits however did not alter the integrity or intent of the document. I would prefer to call this a procedure document and not an agreement.

Dave, do you think there will be any issues for reimbursable employers on charges?

From: Wise, Steve [IWD]
Sent: Wednesday, August 21, 2013 7:49 AM
To: Hillary, Teresa [IWD]; Lewis, Devon [IWD]; Wilkinson, Michael [IWD]; Eklund, David [IWD]
Subject: PROCESS FOR HANDLING § 96.3-7-b CASES

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    a. The issue will be the separation issues of discharge and quit and "Whether the claimant was overpaid" and normal Law §§ 96.5-2-a, 96.5-1, & 96.3-7. **Plus:** "Should benefits be repaid by claimant or charged to the employer due to employer's participation in the fact finding? Law § 96.3-7 & 871 IAC 24.50-7.
    b. Administrative file does not have to be sent out unless requested by a party.
    c. During intake, the first page of the Notice of UI Fact-finding Interview on ERIC for the reference number being appealed should be printed out for the ALJ since it has information about whether the employer is a base-period employer and who participated in the hearing. This is where Claims is supposed to put the check boxes for participation or non-participation.
    d. During the hearing, the ALJ will check the Notice of UI Fact-finding Interview and ERIC for the decision in question for employer participation and ask the parties about participation.
        i. If the employer agrees that it did not participate in the fact-finding interview and ALJ reverses the decision granting benefits creating an overpayment—ALJ issues decision that (1) the claimant was overpaid benefits but (2) the claimant is not required to repay those benefits and (3) the employer is not relieved of benefit charges because the employer failed to participate.
        ii. If the claimant and employer agree that the employer participated in the fact-finding interview and ALJ reverses the decision granting benefits creating an overpayment—ALJ issues decision that (1) the claimant was overpaid benefits and (2) the claimant is required to repay the benefits because the employer participated.
        iii. If the parties the claimant and employer do not agree that the employer participated in the fact-finding interview and there is no proper way to resolve the issue without sending out the fact-finding documents to the parties—ALJ issues decision (1) that the claimant was overpaid benefits and (2) remanding the issue of whether the employer participated and whether benefits should be repaid by claimant or charged to the employer due to employer's participation in the fact finding

3. If the employer was a **Non-Base Period Employer**.
    a. Keep in mind that charges to the employer's account are not involved in these type of cases where there is an overpayment.
    b. The issue will be as now the separation issues of discharge and quit and "Whether the claimant was overpaid and normal Law §§, 96.5-2-a, 96.5-1, & 96.3-7. **Plus:** Should benefits be repaid by claimant due to employer's participation in the fact finding? Law § 96.3-7 and 871 IAC 24.50-7.
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    e. During the hearing, the ALJ will check the Notice of UI Fact-finding Interview and ERIC for the decision in question for employer participation and ask the parties about participation.

i. If the employer agrees that it did not participate in the fact-finding interview and ALJ reverses the decision granting benefits creating an overpayment—ALJ issues decision that (1) the claimant was overpaid benefits but (2) the claimant is not required to repay those benefits.

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iii. If the parties the claimant and employer do not agree that the employer participated in the fact-finding interview and there is no proper way to resolve the issue without sending out the fact-finding documents to the parties—ALJ issues decision (1) that the claimant was overpaid benefits and (2) remanding the issue of whether the employer participated and whether benefits should be repaid by claimant.

4. If the **Separation Decision** was issued **July 1, 2013, or before** there is no change in what is being done (these will be few and far between now).
   a. The issue will be as now the separation issues of discharge and quit and "Whether the claimant was overpaid" and normal Law §§ 96.5-2-a, 96.5-1, & 96.3-7.
   b. Administrative file does not have to be sent out unless requested by a party.
   c. These cases **do not** involve the issue of whether the employer is to be charged for the overpayment.
   d. ALJ can remand as before on the issue of amount of the overpayment and whether repayment of the overpayment is required.

- Image 1
- Image 2
- Image 3
- Image 4
- Image 5
- Image 6

Image 1

Attachment to UIPL 02-12, Change 1

1

Unemployment Compensation (UC) Program Integrity
Amendments made by the Trade Adjustment Assistance Extension Act of 2011 (TAAEA)
Questions and Answers

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Image 2

Attachment to UIPL 02-12, Change 1

2

Unemployment Compensation (UC) Program Integrity
Amendments made by the Trade Adjustment Assistance Extension Act of 2011
Questions and Answers

A.

1. **Appeals**

Mandatory Penalty Assessment on Fraud Claims/Overpayments

Question: May an individual appeal the mandatory "penalty" on fraud overpayments?

Answer: Yes. While an individual may appeal a penalty assessment, the percentage of the penalty is not an issue on which an appellate authority has any discretion since it is set by Federal law. The individual may, however, raise an issue concerning whether the amount on which the penalty is assessed was correct. Under all state UC laws,

individuals may also appeal an overpayment determination, and whether or not it constituted fraud. If the decision changes the overpayment determination from fraud to non-fraud, the mandatory Federal penalty would not be applicable. This requirement applies to any fraud overpayment determination made after October 21, 2013, or earlier if the state enacts legislation with an earlier effective date, as one of the conditions for the state to continue to receive UC administrative grants.

2. **Federal UC Programs**

Question: Does the requirement that states immediately deposit receipts of the Federally-mandated penalties on fraud overpayments into the unemployment fund of the state apply to the Federal UC programs (i.e., Disaster Unemployment Assistance (DUA); Trade Readjustment Allowances (TRA); UC for Federal Employees (UCFE); UC for ExServicemembers (UCX); Federal Additional Compensation (FAC); and Emergency Unemployment Compensation (EUC))?

Answer: Yes. Although the repayment of the amount of the actual overpayment must be made to the fund from which the payment was made, the penalty mandated under TAAEA must be deposited into the state's account in the Unemployment Trust Fund (UTF) and used for the payment of UC. This is because section 251(b)(1) of the TAAEA requires that the state must "deposit any such penalty received in the same manner as the State ... deposits such penalties under the provisions of State law implementing section 303(a)(11)" of the Social Security Act (SSA).

3. **Reporting for Federal UC Programs**

Question: Are states required to report the penalty amount on a fraud overpayment for Federal UC claims on the Employment and Training Administration (ETA) 2112, *Unemployment Insurance (UI) Financial Transaction Summary*?

Answer: Yes. States must report any recovered penalty amounts deposited into the state's account in the UTF on line 12 of the ETA 2112 report (OMB No. 1205-0154). Instructions for the completion of the ETA 2112 report are contained in UI Reports Handbook No. 401, Section II-1-1.

Image 3

Attachment to UIPL 02-12, Change 1

3

4. **Overpayment Waivers**

Question: May the state waive the Federally-mandated penalty?

Answer: No. Section 303(a)(11) of SSA has no provision allowing for a waiver of this penalty. However, if the state has a fraud penalty in its statute greater than the 15 percent Federally-mandated penalty, any amount above the 15 percent may be waived in accordance with the state UC law.

B.

1. **Combined Wage Claims (CWC)**

Prohibition on Noncharging Due to Employer Fault

a. **Question**: When an out-of-state employer on a CWC is determined to be at fault for failing to respond timely or adequately to a request for information about a claim, how will the paying state notify the transferring state that this (out-of-state) employer must be charged?

Answer: The paying state must transmit a copy of the employer's charge notice to the transferring state or include notification of the charges in the comments section of the IB-6, Statement of Benefits Paid to Combined-Wage Claimants, sent to the transferring state. We are also exploring other options to facilitate this needed exchange of information between states.

b. **Question**: What if the separating employer is an out-of-state employer with no base period wages to transfer on a CWC (i.e., the wages are outside of the base period of the CWC), and this employer, or the employer's agent, is determined be at fault for failing to respond timely or adequately to the agency's request for information relating to a claim?

Answer: The noncharging prohibition applies only when an employer is potentially chargeable. In the example cited above, there would be no charging of benefit payments because the employer is not subject to the paying state's law and is not chargeable under the transferring state's law. If feasible, such employer's account may be "flagged" in the event a later claim for UC is filed and the wages from this separating employer are used in establishing a new claim.

2. **Employer Notification of Charges**

Question: What type of notification must states provide to the employer when the state determines that the employer, or the employer's agent, was at fault for failing to respond timely or adequately to a request for information relating to a claim, which caused an overpayment?

Answer: A state must follow its own law concerning notification of charges to an employer, or its agent. This notice must provide identifying claimant information such as the claimant name, social security number, and the reason(s) for the determination.

Image 4

Attachment to UIPL 02-12, Change 1

4

3. **Employer Appeals**

a. **Question**: In the case of a CWC, if an out-of-state employer from the transferring state (i.e., the state that transfers wages to the paying state) files an appeal about charges from a CWC, which state (the paying state or the transferring state) is responsible for conducting the appeals hearing?

Answer: The employer may appeal the chargeability of the overpaid benefits and the appeal would be heard by the paying state, since the paying state is using the wages and has responsibility under its law to charge or non-charge the employer's account for the CWC.

b. **Question**: May an employer appeal the state's determination that the employer (or its agent) is at fault for failing to respond timely or adequately to the agency's request for information relating to a claim?

Answer: Yes. The employer may appeal the determination by the state that the employer was at fault for "failing to respond... timely and adequately...." However, the remedy, that is, the prohibition on noncharging, is not an issue on which an appellate authority has any discretion since it is set by Federal law. This requirement relates to any overpayment determination made after October 21, 2013, or earlier if the state enacts legislation with an earlier effective date, as one of the conditions for the state to continue to receive administrative grants.

4. **Reimbursing Employers**

a. **Question**: If a reimbursing employer has been determined to be at fault for failing to respond timely or adequately to a request for information resulting in an overpayment (and this fault was part of a pattern) but the state later recovers the overpayment, may the state apply a credit to the reimbursing employer?

Answer: No, if a pattern has been established the state may not apply a credit to the reimbursing employer.

As with contributory employers, the reimbursing employer may appeal the state's determination that the employer was at fault. If the appellate authority upholds the determination, the appellate authority is required under Federal law to deny the credit to the reimbursing employer. This requirement applies to any overpayment determination made after October 21, 2013, or earlier if the state enacts legislation

with an earlier effective date, as one of the conditions for the state to continue to receive administrative grants.

b. **Question**: Are section 501(c)(3) non-profit organizations, governmental agencies, or Indian Tribes that elect to be contributory employers instead of reimbursing employers treated any differently than for-profit employers determined to be at fault for failing to respond timely or adequately to information requests by the agency (resulting in a UC overpayment)?

Answer: No. Employers that "elect" to be treated as contributory employers must be treated the same as all other employers for this purpose, because all employers must be rated over the same time period using the same factor(s) (including noncharging) which bear a direct relation to the employers' experience with unemployment.

Image 5

Attachment to UIPL 02-12, Change 1

5

5. **Pattern of Failing to Respond Timely and Adequately to Requests for Information**

Question: If a state decides to adopt a standard that includes a "pattern" of failing to respond timely and adequately to information requests, what period of time does the state need to evaluate?

Answer: Each state must develop its own definition of what it means to establish a pattern of failing to respond timely and adequately to requests for information including the period of time involved.

6. **Employer Agents**

Question: Is the state's evaluation of an employer's agent failing to respond timely or adequately to the agency's requests related to the agent's overall pattern for all of its client employers or related to each individual client employer the agent represents?

Answer: A state may evaluate the agent's overall pattern, or at its option, the agent's pattern related to each individual client employer that it represents. NOTE: The Department has modified its initial interpretation provided in section 5.D of UIPL No. 02-12. Because the statute does not explicitly require charging of benefits if the agent has a pattern overall and a particular client employer does not have a pattern, we have

changed our interpretation to permit states maximum flexibility.

7. **Monetary Determinations**

Question: The state agency uses an affidavit of earnings/wages submitted by the claimant when the employer does not file a timely contribution report or fails to report the claimant on the contribution report. If it is later determined that the affidavit of wages was incorrect, causing an overpayment, would the prohibition on noncharging be applicable?

Answer: The employer's failure to file a timely contribution report or to include a claimant on a timely filed contribution report, by itself, is not subject to the prohibition on noncharging. However, if, for example, because of a contribution report delinquency, the state agency requests information from an employer (or the employer's agent) and the employer or agent fails to respond timely or adequately to that request, the prohibition on noncharging may apply depending on whether the state law requires a pattern of such failure and whether such pattern has been established.

C.

1. **Question**: Why will the Department of Health and Human Services (HHS), as opposed to the Department, provide guidance to those states that may need state statutory changes to address the expanded scope of individuals reported to the State Directory of New Hires?

Reporting of Rehired Employees to the Directory of New Hires

Answer: The statute makes HHS responsible for determining if statutory changes are required in the state.

Image 6

Attachment to UIPL 02-12, Change 1

6

2. **Question**: Are states permitted to establish a penalty for an employer that fails to report properly or timely to the Directory of New Hires?

Answer: Yes. Section 453A(d) of the SSA (42 U.S.C. 653A(d)) allows states to impose the following penalties for an employer failing to properly or timely report new hires.

See below:

(d) Civil money penalties on noncomplying employers—
The State shall have the option to set a State civil money penalty which shall not exceed -
(1) $25 per failure to meet the requirements of this section with respect to a newly

hired employee; or
(2) $500 if, under State law, the failure is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a

false or incomplete report.

D.

1. **Question**: What are the consequences if a state fails to implement the mandatory penalty

for fraud overpayments?
Consequences for Failure to Implement the Program Integrity Changes

Answer: A state's failure to implement the penalty would be grounds for initiating conformity proceedings to deny certifying the state for grants for the administration of the state UC law until such time as the law conformed to the requirements of Section 303(a)(11), SSA.

2. **Question**: What are the consequences if a state fails to provide that an employer's account will not be relieved of charges relating to a payment from the state unemployment fund as required by Section 3303(f)(1), FUTA?

Answer: A state's failure to prohibit relief from charging would be grounds for initiating proceedings to withhold the certification that permits all contributing employers to take the "additional" credit provided for in Section 3302(b), FUTA. The withholding of certification would remain until such time that the state passes legislation conforming with Section 3303(f), FUTA.

Message: RE: Recap of August 9 Meeting

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:32:12 PM
Item ID:	40861345
Policy Action:	Not Specified

Mark History:

No reviewing has been done

Policies:

No Policies attached

RE: Recap of August 9 Meeting

From Hillary, Teresa [IWD]

Date Tuesday, August 13, 2013 3:58 PM

To Wilkinson, Michael [IWD]; Wise, Steve [IWD]; Eklund, David [IWD]; Lewis, Devon [IWD]

Cc

Works for me and Devon has no problem. If on Thursday must be 1:00 pm to accommodate Devon's other meetings.

From: Wilkinson, Michael [IWD]
Sent: Tuesday, August 13, 2013 3:54 PM
To: Wise, Steve [IWD]; Eklund, David [IWD]; Lewis, Devon [IWD]
Cc: Hillary, Teresa [IWD]
Subject: RE: Recap of August 9 Meeting

I apologize, but could we put this off until Thursday or Friday? Dave and I have a couple critical deadlines that came up after we talked. Please recommend time and I will get a call set up.

From: Wise, Steve [IWD]
Sent: Tuesday, August 13, 2013 2:42 PM
To: Wilkinson, Michael [IWD]; Eklund, David [IWD]; Lewis, Devon [IWD]
Cc: Hillary, Teresa [IWD]
Subject: RE: Recap of August 9 Meeting

Are we still on for 4 pm today? If you give me your phone numbers I can just set up the conference call like we do for hearings unless we have more parties to add. So far, I do not see that a reservation phone conference has been set up.

From: Wise, Steve [IWD]
Sent: Monday, August 12, 2013 9:23 AM
To: Lewis, Devon [IWD]; Wilkinson, Michael [IWD]; Eklund, David [IWD]
Cc: Hillary, Teresa [IWD]
Subject: Recap of August 9 Meeting

Recap of August 9 Meeting
Attendees: Steve Wise, Devon Lewis, Mike Wilkinson, Dave Eklund

The meeting was to discuss implementation of Iowa Code § 96.3-7-b overpayment provisions. The director had wanted us to hash out a solution to this.

The initial position of the UI Division was at the time of fact-finding, the fact-finder would issue a separation decision and a summary letter on employer participation reading: A decision regarding the separation of employment has been adjudicated allowing unemployment benefits to the claimant listed above. This decision was issued without the above listed employer's participation in the fact finding interview conducted on (date) . Steve brought up the point that the summary letter as drafted may not meet DOL requirements since it does not mention employer charges if an overpayment occurs due to a failure to participate. Mike agreed that it would probably have to be reworked.

Appeals' initial position was that the summary letters with right of appeal create workflow problems and potential confusion to the parties about what is being appealed, what information needs to be sent out to the parties, and what to do with the cases where IWD makes an informal determination that the employer participated, which results in the claimant being required to repay the overpayment without an opportunity to contest the determination that the employer participated. Appeals would prefer to limit the appeal hearing to the separation issue and remand where an initial grant of benefits is reversed and an overpayment is created. This would involve fewer decisions being issued to the parties and limit those decisions to cases where non-participation has a practical effect since it would only involve cases where an initial grant of benefits is reversed and the claimant actually received benefits.

We also discussed the fact that determinations of participation would only have to be made in separation cases because the statute limits it to cases where an "overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment." Dave and Steve also agreed that the charge provisions of 96.3-7-b would only apply to base-period employers because the penalty for non-participation is the employer cannot be relieved of charges.

In response to the argument that the Appeals position involved extra work, Steve suggested that the process could be automated so the fact-finder would flag the file noting a determination as to whether the employer participated or not. Then, in the limited number of cases where an initial award of benefits is reversed on appeal on a separation case where the claimant has received benefits, the UI division could automatically issue an appealable decision: (1) The claimant is overpaid, but repayment is not required and the employer is charged for the overpayment because the employer failed to participate. (2) The claimant is overpaid, and repayment is required because the employer participated. Mike suggested this would generate many more appeals than under the UI division's summary letter proposal. Appeals' response was that we would accept whatever appeals are generated to make the adjudication process cleaner and to only take up the non-participation issue in cases where it is necessary. We hear this type of cases right now when

claimants appeal overpayment decisions (which are still necessary), and they are simple and straightforward.

One idea bounced around was not sending out summary letters. Instead, at the appeal hearing, the ALJ would check the fact-finding notes and explore with the parties the non-participation issue. If the employer admitted on the record that the employer did not participate or the claimant admitted that the employer did participate, an appeals decision on the participation issue would be issued along with the separation decision. Appeals would have to add the issue of whether the employer participated and is chargeable for benefits paid to the hearing notices to make the parties aware of the legal issues to be considered at the hearing. If the employer does not admit that it failed to participate at the fact-finding or the claimant does not admit that the employer did participate in the fact-finding, then the case would be remanded. This also recognizes that there will likely be some cases where remand is necessary due to the unavailability of fact-finding documents. UI Division will need to have new ANDs decisions to handle this cases in any event.

Steven A. Wise
Administrative Law Judge
515-281-3747

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Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:32:12 PM
Item ID:	40861346
Policy Action:	Not Specified

Mark History:

No reviewing has been done

Policies:

No Policies attached

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Cc Hillary, Teresa [IWD]

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Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:32:12 PM
Item ID:	40861340
Policy Action:	Not Specified

Mark History:

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We also discussed the fact that determinations of participation would only have to be made in separation cases because the statute limits it to cases where an "overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment." Dave and Steve also agreed that the charge provisions of 96.3-7-b would only apply to base-period employers because the penalty for non-participation is the employer cannot be relieved of charges.

In response to the argument that the Appeals position involved extra work, Steve suggested that the process could be automated so the fact-finder would flag the file noting a determination as to whether the employer participated or not. Then, in the limited number of cases where an initial award of benefits is reversed on appeal on a separation case where the claimant has received benefits, the UI division could automatically issue an appealable decision: (1) The claimant is overpaid, but repayment is not required and the employer is charged for the overpayment because the employer failed to participate. (2) The claimant is overpaid, and repayment is required because the employer participated. Mike suggested this would generate many more appeals than under the UI division's summary letter proposal. Appeals' response was that we would accept whatever appeals are generated to make the adjudication process cleaner and to only take up the non-participation issue in cases where it is necessary. We hear this type of cases right now when claimants appeal overpayment decisions (which are still necessary), and they are simple and straightforward.

One idea bounced around was not sending out summary letters. Instead, at the appeal hearing, the ALJ would check the fact-finding notes and explore with the parties the non-participation issue. If the employer admitted on the record that the employer did not participate or the claimant admitted that the employer did participate, an appeals decision on the participation issue would be issued along with the separation decision. Appeals would have to add the issue of whether the employer participated and is chargeable for benefits paid to the hearing notices to make the parties aware of the legal issues to be considered at the hearing. If the employer does not admit that it failed to participate at the fact-finding or the claimant does not admit that the employer did participate in the fact-finding, then the case would be remanded. This also recognizes that there will likely be some cases where remand is necessary due to the unavailability of fact-finding documents. UI Division will need to have new ANDs decisions to handle this cases in any event.

Steven A. Wise
Administrative Law Judge
515-281-3747

BE GREEN – Please consider the environment before printing this e-mail.

Message: Recap of August 9 Meeting

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:32:10 PM
Item ID:	40861304
Policy Action:	Not Specified

Mark History:

No reviewing has been done

Policies:

No Policies attached

Recap of August 9 Meeting

From	Wise, Steve [IWD]	**Date**	Monday, August 12, 2013 9:23 AM
To	Lewis, Devon [IWD]; Wilkinson, Michael [IWD]; Eklund, David [IWD]		
Cc	Hillary, Teresa [IWD]		

Recap of August 9 Meeting
Attendees: Steve Wise, Devon Lewis, Mike Wilkinson, Dave Eklund

The meeting was to discuss implementation of Iowa Code § 96.3-7-b overpayment provisions. The director had wanted us to hash out a solution to this.

The initial position of the UI Division was at the time of fact-finding, the fact-finder would issue a separation decision and a summary letter on employer participation reading: A decision regarding the separation of employment has been adjudicated allowing unemployment benefits to the claimant listed above. This decision was issued without the above listed employer's participation in the fact finding interview conducted on (date) . Steve brought up the point that the summary letter as drafted may not meet DOL requirements since it does not mention employer charges if an overpayment occurs due to a failure to participate. Mike agreed that it would probably have to be reworked.

Appeals' initial position was that the summary letters with right of appeal create workflow problems and potential confusion to the parties about what is being appealed, what information needs to be sent out to the parties, and what to do with the cases where IWD makes an informal determination that the employer participated, which results in the claimant being required to repay the overpayment without an opportunity to contest the determination that the employer participated. Appeals would prefer to limit the appeal hearing to the separation issue and remand where an initial grant of benefits is reversed and an overpayment is created. This would involve fewer decisions

being issued to the parties and limit those decisions to cases where non-participation has a practical effect since it would only involve cases where an initial grant of benefits is reversed and the claimant actually received benefits.

We also discussed the fact that determinations of participation would only have to be made in separation cases because the statute limits it to cases where an "overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment." Dave and Steve also agreed that the charge provisions of 96.3-7-b would only apply to base-period employers because the penalty for non-participation is the employer cannot be relieved of charges.

In response to the argument that the Appeals position involved extra work, Steve suggested that the process could be automated so the fact-finder would flag the file noting a determination as to whether the employer participated or not. Then, in the limited number of cases where an initial award of benefits is reversed on appeal on a separation case where the claimant has received benefits, the UI division could automatically issue an appealable decision: (1) The claimant is overpaid, but repayment is not required and the employer is charged for the overpayment because the employer failed to participate. (2) The claimant is overpaid, and repayment is required because the employer participated. Mike suggested this would generate many more appeals than under the UI division's summary letter proposal. Appeals' response was that we would accept whatever appeals are generated to make the adjudication process cleaner and to only take up the non-participation issue in cases where it is necessary. We hear this type of cases right now when claimants appeal overpayment decisions (which are still necessary), and they are simple and straightforward.

One idea bounced around was not sending out summary letters. Instead, at the appeal hearing, the ALJ would check the fact-finding notes and explore with the parties the non-participation issue. If the employer admitted on the record that the employer did not participate or the claimant admitted that the employer did participate, an appeals decision on the participation issue would be issued along with the separation decision. Appeals would have to add the issue of whether the employer participated and is chargeable for benefits paid to the hearing notices to make the parties aware of the legal issues to be considered at the hearing. If the employer does not admit that it failed to participate at the fact-finding or the claimant does not admit that the employer did participate in the fact-finding, then the case would be remanded. This also recognizes that there will likely be some cases where remand is necessary due to the unavailability of fact-finding documents. UI Division will need to have new ANDs decisions to handle this cases in any event.

Steven A. Wise
Administrative Law Judge
515-281-3747

BE GREEN – Please consider the environment before printing this e-mail.

Message: RE: PROCESS FOR HANDLING § 96.3-7-b CASES

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:32:14 PM
Item ID:	40861420
Policy Action:	Not Specified

Mark History:

No reviewing has been done

Policies:

No Policies attached

RE: PROCESS FOR HANDLING § 96.3-7-b CASES

From Hillary, Teresa [IWD] **Date** Wednesday, August 21, 2013 8:37 AM
To Wise, Steve [IWD]
Cc Lewis, Devon [IWD]

I think it looks good. I too had my first OP case with the new issues on it yesterday. My cl did not participate in the hearing. My facts were the classic and #2 on your example. I have the ff notes and am going to make a decn re: participation since it is clear to me. When one party does not participate in our hearing, I am not automatically considering that 'disagreement" on the participation issue. I want to make sure I'm on the right page with the policy. So I'm am reversing the separation case, requiring repayment by the claimant and relieving the Er of charges.

Let me know if I'm wrong,

Teresa K. Hillary
Iowa Workforce Development
1000 E Grand Avenue
Des Moines IA 50319

Phone: 515.725.2683
FAX: 515.242.5144

From: Wise, Steve [IWD]
Sent: Wednesday, August 21, 2013 7:49 AM
To: Hillary, Teresa [IWD]; Lewis, Devon [IWD]; Wilkinson, Michael [IWD]; Eklund, David [IWD]

Subject: PROCESS FOR HANDLING § 96.3-7-b CASES

Below and attached is the process I understand was agreed to. I want to get this out to ALJs ASAP because I had cases yesterday where the issue of participation in the hearing had been added and the fact-finding information was sent to the parties. I know others have had cases like this as well because I got questions on this yesterday. I have also attached some proposed language Appeals will use in cases where the participation issue is addressed. Let me know if you have questions.

OVERVIEW OF AGREEMENT BETWEEN UI DIVISION AND UI APPEALS AND PROCESS FOR HANDLING § 96.3-7-b CASES

During the fact-finding interview, fact finder will make a determination on whether the employer participated in the fact finding interview or not. This will be noted on Notice of UI Fact-finding Interview page (SIR). A check box will be created for this along with one that designates the employer as a base-period employer. UI Division will share a copy of the revised Notice so we can readily pick this out.

For an **Employer Appeal** of a **Decision Granting Benefits** to the claimant in a **Separation Case**.

1. If the **Separation Decision** was issued after **July 2, 2013, or later**, the process depends on whether the employer was a **Base-Period Employer or not.**

2. If the employer was a **Base Period Employer.**
   a. The issue will be the separation issues of discharge and quit and "Whether the claimant was overpaid" and normal Law §§ 96.5-2-a, 96.5-1, & 96.3-7. **Plus:** "Should benefits be repaid by claimant or charged to the employer due to employer's participation in the fact finding? Law § 96.3-7 & 871 IAC 24.50-7.
   b. Administrative file does not have to be sent out unless requested by a party.
   c. During intake, the first page of the Notice of UI Fact-finding Interview on ERIC for the reference number being appealed should be printed out for the ALJ since it has information about whether the employer is a base-period employer and who participated in the hearing. This is where Claims is supposed to put the check boxes for participation or non-participation.
   d. During the hearing, the ALJ will check the Notice of UI Fact-finding Interview and ERIC for the decision in question for employer participation and ask the parties about participation.
      i. If the employer agrees that it did not participate in the fact-finding interview and ALJ reverses the decision granting benefits creating an overpayment—ALJ issues decision that (1) the claimant was overpaid benefits but (2) the claimant is not required to repay those benefits and (3) the employer is not relieved of benefit charges because the employer failed to participate.
      ii. If the claimant and employer agree that the employer participated in the fact-finding interview and ALJ reverses the decision granting benefits creating an overpayment—ALJ issues decision that (1) the claimant was overpaid benefits and (2) the claimant is required to repay the benefits because the employer participated.

   iii. If the parties the claimant and employer do not agree that the employer participated in the fact-finding interview and there is no proper way to resolve the issue without sending out the fact-finding documents to the parties—ALJ issues decision (1) that the claimant was overpaid benefits and (2) remanding the issue of whether the employer participated and whether benefits should be repaid by claimant or charged to the employer due to employer's participation in the fact finding

3. If the employer was a **Non-Base Period Employer**.
   a. Keep in mind that charges to the employer's account are not involved in these type of cases where there is an overpayment.
   b. The issue will be as now the separation issues of discharge and quit and "Whether the claimant was overpaid and normal Law §§, 96.5-2-a, 96.5-1, & 96.3-7. **Plus:** Should benefits be repaid by claimant due to employer's participation in the fact finding? Law § 96.3-7 and 871 IAC 24.50-7.
   c. Administrative file does not have to be sent out unless requested by a party.
   d. During intake, the first page of the Notice of UI Fact-finding Interview on ERIC for the reference number being appealed should be printed out for the ALJ since it has information about whether the employer is a base-period employer and who participated in the hearing. This is where Claims is supposed to put the check boxes for participation or non-participation.
   e. During the hearing, the ALJ will check the Notice of UI Fact-finding Interview and ERIC for the decision in question for employer participation and ask the parties about participation.
      i. If the employer agrees that it did not participate in the fact-finding interview and ALJ reverses the decision granting benefits creating an overpayment—ALJ issues decision that (1) the claimant was overpaid benefits but (2) the claimant is not required to repay those benefits.
      ii. If the claimant and employer agree that the employer participated in the fact-finding interview and ALJ reverses the decision granting benefits creating an overpayment—ALJ issues decision that (1) the claimant was overpaid benefits and (2) the claimant is required to repay the benefits because the employer participated.
      iii. If the parties the claimant and employer do not agree that the employer participated in the fact-finding interview and there is no proper way to resolve the issue without sending out the fact-finding documents to the parties—ALJ issues decision (1) that the claimant was overpaid benefits and (2) remanding the issue of whether the employer participated and whether benefits should be repaid by claimant.

4. If the **Separation Decision** was issued **July 1, 2013, or before** there is no change in what is being done (these will be few and far between now).
   a. The issue will be as now the separation issues of discharge and quit and "Whether the claimant was overpaid" and normal Law §§ 96.5-2-a, 96.5-1, & 96.3-7.
   b. Administrative file does not have to be sent out unless requested by a party.

c. These cases **do not** involve the issue of whether the employer is to be charged for the overpayment.
d. ALJ can remand as before on the issue of amount of the overpayment and whether repayment of the overpayment is required.

Message: Reference Code 41B finaled

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:32:14 PM
Item ID:	40861402
Policy Action:	Not Specified

Mark History:

No reviewing has been done

Policies:

No Policies attached

Reference Code 41B finaled

From Wise, Steve [IWD]

Date Tuesday, August 20, 2013 9:31 AM

To Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Lewis, Devon [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; Wise, Steve [IWD]

Cc Shroyer, Paula [IWD]; Scott, Cheryll [IWD]

REFERENCE CODE 41B.doc (45 Kb HTML)

I sent out a proposed Reference Code 41B last week—got no objections to it. Below is the email where I explained when it would be used. I know people have now had some cases where it applies. I'm only including the paraphrase language for this statute as the Reference Code 41B, not the verbatim statute. I am giving this language to Paula and Cheryll now so if you want to just include Ref 41B in typing your decision, they can just insert it.

This is what I have drafted as language to use or modify for any case you have where you reverse a separation decision granting benefits where the fact-finding interview was on Monday, July 1 or later, which actually means any representative's decision issued July 2 or later because if the decision was issued on July 2, the fact finding was done on July 1. This is language that will be used only until you get an actual case where the parties have been put on notice that the issue of participation will be addressed. If you have a separation case where you reverse a representative's decision granting benefits issued July 1 or before, you will use Reference 41A and remand for a determination as to

whether the claimant has to repay the overpayment only.

Let me know if you have any questions.

Steven A. Wise
Administrative Law Judge
515-281-3747

BE GREEN – Please consider the environment before printing this e-mail.

REFERENCE CODE 41B

Statute Paraphrased with remand language

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The matter of deciding the amount of the overpayment and whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Agency.

Message: Reference 41B Overpayment Remand Language

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:32:13 PM
Item ID:	40861362
Policy Action:	Not Specified

Mark History:

No reviewing has been done

Policies:

No Policies attached

Reference 41B Overpayment Remand Language

From Wise, Steve [IWD]

Date Friday, August 16, 2013 12:52 PM

To Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Lewis, Devon [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; Wise, Steve [IWD]

Cc

This is what I have drafted as language to use or modify for any case you have where you reverse a separation decision granting benefits where the fact-finding interview was on Monday, July 1 or later, which actually means any representative's decision issued July 2 or later because if the decision was issued on July 2, the fact finding was done on July 1. This is language that will be used only until you get an actual case where the parties have been put on notice that the issue of participation will be addressed. If you have a separation case where you reverse a representative's decision granting benefits issued July 1 or before, you will use Reference 41A and remand for a determination as to whether the claimant has to repay the overpayment only.

.

I think this will probably will end up being turned into Reference 41B. There will be Reference 41C that will be used once we start putting the participation on the hearing notice. I am working on that now.

REFERENCE CODE 41B

Statute Paraphrased with remand language

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The matter of deciding the amount of the overpayment and whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Agency.

Full relevant part of Statute with remand language

Iowa Code § 96.3-7-a and 96.3-7-b(1) provide:

> Recovery of overpayment of benefits.
>
> a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
>
> b. (1)(a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.
>
> (b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

The matter of deciding the amount of the overpayment and whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Agency.

Message: Overpayment Remand Changes

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:32:13 PM
Item ID:	40861367
Policy Action:	Not Specified

Mark History:

No reviewing has been done

Policies:

No Policies attached

Overpayment Remand Changes

From Wise, Steve [IWD] **Date** Friday, August 16, 2013 4:18 PM

To Shroyer, Paula [IWD]; Scott, Cheryll [IWD]

Cc Hillary, Teresa [IWD]; Lewis, Devon [IWD]

I am wanting to give you a heads up.

We are going to be handling overpayment remands a bit differently because of a change in the law, which charges employers for overpayment caused by their failing to participate in the fact-finding interview. Previously, the only impact of the employer's lack of participation was the claimant was not required to repay the overpayment. The process generally was to remand those cases to have the agency to make the initial decision on whether to require repayment.

1. So we will have some cases under the old law where ALJ will remand and use Reference 41A or our own paraphrase of it.

2. For the next couple weeks, we will have cases under the new law where as a stopgap measure, we will be remanding for a determination of whether the claimant will have to repay **and whether** the employer will be charged using some different language that will likely be formalized as Reference 41B. I am working on this and will get the Reference 41B to you ASAP.

3. We have started today including on the hearing notice the issue of whether the claimant must repay and the employer be charged for an overpayment due to lack of participation. That will require some different language that I am also work on. This will likely be formalized as Reference 41C. Again, I will get this to you as soon as I can.

Steven A. Wise
Administrative Law Judge
515-281-3747

BE GREEN – Please consider the environment before printing this e-mail.

Message: RE: Claims - Fact-Finding Meetings

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:31:57 PM
Item ID:	40860871
Policy Action:	Not Specified

Mark History:

No reviewing has been done

Policies:

No Policies attached

RE: Claims - Fact-Finding Meetings

From Lewis, Devon [IWD]

Date Thursday, April 25, 2013 7:21 AM

To Mormann, Marlon [IWD]; Wise, Steve [IWD]; Hendricksmeyer, Bonny [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hillary, Teresa [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; McElderry, Stan [IWD]

Cc

Are you volunteering, Marlon? ;-)

From: Mormann, Marlon [IWD]
Sent: Wednesday, April 24, 2013 11:19 AM
To: Wise, Steve [IWD]; Hendricksmeyer, Bonny [IWD]; Lewis, Devon [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hillary, Teresa [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; McElderry, Stan [IWD]
Subject: RE: Claims - Fact-Finding Meetings

The easy way to break this tie is for someone to go to the State Library and discern the legislative history. I am not sure that will change the way the appeal board decides its cases as they seem immune from legislative intent.

Marlon Mormann, Administrative Law Judge
515-265-3512

From: Wise, Steve [IWD]
Sent: Wednesday, April 24, 2013 10:32 AM
To: Mormann, Marlon [IWD]; Hendricksmeyer, Bonny [IWD]; Lewis, Devon [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hillary, Teresa [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]
Subject: RE: Claims - Fact-Finding Meetings

I have attached a couple of decisions of the EAB on this. I believe the 2010 one was what Dan passed out at the staff meeting I referred to earlier and we discussed.

From: Mormann, Marlon [IWD]
Sent: Wednesday, April 24, 2013 10:01 AM
To: Hendricksmeyer, Bonny [IWD]; Lewis, Devon [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hillary, Teresa [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; Wise, Steve [IWD]
Subject: RE: Claims - Fact-Finding Meetings

Good idea Bonny, probably an issue for the legislature and not rule making.

Marlon Mormann, Administrative Law Judge
515-265-3512

From: Hendricksmeyer, Bonny [IWD]
Sent: Wednesday, April 24, 2013 9:56 AM
To: Lewis, Devon [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hillary, Teresa [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; Wise, Steve [IWD]
Subject: RE: Claims - Fact-Finding Meetings

As for all the controversy about being forced to quit or resign, wouldn't it be easier to look into the possibility of amending the administrative code section to state if it is a forced resignation the inquiry is then whether it was a discharge for misconduct?

From: Lewis, Devon [IWD]
Sent: Tuesday, April 23, 2013 7:55 PM
To: Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; Wise, Steve [IWD]
Subject: RE: Claims - Fact-Finding Meetings

I've heard from two people so far. If you have concerns about Claims, now is the time to speak up or begin keeping some examples for future meetings. Make a statement of the concern and attach supporting documentation. Feel free to check with me to see if a concern is already included in topics to be presented.
Thanks,
Dévon

From: Walsh, Joseph [IWD]
Sent: Tuesday, April 09, 2013 1:38 AM
To: Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Lewis, Devon [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; Wise, Steve [IWD]
Subject: Claims - Fact-Finding Meetings

I have asked Devon to gather data to begin regular meetings with the UI Division to address issues which we routinely see. I have been trying to arrange a meeting later this month (targeting April 25).

If you have issues you regularly see with FF please send those issues with a representative example to Devon. You do not need to pile on numbers. In other words if you see a regular issue (for example screwing up timely protests) you do not need to send her 15 examples of it. One representative example is enough. I would like to focus on repeat problems. Rather than something incredibly stupid that happens one time in a million I would like to get at the somewhat stupid things that happen regularly at least to start with. Devon and Teresa will try to prioritize these issues so as not to overwhelm the UI people. Concrete examples are best (maybe the ANDS dec plus the appeal decision).

Joseph L. Walsh
Chief Administrative Law Judge
Unemployment Insurance Appeals
1000 East Grand Avenue
Des Moines, Iowa 50319
Phone: (515) 281-8119
joseph.walsh@iwd.iowa.gov

Message: RE: Claims - Fact-Finding Meetings

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:31:57 PM
Item ID:	40860869
Policy Action:	Not Specified

Mark History:

No reviewing has been done

Policies:

No Policies attached

RE: Claims - Fact-Finding Meetings

From Lewis, Devon [IWD]

Date Wednesday, April 24, 2013 11:00 PM

To Mormann, Marlon [IWD]; Wise, Steve [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; McElderry, Stan [IWD]

Cc

There are enough other issues to present to them without the quit in lieu of discharge issue. If we are in disagreement, we don't want to confuse them until we get it sorted out. I've got plenty of documented issues I've been keeping since 2011 and from Randy's earlier submissions to keep us busy tomorrow. I am hopefully going to have time to have Vanessa scan and e-mail to you what we will present tomorrow afternoon.

With all of this information coming in one or two days before the meeting, I am not going to have time to finish sorting through it all before then anyway. There will be other meetings. Keep track of issues and document enough file info so we can pull supporting documentation. I will not be presenting any issue without it at this point.

Tere and I will let you know how it goes.
Thanks,

Dévon

From: Mormann, Marlon [IWD]
Sent: Wednesday, April 24, 2013 8:00 AM
To: Wise, Steve [IWD]; Lewis, Devon [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; McElderry, Stan [IWD]
Subject: RE: Claims - Fact-Finding Meetings

I agree with Steve on 2 and 3 and take exception to number 1.

I believe legislative history and strict statutory construction do not indicate a quit in lieu of discharge is a misconduct issue. I have attached my shell decision for review. Claims is doing this one right. Devon, please pass my shell to claims for their consideration.

Marlon Mormann, Administrative Law Judge
515-265-3512

From: Wise, Steve [IWD]
Sent: Tuesday, April 23, 2013 9:03 PM
To: Lewis, Devon [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]
Subject: RE: Claims - Fact-Finding Meetings

1. Claim decisions that a claimant was compelled to quit or be discharged therefore the claimant **quit employment with good cause attributable to the employer** and benefits are awarded. ALJs have agreed that this separation must be treated as a discharge and the issue of whether the discharge was for misconduct must be decided.
2. Claim decisions that a claimant who is working part-time being determined to be working the same hours and wages as the original contract of hire when the claim is based on separation from full-time employment.
3. Notice of Claims being issued without an explanation of the figure representing amount of benefits chargeable to an employer in the benefit year.

I will forward others as I think of them.

From: Lewis, Devon [IWD]
Sent: Tuesday, April 23, 2013 7:55 PM
To: Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise,

Debra [IWD]; Wise, Steve [IWD]
Subject: RE: Claims - Fact-Finding Meetings

I've heard from two people so far. If you have concerns about Claims, now is the time to speak up or begin keeping some examples for future meetings. Make a statement of the concern and attach supporting documentation. Feel free to check with me to see if a concern is already included in topics to be presented.
Thanks,
Dévon

From: Walsh, Joseph [IWD]
Sent: Tuesday, April 09, 2013 1:38 AM
To: Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Lewis, Devon [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; Wise, Steve [IWD]
Subject: Claims - Fact-Finding Meetings

I have asked Devon to gather data to begin regular meetings with the UI Division to address issues which we routinely see. I have been trying to arrange a meeting later this month (targeting April 25).

If you have issues you regularly see with FF please send those issues with a representative example to Devon. You do not need to pile on numbers. In other words if you see a regular issue (for example screwing up timely protests) you do not need to send her 15 examples of it. One representative example is enough. I would like to focus on repeat problems. Rather than something incredibly stupid that happens one time in a million I would like to get at the somewhat stupid things that happen regularly at least to start with. Devon and Teresa will try to prioritize these issues so as not to overwhelm the UI people. Concrete examples are best (maybe the ANDS dec plus the appeal decision).

Joseph L. Walsh
Chief Administrative Law Judge
Unemployment Insurance Appeals
1000 East Grand Avenue
Des Moines, Iowa 50319
Phone: (515) 281-8119
joseph.walsh@iwd.iowa.gov

Message: RE: Claims - Fact-Finding Meetings

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:31:57 PM
Item ID:	40860863
Policy Action:	Not Specified

Mark History:
No reviewing has been done

Policies:
No Policies attached

RE: Claims - Fact-Finding Meetings

From Wise, Steve [IWD]

Date Tuesday, April 23, 2013 9:03 PM

To Lewis, Devon [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]

Cc

Notice of Claim.pdf (189 Kb HTML) **Quit or be Discharged ALJ Decision.doc** (52 Kb HTML) **Quit or be Discharged ANDS.pdf** (29 Kb HTML) **Same Hours and Wages ALJ Decision.sw.doc** (49 Kb HTML) **Same Hours and Wages ANDS Decision.pdf** (29 Kb HTML)

1. Claim decisions that a claimant was compelled to quit or be discharged therefore the claimant **quit employment with good cause attributable to the employer** and benefits are awarded. ALJs have agreed that this separation must be treated as a discharge and the issue of whether the discharge was for misconduct must be decided.
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Sent: Tuesday, April 23, 2013 7:55 PM
To: Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; Wise, Steve [IWD]
Subject: RE: Claims - Fact-Finding Meetings

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Thanks,
Dévon

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Sent: Tuesday, April 09, 2013 1:38 AM
To: Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Lewis, Devon [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; Wise, Steve [IWD]
Subject: Claims - Fact-Finding Meetings

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Joseph L. Walsh
Chief Administrative Law Judge
Unemployment Insurance Appeals
1000 East Grand Avenue
Des Moines, Iowa 50319
Phone: (515) 281-8119
joseph.walsh@iwd.iowa.gov

Image 1

IOWA WORKFORCE DEVELOPMENT

UNEMPLOYMENT INSURANCE APPEALS

MARY A NELSON **PO BOX 550** **SOLON IA 52333-0550** **THE UNIVERSITY OF IOWA** **C/O MARY EGGENBURG** **120 USB-BENEFITS OFFICE** **IOWA CITY IA 52242**	68-0157 (9-06) - 3091078 - EI **APPEAL NO. 12A-UI-06454-SWT** **ADMINISTRATIVE LAW JUDGE** **DECISION** APPEAL RIGHTS: **This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to: ***Employment Appeal Board*** ***4th Floor – Lucas Building*** ***Des Moines, Iowa 50319*** ***OR*** ***Fax Number: (515)281-7191*** The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. AN APPEAL TO THE BOARD SHALL STATE CLEARLY: The name, address and social security number of the claimant. A reference to the decision from which the appeal is taken. That an appeal from such decision is being made and such appeal is signed. The grounds upon which such appeal is based. YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits. **SERVICE INFORMATION:** A true and correct copy of this decision was mailed to each of the parties listed.

IOWA WORKFORCE DEVELOPMENT

UNEMPLOYMENT INSURANCE APPEALS

MARY A NELSON **Claimant** **THE UNIVERSITY OF IOWA** **Employer**	68-0157 (9-06) - 3091078 - EI APPEAL NO. **12A-UI-06454-SWT** **ADMINISTRATIVE LAW JUDGE** **DECISION**

	OC: 05/06/12 Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated May 23, 2012, reference 01, that concluded the claimant was eligible for benefits because she was forced to quit or be discharged. A telephone hearing was held on June 26, 2012. The parties were properly notified about the hearing. The claimant participated in the hearing. Mary Eggenburg participated in the hearing on behalf of the employer with a witness, Gordon Tribbey.

ISSUES:

Did the claimant voluntarily quit or was she discharged?

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full-time for the employer as law library associate director from July 1, 1995, to January 3, 2012. About three years before her employment ended, her supervisor told her that she needed to watch her conduct toward employees.

Near the beginning of December 2011, the claimant had become frustrated with a staff member, Druet Klugh. The claimant and other staff members had been cleaning an office. Klugh had moved some of the files that the claimant had organized, which upset the claimant. She went into the office of Dawn Banovitz, administrative services manager, and commented something to the effect: "I could just shoot Druet for moving those files." This was an expression of frustration, not an actual threat of violence toward Klugh. Another employee overheard the comment and reported it to Gordon Tribbey, assistant dean for finance and administration. The claimant was placed on administrative leave on December 15, 2011, pending an investigation into the claimant's conduct.

The employer conducted an investigation and received reports from employees that the claimant had in the past been discourteous, yelled, and used profanity toward employees, and had improperly denied employee's leave. Management decided the claimant had violated the employer's workplace violence, ethics, and anti-retaliation policies. As a result, on January 3, 2012, the employer informed the claimant that she was being terminated or she could resign in lieu of being terminated. The claimant resigned in lieu of being discharged.

The claimant never directed profanity at employees but would at times speak loudly and was abrasive in dealing with employees. She did not deny requested leave to employee unless there was no staff coverage for the library and did not ever do so for retaliatory reasons.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code § 96.5-1 and 96.5-2-a. To voluntarily quit means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship and chooses to leave employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. <u>Wills v. Employment Appeal Board</u>, 447 N.W.2d 137, 138 (Iowa 1989); <u>Peck v. Employment Appeal Board</u>, 492 N.W.2d 438, 440 (Iowa App. 1992). The rules make it clear that a claimant who is given the choice of resigning or being discharged has not voluntarily quit employment. 871 IAC 24.26(21). Instead, the separation must be treated as a discharge and the question of whether the discharge was for misconduct must be determined.

The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such

degree of recurrence as to manifest equal culpability, wrongful intent, or evil design. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not misconduct within the meaning of the statute. 871 IAC 24.32(1).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

Finally, 871 IAC 24.32(8) provides: "While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act."

The current act of alleged misconduct that must be evaluated is the comment the claimant made about Druet Klugh. The claimant testified credibly about this incident, and her testimony outweighs the testimony from Tribbey, who had no personal knowledge of what happened. As my findings show, this comment is a common expression of frustration and could not be reasonably interpreted as an actual threat of violence toward Klugh. I also believe the claimant's credible testimony that she never denied leave for retaliatory or other inappropriate reasons or directed profanity toward employees. The evidence presented by the employer was all hearsay evidence of reported conduct by the claimant without any specificity regarding the dates of the alleged conduct.

While the employer may have been justified in discharging the claimant, no current work-connected misconduct as defined by the unemployment insurance law has been established.

DECISION:

The unemployment insurance decision dated May 23, 2012, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

____

Steven A. Wise

Administrative Law Judge

____

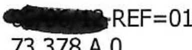
Decision Dated and Mailed

saw/kjw

Image 1

A000604

7494

REF=01
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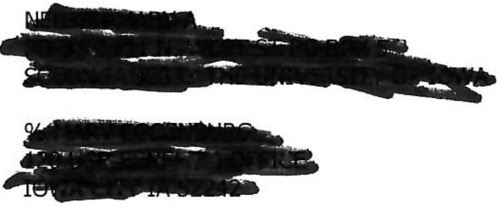

DECISION:
YOU ARE ELIGIBLE TO RECEIVE UNEMPLOYMENT INSURANCE BENEFITS AS LONG AS YOU MEET ALL THE OTHER ELIGIBILITY REQUIREMENTS. THE EMPLOYER'S ACCOUNT MAY BE CHARGED F0R BENEFITS PAID.

EXPLANATION OF DECISION:
OUR RECORDS INDICATE YOU RESIGNED ON 01/03/12. YOU WERE FORCED TO DO SO OR BE DISCHARGED. YOUR QUITTING WAS CAUSED BY YOUR EMPLOYER.

LEGAL REFERENCE:
THIS ALLOWANCE WAS MADE UNDER IOWA ADMINISTRATIVE CODE SECTION 871-24.26(21). A COPY IS AVAILABLE AT ANY WORKFORCE DEVELOPMENT CENTER.

TO APPEAL THIS DECISION:
THIS DECISION BECOMES FINAL UNLESS AN APPEAL IS POSTMARKED BY 06/02/12, OR RECEIVED BY IOWA WORKFORCE DEVELOPMENT APPEAL SECTION BY THAT DATE. IF THIS DATE FALLS ON A SATURDAY, SUNDAY, OR LEGAL HOLIDAY, THE APPEAL PERIOD IS EXTENDED TO THE NEXT WORKING DAY.

QUESTIONS:
IF YOU HAVE QUESTIONS OR NEED INFORMATION, CALL THE WORKFORCE DEVELOPMENT CENTER AT (319) 351-1035 BETWEEN 9 A.M. AND 3 P.M.

IOWA WORKFORCE DEVELOPMENT

UNEMPLOYMENT INSURANCE APPEALS

ROBERT K GLADWELL 3145 M AND W CIRCLE MUSCATINE IA 52761 FAREWAY STORES INC 2300 - 8TH ST BOONE IA 50036	68-0157 (9-06) - 3091078 - EI **APPEAL NO. 12A-UI-11597-SWT** **ADMINISTRATIVE LAW JUDGE** **DECISION** APPEAL RIGHTS: **This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to: *Employment Appeal Board* *4th Floor – Lucas Building* *Des Moines, Iowa 50319* *OR* *Fax Number: (515)281-7191* The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. AN APPEAL TO THE BOARD SHALL STATE CLEARLY: The name, address and social security number of the claimant. A reference to the decision from which the appeal is taken. That an appeal from such decision is being made and such appeal is signed. The grounds upon which such appeal is based. YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits. **SERVICE INFORMATION:** A true and correct copy of this decision was mailed to each of the parties listed.

IOWA WORKFORCE DEVELOPMENT

UNEMPLOYMENT INSURANCE APPEALS

ROBERT K GLADWELL Claimant FAREWAY STORES INC	68-0157 (9-06) - 3091078 - EI **APPEAL NO. 12A-UI-11597-SWT** **ADMINISTRATIVE LAW JUDGE**

Employer	DECISION OC: 04/22/12 Claimant: Appellant (4)

Section 96.4-3 – Able to and Available for Work

Section 96.19-38-b – Eligibility for Partial Unemployment Insurance Benefits

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated September 19, 2012, reference 02, that concluded the claimant was ineligible to receive partial unemployment insurance benefits since his hours and/or wages had not been reduced. A telephone hearing was held on October 22, 2012. The parties were properly notified about the hearing. The claimant failed to participate in the hearing. Theresa Mclaughlin participated in the hearing on behalf of the employer with a witness, Tony Clennan. Official notice is taken of the Agency's records regarding the claimant's unemployment insurance claim, which show the claimant filed a new claim for unemployment insurance benefits effective April 22, 2012, based on his full-time employment with Menasha Packaging Company. His weekly benefit amount was determined to be $374.00. If a party objects to taking official notice of these facts, the objection must be submitted in writing no later than seven days after the date of this decision.

ISSUES:

Is the claimant eligible for partial unemployment insurance benefits?

Was the claimant able to and available for work?

FINDINGS OF FACT:

The claimant filed a new claim for unemployment insurance benefits effective April 22, 2012, based on his full-time employment with Menasha Packaging Company. His weekly benefit amount was determined to be $374.00.

The claimant took a part-time, on-call job with the employer as a meat clerk starting August 6, 2012, and currently is employed on the same basis. He has been working about 20 hours per week at $9.00 per hour.

The claimant filed an additional claim for unemployment insurance benefits August 26, 2012. He has not, however, filed any weekly claims for benefits.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was eligible for partial unemployment insurance benefits effective August 26, 2012.

Iowa Code § 96.3-3 provides:

3. Partial unemployment. An individual who is partially unemployed in any week as defined in section 96.19, subsection 38, paragraph "b", and who meets the conditions of eligibility for benefits shall be paid with respect to that week an amount equal to the individual's weekly benefit amount less that part of wages payable to the individual with respect to that week in excess of one-fourth of the individual's weekly benefit amount. The benefits shall be rounded to the lower multiple of one dollar.

Iowa Code § 96.19-38-b provides in part:

An individual shall be deemed partially unemployed in any week in which the individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

The Agency decided that the claimant was not eligible for partial unemployment insurance benefits because he

was still employed at the same hours and wages as his original contract of hire. This provision does not apply since the employer is not a base period employer, and the claimant filed for benefits based on his full-time job. Instead, Iowa Code § 96.19-38-b applies as this is really supplemental employment. If the claimant had filed weekly claims, he would have been eligible because his wages were well below his weekly benefit amount. Of course, the claimant cannot receive benefits if he has not filed weekly claims.

The unemployment insurance law provides that an individual be able to and available for work. Iowa Code § 96.4-3. The claimant was able to and available to work, and there is no evidence that the claimant restricted the hours he was willing to work.

The employer's account is not presently chargeable for benefits paid to the claimant since it is not a base period employer on the claim. If the employer becomes a base period employer in a future benefit year, charges to the employer will be based on his employment situation at that time.

DECISION:

The unemployment insurance decision dated September 19, 2012, reference 02, is modified in favor of the claimant. The claimant is not subject to an availability disqualification based on his working the same hours and wages as his original contract of hire.

____

Steven A. Wise

Administrative Law Judge

____

Decision Dated and Mailed

saw/css

Image 1

A000623

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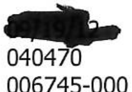
REF=02
43 053 D 0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IF THIS DECISION DENIES BENEFITS AND IS NOT REVERSED ON APPEAL, IT
MAY RESULT IN AN OVERPAYMENT WHICH YOU WILL BE REQUIRED TO REPAY.

DECISION:
YOU ARE NOT ELIGIBLE TO RECEIVE UNEMPLOYMENT INSURANCE BENEFITS.

EXPLANATION OF DECISION:
OUR RECORDS INDICATE YOU ARE STILL EMPLOYED IN YOUR JOB. SINCE YOU
ARE STILL EMPLOYED FOR THE SAME HOURS AND WAGES AS IN YOUR ORIGINAL
CONTRACT OF HIRE, YOU CANNOT BE CONSIDERED PARTIALLY UNEMPLOYED
WITHIN THE MEANING OF THE LAW. BENEFITS ARE DENIED AS OF 08/26/12.

TO BECOME ELIGIBLE FOR BENEFITS:
IF THE CIRCUMSTANCES HAVE CHANGED AND YOU BELIEVE THE DISQUALIFICATION CAN BE REMOVED, YOU SHOULD
CONTACT YOUR LOCAL WORKFORCE
DEVELOPMENT CENTER BETWEEN 9 A.M. AND 3 P.M. AND REQUEST THAT IT BE
REMOVED.

LEGAL REFERENCE:
THIS DISQUALIFICATION WAS MADE UNDER LAW SECTION 96.4-3. A COPY IS
AVAILABLE AT ANY WORKFORCE DEVELOPMENT CENTER.

TO APPEAL THIS DECISION:
THIS DECISION BECOMES FINAL UNLESS AN APPEAL IS POSTMARKED BY
09/29/12, OR RECEIVED BY IOWA WORKFORCE DEVELOPMENT APPEAL SECTION
BY THAT DATE. IF THIS DATE FALLS ON A SATURDAY, SUNDAY, OR LEGAL
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DEVELOPMENT CENTER AT (563) 445-3200 BETWEEN 9 A.M. AND 3 P.M.

Message: RE: Claims - Fact-Finding Meetings

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:31:57 PM
Item ID:	40860864
Policy Action:	Not Specified

Mark History:

No reviewing has been done

Policies:

No Policies attached

RE: Claims - Fact-Finding Meetings

From Wise, Steve [IWD]

Date Wednesday, April 24, 2013 9:01 AM

To McElderry, Stan [IWD]; Mormann, Marlon [IWD]; Lewis, Devon [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]

Cc

I thought this issue was discussed in an ALJ staff meeting and a consensus was reached, but I must be mistaken. As a result, there is no purpose in discussing the issue with claims.

This is my full reasoning:

REASONING AND CONCLUSIONS OF LAW

Under the unemployment insurance law, a claimant is disqualified from receiving unemployment insurance benefits if the separation from employment is a voluntary quit without good cause attributable to the employer or a discharge for work-connected misconduct. Iowa Code Sections 96.5-1 and 96.5-2-a. To voluntarily quit means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship and chooses to leave employment. *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989). The claimant had the choice of submitting a resignation or being discharged. His written resignation does not negate the fact that his separation from employment was an involuntary termination initiated by the employer.

The next question is whether the claimant is qualified to receive unemployment insurance benefits under 871 IAC 24.26(21). The Agency awarded benefits based on this rule and concluded that since he was forced to quit or be discharged, his quitting was caused by the employer.

871 IAC 24.26(21) provides:

> The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

A claimant who leaves employment voluntarily with good cause attributable to the employer is qualified to receive unemployment insurance benefits. Iowa Code Section 96.5-1. Is a claimant who resigns when given the choice of resigning or being discharged automatically qualified for benefits as the Agency concluded?

The Iowa Supreme Court has ruled that the principles of statutory construction apply to interpreting agency rules. *Iowa Federation of Labor v. IDJS*, 427 N.W.2d 443, 449 (Iowa 1988). In interpreting statutes, the words of the statute should be given their plain and generally accepted meaning. Judges should interpret statutes to avoid interpretations that produce strained, unreasonable or absurd results. Id. All parts of a statute are to be considered together without giving undue importance to a single or isolated part. The ultimate goal is to ascertain and give effect to the intention of the law making body. The language used in the statute and the purpose for which it was enacted must be examined. *Iowa Beef Processors, Inc. v. Miller*, 312 N.W.2d 530, 532 (Iowa 1981).

Applying these principles to the rule in question, the words of the rule are not clear and unambiguous and it is necessary to interpret what the

rule means. The introductory sentence of the rule suggests that the 28 subsections that follow constitute "reasons for a claimant leaving employment with good cause attributable to the employer." 871 IAC 24.26. Yet, a careful examination of the 28 subsections discloses that the rule's purpose is to provide guidance in deciding whether a separation from employment is or is not a voluntary quit, and if it is, whether the quit is for good cause attributable to the employer. Some of the subsections describe factual situations where no voluntarily quit has occurred, while others identify situations where the employee has voluntarily quit but for good cause. This is consistent with the title of the section: "Voluntary quit with good cause attributable to the employer and separations not considered voluntary quits." 871 IAC 24.26.

What category does 871 IAC 24.26(21) fall into then? This subsection's purpose is to address a common position taken by employers that a person who has resigned has voluntarily quit despite the fact that the resignation was forced. The provision makes it clear that the separation from employment is not a voluntary quit. To interpret the rule as directing a conclusion that the claimant left work with good cause attributable to the employer produces an unreasonable result. Giving the claimant a choice of resigning or being fired is not different than informing a claimant that he is being discharged but permitting him to say he has resigned to avoid having a discharge on his work record.

If a forced resignation is not a voluntary quit, how should it be characterized? A termination of employment initiated by the employer for work-conduct issues is a discharge for unemployment insurance purposes. 871 IAC 24.1(13). The reasons for the discharge must be evaluated under the misconduct standard to decide whether the claimant should be awarded or denied benefits.

From: McElderry, Stan [IWD]
Sent: Wednesday, April 24, 2013 8:14 AM
To: Mormann, Marlon [IWD]; Wise, Steve [IWD]; Lewis, Devon [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]
Subject: RE: Claims - Fact-Finding Meetings

IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

STELLA S WILSON
624 W 2ND ST S
NEWTON IA 50208 4621

CASEY'S MARKETING COMPANY
CASEY'S GENERAL STORES
PO BOX 283
ST LOUIS MO 63166 0283

APPEAL NO. 11A-UI-03763-M2T

ADMINISTRATIVE LAW JUDGE DECISION

APPEAL RIGHTS:

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
OR

FAX NUMBER (515)281-7191

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

The name, address and social security number of the claimant.
A reference to the decision from which the appeal is taken.
That an appeal from such decision is being made and such appeal is signed.
The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

STELLA S WILSON Claimant	**APPEAL NO. 11A-UI-03763-M2T**
	ADMINISTRATIVE LAW JUDGE DECISION
CASEY'S MARKETING COMPANY Employer	
	OC: 07/11/10 **Claimant: Respondent (5)**

Section 96.5-1 – Voluntary Quit

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated March 17, 2011, reference 03, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on April 14, 2011. Claimant participated. Employer participated.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct or quit.
The issue in this matter is whether claimant quit for good cause attributable to employer.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds:

The claimant was given the chance to resign or be discharged by the employer due to absences she was having due to her own and her husband's health issues. A quit conferred a benefit on employer and the claimant. Claimant could be rehired by other Casey's stores, and the store could get on with hiring another worker without going through with a discharge process on the claimant. The claimant quit on January 28, 2011 rather then be discharged.

REASONING AND CONCLUSIONS OF LAW:

REF 14 15

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

This is not a disqualifiable event because claimant quit in lieu of discharge. The rules specifically state that benefits shall be allowed when a person quits in lieu of discharge. It is not a true voluntary quit nor is it a discharge. It is an involuntary quit, a different type of separation not disqualifying under Iowa Code Section 96.5-1 as a voluntary quit or under 96.5-2-A as a discharge for misconduct.

While there is a difference in opinion on this issue within the department, the plain reading of the rule has but one logical conclusion. There is no language that shifts the burden of proof from a quit to a misconduct issue. Tradition within the appeal section recently has been to shift this type of case to the issue of misconduct. The undersigned has always disagreed with this erroneous interpretation. The rule specifically states that quitting under such duress is a quit for good cause attributable to employer. We as administrative law judges are bound by the enabling statues and rules. Absent a specific rule that shifts this issue to misconduct, this is a quit for good cause as shown by the rule. Employers receive significant benefit where an employee chooses to quit rather than face discharge. When first introduced the rule history was explained that qualification is automatic under this circumstance because of the benefit conferred on the employer by a voluntary resignation. That history has been ignored far too long. The department's fact finding ANDS decision which has remained static, still reflects the original intent of the rule and finds that a quit when faced with a quit or discharge scenario is a quit with good cause attributable to the employer.

Ref 198

The administrative law judge holds that claimant was not discharged for an act of misconduct and was not a voluntary quit and, as such, is not disqualified for the receipt of unemployment insurance benefits. This is a quit for good cause attributable to employer based on the administrative rules. Under a misconduct analysis the discharge would not have been disqualifying either.

DECISION:

The decision of the representative dated March 17, 2011, reference 03, is modified without effect. Unemployment insurance benefits are allowed provided claimant is otherwise eligible.

Stan McElderry
Administrative Law Judge

Decision Dated and Mailed

srm/

From: Mormann, Marlon [IWD]
Sent: Wednesday, April 24, 2013 8:00 AM
To: Wise, Steve [IWD]; Lewis, Devon [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; McElderry, Stan [IWD]
Subject: RE: Claims - Fact-Finding Meetings

I agree with Steve on 2 and 3 and take exception to number 1.

I believe legislative history and strict statutory construction do not indicate a quit in lieu of discharge is a misconduct issue. I have attached my shell decision for review. Claims is doing this one right. Devon, please pass my shell to claims for their consideration.

Marlon Mormann, Administrative Law Judge
515-265-3512

From: Wise, Steve [IWD]
Sent: Tuesday, April 23, 2013 9:03 PM
To: Lewis, Devon [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]
Subject: RE: Claims - Fact-Finding Meetings

1. Claim decisions that a claimant was compelled to quit or be discharged therefore the claimant **quit employment with good cause attributable to the employer** and benefits are awarded. ALJs have agreed that this separation must be treated as a discharge and the issue of whether the discharge was for misconduct must be decided.
2. Claim decisions that a claimant who is working part-time being determined to be working the same hours and wages as the original contract of hire when the claim is based on separation from full-time employment.
3. Notice of Claims being issued without an explanation of the figure representing amount of benefits chargeable to an employer in the benefit year.

I will forward others as I think of them.

From: Lewis, Devon [IWD]
Sent: Tuesday, April 23, 2013 7:55 PM
To: Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; Wise, Steve [IWD]
Subject: RE: Claims - Fact-Finding Meetings

I've heard from two people so far. If you have concerns about Claims, now is the time to speak up or begin keeping some examples for future meetings. Make a statement of the concern and attach supporting documentation. Feel free to check with me to see if a concern is already included in topics to be presented.
Thanks,
Dévon

From: Walsh, Joseph [IWD]
Sent: Tuesday, April 09, 2013 1:38 AM
To: Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Lewis, Devon

[IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; Wise, Steve [IWD]
Subject: Claims - Fact-Finding Meetings

I have asked Devon to gather data to begin regular meetings with the UI Division to address issues which we routinely see. I have been trying to arrange a meeting later this month (targeting April 25).

If you have issues you regularly see with FF please send those issues with a representative example to Devon. You do not need to pile on numbers. In other words if you see a regular issue (for example screwing up timely protests) you do not need to send her 15 examples of it. One representative example is enough. I would like to focus on repeat problems. Rather than something incredibly stupid that happens one time in a million I would like to get at the somewhat stupid things that happen regularly at least to start with. Devon and Teresa will try to prioritize these issues so as not to overwhelm the UI people. Concrete examples are best (maybe the ANDS dec plus the appeal decision).

Joseph L. Walsh

Chief Administrative Law Judge
Unemployment Insurance Appeals
1000 East Grand Avenue
Des Moines, Iowa 50319
Phone: (515) 281-8119
joseph.walsh@iwd.iowa.gov

Message: RE: Claims - Fact-Finding Meetings

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:31:57 PM
Item ID:	40860865
Policy Action:	Not Specified

Mark History:

No reviewing has been done

Policies:

No Policies attached

RE: Claims - Fact-Finding Meetings

From Wise, Steve [IWD]

Date Wednesday, April 24, 2013 10:32 AM

To Mormann, Marlon [IWD]; Hendricksmeyer, Bonny [IWD]; Lewis, Devon [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hillary, Teresa [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]

Cc

Quit in Lieu of Discharge 11B-UI-03210.EAB.pdf (45 Kb HTML) **Quit in Lieu of Discharge 10B-UI-07245.EAB.pdf** (88 Kb HTML)

I have attached a couple of decisions of the EAB on this. I believe the 2010 one was what Dan passed out at the staff meeting I referred to earlier and we discussed.

From: Mormann, Marlon [IWD]
Sent: Wednesday, April 24, 2013 10:01 AM
To: Hendricksmeyer, Bonny [IWD]; Lewis, Devon [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hillary, Teresa [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; Wise, Steve [IWD]
Subject: RE: Claims - Fact-Finding Meetings

Good idea Bonny, probably an issue for the legislature and not rule making.

Marlon Mormann, Administrative Law Judge
515-265-3512

From: Hendricksmeyer, Bonny [IWD]
Sent: Wednesday, April 24, 2013 9:56 AM
To: Lewis, Devon [IWD]; Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hillary, Teresa [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; Wise, Steve [IWD]
Subject: RE: Claims - Fact-Finding Meetings

As for all the controversy about being forced to quit or resign, wouldn't it be easier to look into the possibility of amending the administrative code section to state if it is a forced resignation the inquiry is then whether it was a discharge for misconduct?

From: Lewis, Devon [IWD]
Sent: Tuesday, April 23, 2013 7:55 PM
To: Walsh, Joseph [IWD]; Ackerman, Susan [IWD]; Donner, Lynette [IWD]; Elder, Julie [IWD]; Hendricksmeyer, Bonny [IWD]; Hillary, Teresa [IWD]; Mormann, Marlon [IWD]; Nice, Terence [IWD]; Scheetz, Beth [IWD]; Seeck, Vicki [IWD]; Stephenson, Randall [IWD]; Timberland, James [IWD]; Wise, Debra [IWD]; Wise, Steve [IWD]
Subject: RE: Claims - Fact-Finding Meetings

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From: Walsh, Joseph [IWD]
Sent: Tuesday, April 09, 2013 1:38 AM
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Subject: Claims - Fact-Finding Meetings

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Joseph L. Walsh
Chief Administrative Law Judge
Unemployment Insurance Appeals
1000 East Grand Avenue
Des Moines, Iowa 50319
Phone: (515) 281-8119
joseph.walsh@iwd.iowa.gov

- Image 1
- Image 2
- Image 3
- Image 4
- Image 5
- Image 6

Image 1

BEFORE THE

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

HECTOR VILLARREAL

Claimant,

and

DFS INC

Employer.

:
:
: **HEARING NUMBER:** 11B-UI-03210
:
:
: **EMPLOYMENT APPEAL BOARD**
: **DECISION**

N O T I C E

THIS DECISION BECOMES FINAL unless (1) **a request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1, 24.26(21)

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Hector Villarreal (Claimant) worked for DFS, Inc. (Employer) as a full time feed truck delivery driver

from April 26, 2010 until January 31, 2011. (Tran at p. 4; p. 8). Under the Employer's policies a driver who has his license suspended can be fired. (Ex. B). Drivers are required to notify the Employer if their licenses are suspended, revoked, or canceled. (Tran at p. 5; Ex. G).

On May 4, 2010 the Claimant was caught speeding. (Tran at p. 5; p. 13; Ex. D). He was convicted for this offense on May 17, 2010. (Ex. D). On January 6, 2011 the Claimant's license to drive was suspended for a serious violation. (Tran at p. 5; p. 8; Ex. E). His license could be reinstated no sooner than March 10, 2011. (Ex. E). The Claimant first reported this to the Employer on January 31. (Tran at p. 5-6). He never had previously reported the May 17 conviction to the Employer. (Tran at p. 5-6; p. 14). On January 31, 2011, the Claimant asserted that he was the victim of identity theft and had lost his

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Image 2

license due to an OWI which belonged to his brother. (Tran at p. 5-6; Ex. G). Yet no OWI shows on the Claimant's records. (Ex. D; Ex. E). The suspension was not the result of a putative OWI, but for the serious violation speeding ticket. (Tran at p. 11-12; Ex. D, Ex. E). The Claimant did not attend the driver improvement program offered by the DOT. (Tran at p. 13).

The available court records for the May 17 guilty plea show that the Claimant plead to violating Iowa Code § 321.285 by going 81 miles per hour in a zone posted for 55. We have taken official notice of these facts because they are ones "whose accuracy cannot reasonably be questioned." I. R. Evid. 5.201. We need not give notice to these parties that we intend to take this notice since "fairness to the parties does not require an opportunity to contest such facts." Iowa Code §17A.14.

REASONING AND CONCLUSIONS OF LAW:

Is a Claimant Who Is Forced to Quit Automatically Qualified For Benefits No Matter What They Did Wrong?

The Administrative Law Judge seems to have found that whenever an employee is given the choice to quit or be fired, and the employee chooses the "quit" option, then the employee gets benefits regardless of any misconduct. We find that this is not the law.

As an initial matter, the opinion of the learned Administrative Law Judge carries weight with us, but so do the opinions of other Administrative Law Judges at Iowa Workforce. And we agree with the position taken by many
other Administrative Law Judges of Iowa Workforce. For example, Administrative Law Judge Steve Wise has explained:

The unemployment insurance rules state that when a claimant is compelled to resign when given the choice of resigning or being discharged, it is not considered a voluntary leaving. 871 IAC 24.26(21). In such a case, the separation is treated as a discharge and the question becomes whether the discharge was for misconduct.

Murray v. Dept of Veteran's Affairs, 08A-UCFE-00011-SWT (3/18/08)(imposing disqualification for misconduct); *accord Miller v. Vendor's Unlimited*, 05A-UI-01997-S2T (2005)(ALJ Scheetz subjects case to misconduct analysis because "The claimant's separation was involuntary and must be analyzed as a termination."); *Sisson v. Mercy Hospital*, 04A-UI-10579-RT (2003)(ALJ Renegar writes "when she was given the choice of resigning or being discharged and this is not a voluntary leaving and is treated, at least for unemployment insurance benefit purposes, as a discharge. Therefore, disqualifying misconduct must be

determined."); *Green v. Electric Pump, Inc.* 10A-UI-10034-VST (2010)(ALJ Seeck writes "Iowa law is clear that if an employee is given the choice of resigning or being terminated, this is not a voluntary leaving on the part of the employee. Accordingly, these cases are analyzed as a discharge for misconduct."); *Rick v. Cloverleaf*
Cold Storage, 06A-UI-10030-NT (2006)(Judge Nice disqualifies based on misconduct where claimant given choice of quit or be fired); *Stokesbary v. IPC Int'l Corp,* 09A-UI18400-JTT (2009)(ALJ Timberland writes "In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits."); *Edmond v. Tone Brothers,* 06A-UI-06958-ET (2006)(ALJ Elder writes "Under Iowa law, when a claimant resigns under

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Image 3

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11B-UI-03210

those circumstances it is considered to be a discharge rather than a voluntary leaving. Therefore, the administrative law judge finds the claimant was discharged from his employment."); *McGuire v. Bank of the West,* 07A-UI-00643-HT (2007)(ALJ Hendricksmeyer disqualifies claimant on misconduct theory because "The claimant may have submitted a resignation but under the provisions of the above Administrative Code section, this is not a voluntary quit because continuing work was not available to her. She would have been discharged if she had not resigned. Therefore the determination must be whether she was discharged for misconduct."). We have unanimously reached this same conclusion ourselves. *Kelly v. Council Bluffs Catholic School System*, 10B UI07245 (2010); *Meeks v. Waterloo,* 11B UI-11311 (2011).

In *Flesher v IDJS,* 372 N.W.2d 230 (Iowa 1985) a claimant resigned when given the choice to resign or be discharged. The employer there protested as a voluntary quit, but Workforce disqualified the claimant based on misconduct. The Supreme Court held that the agency had authority to raise the misconduct issue, and disqualified the Claimant on misconduct. While not saying so in so many words, *Flesher* strongly supports the conclusion that a resignation in lieu of discharge should be analyzed as a discharge, and that if misconduct appears a disqualification can be imposed.

This position is consistent with the literal meaning of the rule, and with the policy of the Employment Security Law. A careful reading of the rule establishes that where a Claimant is given the choice of quitting or being fired this is not a voluntary quit. True it says, in the general provision that "the following are reasons for a claimant leaving employment with good cause attributable to the employer." This, in isolation, sounds like a forced quit is a quit for good cause. But the specific rule says "this shall not be considered a voluntary leaving." We agree. It's just not a voluntary quit. So it certainly is not disqualifying *as a voluntary quit.* But this does not mean it cannot be disqualifying as a discharge. Indeed, the rules state that "[a] discharge is a termination of employment initiated by the employer." 871 IAC 24.1(113). This case matches this definition, and the case should be analyzed as a discharge under the literal terms of the rules.

Policy, too, supports this approach. When analyzing this case as a discharge we ask whether misconduct is proven, and if so we deny benefits. We would not automatically grant benefits because the discharge took the form of a forced resignation. Iowa's Employment Security Law provides that it is to be interpreted "for the benefit of persons unemployed through no fault of their own." Iowa Code §96.2 (2011). An employee who commits misconduct is not unemployed through no fault of his own. And this is so whether he is fired outright or given a choice to resign first. We just cannot see how the policy behind the Employment Security Law should be any different for a claimant who commits misconduct and is fired, than it is for a claimant who commits misconduct and is given a choice to quit before being fired. Indeed, why would a Claimant who chooses "quit" get benefits but the exact same person would not get benefits if they chose "fired?" Frankly, the approach we take strikes us as the only one that makes any sense in terms of the purposes of the

law.

Image 4

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11B-UI-03210

Did the Claimant Commit Misconduct?

Applying a misconduct analysis we have little trouble disqualifying the Claimant. Iowa Code Section 96.5(2)(a) (2011) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(a):

Misconduct is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in the carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

Where an employee commits acts that impair the employee's ability to function on the job this can be misconduct even if the acts do not occur at work or during work hours. *See Cook v. IDJS*, 299 N.W.2d 698, 702 (Iowa 1980)("While he received most of his driving citations during non-work hours and in his personal car, they all bore directly on his ability to work for Hawkeye."). Conduct that is contrary to established policies of the employer may be disqualifying even if the conduct is away from work. *Kleidosty v. Employment Appeal Board*, 482 N.W.2d 416 (Iowa 1992)(drug offense).

Image 5

Page 5
11B-UI-03210

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We do not find credible the Claimant's assertion that he was suspended over some mix-up with his brother's OWI, or that the Claimant previously told his superiors about his speeding violation. Indeed, at the end of the hearing the Claimant says "if I would've received that letter to my had at my physical address, I would go to that class that was being offered..." and thereby avoided the whole problem. (Tran at p. 13). This testimony is entirely consistent with a serious violation based on speed, followed by a notice of required training in lieu of suspension. 761 IAC 615.43(a)(2)(driver improvement program offered to someone exceeding speed between 25 and 30 mph). It appears, as Exhibit E itself shows, that the suspension was for the serious violation itself (speeding), and rule 615.43(4) was not invoked. Either way, the greater weight of the evidence supports that the suspension was not due to some confusion of the Claimant with his brother.

The Claimant did speed by an excessive amount in May, 2010. This, in turn, endangered his license. The Claimant's conduct in speeding is similar to the conduct found to be disqualifying in *Cook.* In *Cook* the employee was a driver who received numerous speeding citations. Although Cook retained his driver's license the employer's insurance carrier refused to cover him due to his record. The Supreme Court found that the discharge of Cook was founded on misconduct. Like *Cook* this case involves speeding violations by the Claimant. Like *Cook* the Employer here decided to terminate the Claimant because the speeding meant he could no longer drive at work for a couple months. The Claimant "does not claim that anyone forced him to violate the laws of the road, yet he persisted in doing so." *Cook* at 702. We conclude, like the Court in *Cook*, that the Claimant was guilty of misconduct by his "self-inflicted" suspension of his license. *Id.*

In addition, we find that the Claimant did not tell the Employer of his guilty plea until January 2011. This delay in contravention of the Employer's policies is *by itself* sufficient to be disqualifying misconduct. *See White v EAB* 448 N.W.2d 691 (Iowa App. 1989)(lack of candor in internal investigation is disqualifying).

As for current act, the record established that the Employer acted promptly once it knew of the Claimant's speeding and license suspension on January 31. We determine the issue of "current act" by looking to the date of the termination and comparing this to the date the misconduct first came to the attention of the Employer. *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988)(using date notice of disciplinary meeting first given). Under this test the termination was not for a past act of misconduct.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

871 IAC 23.43(3) Rule of two affirmances.

a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.

Image 6

Page 6
11B-UI-03210

b. However, if the decision is subsequently reversed by higher authority:

(1) The protesting employer involved shall have all charges removed for all payments made on such claim.
(2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
(3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

DECISION:

The administrative law judge's decision dated May 4, 2011 is REVERSED. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

Monique F. Kuester

Elizabeth L. Seiser

RRA/fnv

- Image 1
- Image 2
- Image 3
- Image 4
- Image 5
- Image 6

Image 1

BEFORE THE

EMPLOYMENT APPEAL BOARD

Lucas State Office Building

Fourth floor

Des Moines, Iowa 50319

PAUL M KELLY

Claimant,

and

COUNCIL BLUFFS - CATHOLIC SCHOOL SYSTEM

Employer.

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:
: **HEARING NUMBER:** 10B-UI-07245
:
:
: **EMPLOYMENT APPEAL BOARD**
: **DECISION**

:

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request

is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1, 24.26(21)

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The administrative law judge's Findings of Fact are adopted by the Board as its own with the following modifications and additions:

The employees of the Employer are aware that the fuel is locked, and is not for public use. (Tran at p. 7; p. 11). Personal use, followed by repayment, is allowed only if there is a prior arrangement. (Tran at p. 11). The Claimant had made no such arrangement. (Tran at p. 11).

Image 2

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REASONING AND CONCLUSIONS OF LAW:

Is a Claimant Who Is Forced to Quit Automatically Qualified For Benefits No Matter What They Did Wrong?

The Administrative Law Judge seems to have found that whenever an employee is given the choice to quit or be fired, and the employee chose the "quit" option, then the employee gets benefits regardless of any misconduct. We find that this is not the law.

As an initial matter, the opinion of the learned Administrative Law Judge carries weight with us, but so do the opinions of other Administrative Law Judges at Iowa Workforce. And we agree with the position taken by many other Administrative Law Judges of Iowa Workforce. For example, Administrative Law Judge Steve Wise has explained:

The unemployment insurance rules state that when a claimant is compelled to resign when given the choice of resigning or being discharged, it is not considered a voluntary leaving. 871 IAC 24.26(21). In such a case, the separation is treated as a discharge and the question becomes whether the discharge was for misconduct.

Murray v. Dept of veteran's Affairs, 08A-UCFE-00011-SWT (3/18/08)(imposing disqualification for misconduct); *accord Miller v. Vendor's Unlimited*, 05A-UI-01997-S2T (2005)(ALJ **Scheetz** subjects case to misconduct analysis because "The claimant's separation was involuntary and must be analyzed as a termination."); *Sisson v. Mercy Hospital,* 04A-UI-10579-RT (2003)(ALJ **Renegar** writes "when she was

given the choice of resigning or being discharged and this is not a voluntary leaving and is treated, at least for unemployment insurance benefit purposes, as a discharge. Therefore, disqualifying misconduct must be determined."); *Green v. Electric Pump, Inc.* 10A-UI-10034-VST (2010)(ALJ **Seeck** writes "Iowa law is clear that if an employee is given the choice of resigning or being terminated, this is not a voluntary leaving on the part of the employee. Accordingly, these cases are analyzed as a discharge for misconduct."); *Rick v. Cloverleaf Cold Storage*, 06A-UI-10030-NT (2006)(Judge **Nice** disqualifies based on misconduct where claimant given choice of quit or be fired); *Stokesbary v. IPC Int'l Corp*, 09A-UI18400-JTT (2009)(ALJ **Timberland** writes "In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits."); *Edmond v. Tone Brothers*, 06A-UI-06958-ET (2006)(ALJ **Elder** writes "Under Iowa law, when a claimant resigns under those circumstances it is considered to be a discharge rather than a voluntary leaving. Therefore, the administrative law judge finds the claimant was discharged from his employment."); *McGuire v. Bank of the West*, 07A-UI-00643-HT (2007)(ALJ **Hendricksmeyer** disqualifies claimant on misconduct theory because "The claimant may have submitted a resignation but under the provisions of the above Administrative Code section, this is not a voluntary quit because continuing work was not available to her. She would have been discharged if she had not resigned. Therefore the determination must be whether she was discharged for misconduct.").

This position is consistent with the literal meaning of the rule, and with the policy of the Employment Security Law. A careful reading of the rule establishes that where a Claimant is given the choice of quitting or being fired this is not a voluntary quit. True it says, in the general provision that "the following are reasons for a claimant leaving employment with good cause attributable to the employer."

Image 3

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This, in isolation, sounds like a forced quit is a quit for good cause. But the specific rule says "this shall not be considered a voluntary leaving." We agree. It's just not a voluntary quit. So it certainly is not disqualifying *as a voluntary quit*. But this does not mean it cannot be disqualifying as a discharge. Indeed, the rules state that "[a] discharge is a termination of employment initiated by the employer." 871 IAC 24.1(113). This case matches this definition, and the case should be analyzed as a discharge under the literal terms of the rules.

Policy, too, supports this approach. When analyzing this case as a discharge we ask whether misconduct is proven, and if so we deny benefits. We would not automatically grant benefits because the discharge took the form of a forced resignation. Iowa's Employment Security Law provides that it is to be interpreted "for the benefit of persons unemployed through no fault of their own." Iowa Code §96.2 (2009). An employee who commits misconduct is not unemployed through no fault of his own. And this is so whether he is fired outright or given a choice to resign first. We just cannot see how the policy behind the Employment Security Law should be any different for a claimant who commits misconduct and is fired, than it is for a claimant who commits misconduct and is given a choice to quit before being fired. Indeed, why would a Claimant who chooses "quit" get benefits but the exact same person would not get benefits if they chose "fired?" Frankly, the approach we take strikes us as the only one that makes any sense in terms of the purposes of the law.

Did the Claimant Commit Misconduct?

Applying a misconduct analysis we have little trouble disqualifying the Claimant. Iowa Code Section 96.5(2)(a) (2009) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(a):

Misconduct is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in the carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct

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Image 4

within the meaning of the statute.

Image 5

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"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

Theft from an employer is generally disqualifying misconduct. *Ringland Johnson Inc. v. Employment Appeal Board,* 585 N.W.2d 269 (Iowa 1998). Here, as we and the Administrative Law Judge have found, the Claimant used the Employer's gasoline for personal purposes. Naturally it matters not that the Claimant put the gas in his friend's car rather than his own. The fact is he used the gas for private purposes without paying for it. This was intentional conduct that was a willful and wanton disregard of the employer's interest and was a deliberate violation of standards of behavior which the employer has the right to expect of employees. The Claimant is disqualified for being terminated for misconduct.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

871 IAC 23.43(3) Rule of two affirmances.

a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the

decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.

b. However, if the decision is subsequently reversed by higher authority:

(1) The protesting employer involved shall have all charges removed for all payments made on such claim.
(2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
(3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

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DECISION:

The administrative law judge's decision dated July 8, 2010 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)(a).

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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John A. Peno

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Monique F. Kuester

____

Elizabeth L. Seiser

RRA/fnv

Message: RE: Implementation of UC Program Integrity Amendments

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:32:08 PM
Item ID:	40861243
Policy Action:	Not Specified

Mark History:

No reviewing has been done

Policies:

No Policies attached

RE: Implementation of UC Program Integrity Amendments

From Hillary, Teresa [IWD] **Date** Tuesday, July 30, 2013 7:30 AM

To Wise, Steve [IWD]; Lewis, Devon [IWD]

Cc Wahlert, Teresa [IWD]; Wilkinson, Michael [IWD]; Eklund, David [IWD]; West, Ryan [IWD]

Because when I visited with both Mike W and Dave E yesterday both of them thought the issue had not been resolved. Mike W was not present for our training on July 18 and did not know that we discussed it at our staff meeting. When I was at the A-C meeting last Thursday, he still wanted to discuss what "participation" would mean and how we were going to handle the OP issue. When I talked to Dave E yesterday he said the last he knew of it was a July 3 meeting where he, Joe W, Joe B, you on the phone had a discussion and no decn was made. He did not stay for the staff meeting. I have no issue at all with the remand idea, but I do think in appeals we can do a better job of communicating what we are going to do.

From: Wise, Steve [IWD]
Sent: Monday, July 29, 2013 8:38 PM
To: Hillary, Teresa [IWD]; Lewis, Devon [IWD]
Subject: FW: Implementation of UC Program Integrity Amendments

Tere,

This is response to your Lync conversation below. Based on all the correspondence below, I thought this was settled. Devon told me that UI Division had agreed that we would remand. Everything I did last week on the overpayment language to go into our decisions was based on this. My next step was to prepare a tutorial and schedule the training on handling this. The email sent by Devon was sent to both Ryan West and Dave Eklund and includes the whole history and reasoning why remand of those cases involving reversals of grants of benefits is the best approach. I'm not sure why we are revisiting this. My understanding is this was also discussed during the training.

Hillary, Teresa [IWD] [4:43 PM]:
i am talking to dave e on the phone.
who made the decn that we would remand.
on op cases. dave e, who was out last week, seems to think that ff was going to make a decn on particpation at ff. and then we would not remand, but make the decn
dave e has no follow up for bervid or wilkinson saying that we will not remand.
from bervid or wilinson

From: Lewis, Devon [IWD]
Sent: Wednesday, July 24, 2013 10:33 AM
To: West, Ryan [IWD]; Eklund, David [IWD]
Cc: Wise, Steve [IWD]; Hillary, Teresa [IWD]
Subject: FW: Implementation of UC Program Integrity Amendments

Dave and Ryan,
I'm heading out on vacation so want to put you in touch with Steve about the OP waiver/penalty language and FF training. I know you are holding back some FF decisions pending Appeals' action so we will move Steve's hearings if need be to accomplish this ASAP.

I now have access to work e-mail on my cell phone and will be available at 515-292-0712 if anyone needs to reach me. I plan to participate in our staff meeting by phone on August 1. I will be back at work on August 6.
Thanks,
Dévon

From: Wise, Steve [IWD]
Sent: Wednesday, July 17, 2013 9:23 PM
To: Lewis, Devon [IWD]; Donner, Lynette [IWD]; Mormann, Marlon [IWD]
Cc: Wise, Debra [IWD]; Hillary, Teresa [IWD]
Subject: RE: Implementation of UC Program Integrity Amendments

Devon, I spoke to Teresa H and Teresa W about this at the end of the Monday meeting. I'm giving a presentation at the Municipal Professional Institute tomorrow in Ames, including a Skilled Iowa segment. Joe had approved this before and the director confirmed it. I am not sure when I will be back in town.

If the decision is to follow our current policy of remanding reversals of decisions granting benefits for the Agency to decide if the overpayment should be recovered and the employer charged for the overpayment—by the end of next week at the latest—I will have a tutorial or flow chart for everyone to use. I would agree to help train on this topic. I would also agree to produce a draft of the language that would go into decisions to accomplish this. I would try to get that draft done ASAP.

From: Lewis, Devon [IWD]
Sent: Wednesday, July 17, 2013 5:19 PM
To: Donner, Lynette [IWD]; Mormann, Marlon [IWD]; Wise, Steve [IWD]
Cc: Wise, Debra [IWD]; Hillary, Teresa [IWD]
Subject: RE: Implementation of UC Program Integrity Amendments

I talked to Ryan West in Claims yesterday and he seemed resigned to remands on this issue. I think the discussion points are valid and we should proceed on that basis unless instructed otherwise. Steve and Lynette, would you please lead the discussion about this tomorrow? Could we develop a *very short* tutorial outline or flow chart for FF and DIA (and us) about this? Who would like to help provide training to FF and DIA?

From: Donner, Lynette [IWD]
Sent: Wednesday, July 17, 2013 12:53 PM
To: Mormann, Marlon [IWD]; Lewis, Devon [IWD]; Wise, Steve [IWD]
Cc: Wise, Debra [IWD]; Hillary, Teresa [IWD]
Subject: RE: Implementation of UC Program Integrity Amendments

The draft previously circulated had suggested overpayment ref. code and model paraphrased code language, hinged on the assumption that we were going to go ahead and do the determination on participation, and only focus on participation, not the other "hidden" issues, but until the policy decision is made, I don't know that it's ready to implement.

From: Mormann, Marlon [IWD]
Sent: Wednesday, July 17, 2013 12:40 PM
To: Lewis, Devon [IWD]; Wise, Steve [IWD]
Cc: Donner, Lynette [IWD]; Wise, Debra [IWD]; Hillary, Teresa [IWD]
Subject: RE: Implementation of UC Program Integrity Amendments

Does anyone have overpayment language for reasoning and conclusions so we can modify our shells???????????????? I want a one size fits all shell that hits all overpayment issues. Please advise.

Marlon Mormann, Administrative Law Judge
515-265-3512

From: Lewis, Devon [IWD]
Sent: Wednesday, July 17, 2013 10:50 AM
To: Wise, Steve [IWD]
Cc: Donner, Lynette [IWD]; Wise, Debra [IWD]; Mormann, Marlon [IWD]; Hillary, Teresa [IWD]
Subject: RE: Implementation of UC Program Integrity Amendments

Thanks for the info, Steve. Who would like to present the topic and answer questions at the staff meeting tomorrow?

From: Wise, Steve [IWD]
Sent: Tuesday, July 16, 2013 2:59 PM
To: Lewis, Devon [IWD]; Hillary, Teresa [IWD]
Cc: Donner, Lynette [IWD]; Wise, Debra [IWD]; Mormann, Marlon [IWD]
Subject: FW: Implementation of UC Program Integrity Amendments

Below is the email I sent to Joe W., Mike, Joe B. and Dave. There was a meeting after this that I attended by telephone conference that was inconclusive, although everyone agreed that the UI Division would have to have a process in place to handle remands on the issue of whether a claimant would be required to repay an overpayment and whether the employer's account would be charged for an overpayment because there are going to be cases where the fact finding materials would not be available. There was no conclusion that I am aware of that we absolutely could not remand these cases. UI Division was concerned about the computer programming issue of setting up a new ANDs decision or issuing a typed decision.

My main point was that if one of UI Appeals' goals is to reduce postage and copying, that would be defeated by having to send out fact-finding material to the parties in every case involved an employer appeal of a grant of benefits to a claimant. In addition, we are taking up valuable hearing time on a topic that may or may not be necessary since employer's participation is only relevant IF we reverse the grant of benefits, which cannot know in advance. No one was really persuaded and thought that we would not have to send out fact-finding information in advance, but could simply ask the parties about non-participation and tell them what was in the administrative file. Joe B. was not convinced that there would be a DOL compliance issue with our deciding the issue without remand as long as we gave parties a hearing. In a practical sense, he is probably correct that what we do will not be scrutinized that closely by DOL as long as the law was passed.

The last thing Joe told me was that he was going to send out instructions giving ALJs discretion in handling the issue of whether a claimant would be required to repay an overpayment and whether the employer's account would be charged for an overpayment. That is an ALJ could question the parties about the non-participation issue and making a decision on the issue, but would not be required to every case, and if the ALJ was uncomfortable with addressing the issue in a particular case, they could remand since the UI Division has to have a process in place in any event for deciding this issue. He said he was going to advise Mike W. of this plan. Obviously, Joe never got the instruction out and I have no idea if he told Mike W. of this plan.

I think South Dakota's approach is the most sensible and follows the DOL Program Letter, but I am obviously in the minority on this.

I think there is another issue as well, that I have not brought up before. We are focused on the employer non-participation issue, but for non-recovery of the overpayment from the claimant the law also states "the benefits were not received as a result of fraud or willful misrepresentation." So if claimant reported that she was laid off due to lack of work and you find that they quit, even where the employer failed to participate are we going to decide the overpayment must be recovered due to willful misrepresentation? Will Investigations and recovery then adopt that and treat as a fraud overpayment? Shouldn't the claimant then receive notice that a potential issue is willful misrepresentation? And of course, willful misrepresent and fraud cases normally go to DIA. Also interesting then is because of the inconsistent language of 96.3-7-b(1)(a) and (1)(b), you could have a case where an employer is charged for an overpayment that is not waived. Everybody loses.

Let me know if you have other questions.

Steve

From: Wise, Steve [IWD]
Sent: Wednesday, July 03, 2013 9:51 AM
To: Walsh, Joseph [IWD]; Wilkinson, Michael [IWD]; Bervid, Joseph [IWD]; Eklund, David [IWD]
Subject: Implementation of UC Program Integrity Amendments

At the Director's request at our last staff meeting, I sent email inquiries about implementation of UC Program Integrity Amendments to other states. I sent emails to contacts in Kentucky, South Dakota, Maryland, Idaho, Alaska, Arkansas, New Hampshire, Nebraska, Oklahoma, Wisconsin, Minnesota, Georgia, Utah, Wyoming, and Washington. I am still getting responses back.

Many states who have responded have laws that won't go into effect until October 2013 and have laws stating an employer will be charged for an overpayment (1) due to Employer's failure to timely or adequately respond to requests for information **AND** (2) where that employer has a "pattern of failing to respond," which they intend to track for a period of time following the effective date of the law. States have various measures for patterns of failing to respond. The Maryland Chief Hearing Officer said "I will likely be contacting you in another month or two as we approach October to see how you guys got this up and running."

South Dakota is the state that has responded so far who has a statute with language similar to ours that does not require a "pattern of failing to respond" and a law that went into effect July 1, 2013.

Here's South Dakota's new law. "However, no relief of charges applies if the department determines that an erroneous payment has been made because the employer, or an agent of the employer, was at fault for failing to respond timely or adequately to the department's request for information relating to the payment of benefits. For the purposes of this section, an erroneous payment is a payment that would not have been made but for the failure of the employer or the employer's agent to fully respond to the department's request pursuant to § 61-7-5."

Administrative Law Judge Shannon George-Larson after consulting with UI Director Pauline Heier, stated:

We will hold hearings as usual when an employer appeals a determination granting benefits. We will list the usual issues of "Is Claimant disqualified from receiving benefits because Claimant voluntarily quit employment without good cause or was discharged for work-connected misconduct?" and "Is Employer's experience-rating account subject to or exempt from charge?" If the ALJ decision reverses the Agency determination granting benefits, we will use the following language in the Conclusions and the Order to address the chargeability issue:

Employer's experience-rating account is exempt from charge unless the Agency determines Employer is subject to charge for benefits already paid to Claimant due to Employer's failure to timely or adequately respond to Agency inquiries.

The Agency will issue an overpayment determination to Claimant as usual if benefits have been paid. It will be up to the Agency to review the file and issue a determination finding Employer is subject to charge due to fault. If Agency does not issue a determination, our conclusion of no charge stands. If Agency issues a determination, the determination will go to Employer only with appeal rights. It would go to Employer only because in our view Claimant is not an interested party in this issue.

UI Director Pauline Heier, stated

Our UI department will be handling the issue of employer fault at the time we make a decision where an overpayment is created. The nonmonetary determination will include the following statement.
NOTICE TO EMPLOYER: Your experience rating account number {~15~} is charged for benefits paid from {beginning date} to {ending date} as you failed to respond timely or adequately to the department's request for information. Your account is exempt from charge after {ending date}.

The difference between South Dakota and Iowa is that South Dakota has always had a general waiver of overpayment rule that an overpayment can be waived if a claimant requests a waiver of overpayment and establishes that claimant (1) was not at fault in receiving the overpayment, and (2) does not have the ability to repay the overpayment. That is why in South Dakota they say the claimant will not be an interested party on the employer charge issue. Also South Dakota has never included "whether the claimant was overpaid unemployment insurance benefits" as an issue in a separation appeal hearing. The reversal of an award of benefits by an ALJ in South Dakota always triggers the Overpayment unit to issue an overpayment determination.

Message: RE: Implementation of UC Program Integrity Amendments

Case Information:

Message Type:	Exchange
Message Direction:	Internal
Case:	IWD Senator Petersen Request - Version 3
Capture Date:	7/10/2014 1:32:08 PM
Item ID:	40861246
Policy Action:	Not Specified

Mark History:
No reviewing has been done

Policies:
No Policies attached

RE: Implementation of UC Program Integrity Amendments

From Hillary, Teresa [IWD] **Date** Tuesday, July 30, 2013 8:57 AM
To Wilkinson, Michael [IWD]; Wise, Steve [IWD]; Lewis, Devon [IWD]
Cc Wahlert, Teresa [IWD]; Eklund, David [IWD]; West, Ryan [IWD]

I shared with Mike our ref code 226, how we define participation in our decn.

Teresa K. Hillary
Iowa Workforce Development
1000 E Grand Avenue
Des Moines IA 50319

Phone: 515.725.2683
FAX: 515.242.5144

From: Wilkinson, Michael [IWD]
Sent: Tuesday, July 30, 2013 8:56 AM
To: Wise, Steve [IWD]; Lewis, Devon [IWD]; Hillary, Teresa [IWD]
Cc: Wahlert, Teresa [IWD]; Eklund, David [IWD]; West, Ryan [IWD]
Subject: RE: Implementation of UC Program Integrity Amendments

Steve, your attachments do not define "participation" and that is at the foundation of this issue. Not only does staff need to know, but businesses need a good understanding so they can comply. We cannot have local office staff, UISC staff and appeals staff defining it differently. It will be extremely confusing for the business and make us look very bad. As well, it appears that in every case that you reverse the decision it is remanded to claims for a decision. That is one of the more time consuming processes in benefits. I do not see how that is efficient for either IWD or the employer.

From: Wise, Steve [IWD]
Sent: Tuesday, July 30, 2013 8:39 AM
To: Wilkinson, Michael [IWD]; Lewis, Devon [IWD]; Hillary, Teresa [IWD]
Cc: Wahlert, Teresa [IWD]; Eklund, David [IWD]; West, Ryan [IWD]
Subject: RE: Implementation of UC Program Integrity Amendments

As mentioned below, I'm prepared to present training to UI Appeals and UI Division staff on the overpayment process under Iowa Code 96.3-7-b, including training on the definition of participation. Toward that end, I'd created a flowchart that shows the process I thought had been agreed to. I've attached it.

I'd also drafted the language that UI Appeals will use in our decision to accomplish the remand and had submitted it to Tere , who turn shared it with Director Walhert. I've attached the language that I going to send out to the UI Appeals staff. Again, I think if you read through my explanation of the pros and cons on implementing the Iowa Code 96.3-7-b remanding is the best approach because you only have to address the issue when it is necessary.

I'm hoping that we can move forward and am willing to talk about this. I have hearings from 8:30 a.m. to 3 pm today, including an 11:30 hearing.

Steve

From: Wilkinson, Michael [IWD]
Sent: Tuesday, July 30, 2013 8:31 AM
To: Lewis, Devon [IWD]; Hillary, Teresa [IWD]
Cc: Wise, Steve [IWD]; Wahlert, Teresa [IWD]; Eklund, David [IWD]; West, Ryan [IWD]
Subject: RE: Implementation of UC Program Integrity Amendments

This issue is not settled yet. Remand is just another word for "re-work". I brought this up with the Director late last week and we agreed that we did not think appeals and claims were on the same page. I will schedule a conference call for later today to discuss and make a decision.

From: Lewis, Devon [IWD]
Sent: Tuesday, July 30, 2013 8:00 AM
To: Hillary, Teresa [IWD]
Cc: Wise, Steve [IWD]; Wahlert, Teresa [IWD]; Wilkinson, Michael [IWD]; Eklund, David [IWD]; West, Ryan [IWD]
Subject: Re: Implementation of UC Program Integrity Amendments

At the 7/18 staff meeting during training we discussed this issue with RW and DE both present. I looked at them and asked them if they agreed we would have to remand. RW also said to me before PT-Q FF training that they were resigned to remands on the issue. There was some talk of the possibility of them handling it at the FF level but no one ever presented a plan a out how to handle that.
I'm available by phone today through Thursday if you want to conference me in to talk about this.
Dévon

On Jul 30, 2013, at 8:29 AM, "Hillary, Teresa [IWD]" <Teresa.Hillary@iwd.iowa.gov> wrote:

Because when I visited with both Mike W and Dave E yesterday both of them thought the issue had not been resolved. Mike W was not present for our training on July 18 and did not know that we discussed it at our staff meeting. When I was at the A-C meeting last Thursday, he still wanted to discuss what "participation" would mean and how we were going to handle the OP issue. When I talked to Dave E yesterday he said the last he knew of it was a July 3 meeting where he, Joe W, Joe B, you on the phone had a discussion and no decn was made. He did not stay for the staff meeting. I have no issue at all with the remand idea, but I do think in appeals we can do a better job of communicating what we are going to do.

From: Wise, Steve [IWD]
Sent: Monday, July 29, 2013 8:38 PM
To: Hillary, Teresa [IWD]; Lewis, Devon [IWD]
Subject: FW: Implementation of UC Program Integrity Amendments

Tere,

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Hillary, Teresa [IWD] [4:43 PM]:
i am talking to dave e on the phone.
who made the decn that we would remand.
on op cases. dave e, who was out last week, seems to think that ff was going to make a decn on particpation at ff. and then we would not remand, but make the decn
dave e has no follow up for bervid or wilkinson saying that we will not remand.
from bervid or wilinson

From: Lewis, Devon [IWD]
Sent: Wednesday, July 24, 2013 10:33 AM
To: West, Ryan [IWD]; Eklund, David [IWD]
Cc: Wise, Steve [IWD]; Hillary, Teresa [IWD]
Subject: FW: Implementation of UC Program Integrity Amendments

Dave and Ryan,
I'm heading out on vacation so want to put you in touch with Steve about the OP waiver/penalty language and FF training. I know you are holding back some FF decisions pending Appeals' action so we will move Steve's hearings if need be to accomplish this ASAP.

I now have access to work e-mail on my cell phone and will be available at 515-292-0712 if anyone needs to reach me. I plan to participate in our staff meeting by phone on August 1. I will be back at work on August 6.
Thanks,
Dévon

From: Wise, Steve [IWD]
Sent: Wednesday, July 17, 2013 9:23 PM
To: Lewis, Devon [IWD]; Donner, Lynette [IWD]; Mormann, Marlon [IWD]
Cc: Wise, Debra [IWD]; Hillary, Teresa [IWD]
Subject: RE: Implementation of UC Program Integrity Amendments

Devon, I spoke to Teresa H and Teresa W about this at the end of the Monday meeting. I'm giving a presentation at the Municipal Professional Institute tomorrow in Ames, including a Skilled Iowa segment. Joe had approved this before and the director confirmed it. I am not sure when I will be back in town.

If the decision is to follow our current policy of remanding reversals of decisions granting benefits for the Agency to decide if the overpayment should be recovered and the employer charged for the overpayment—by the end of next week at the latest—I will have a tutorial or flow chart for everyone to use. I would agree to help train on this topic. I would also agree to produce a draft of the language that would go into decisions to accomplish this. I would try to get that draft done ASAP.

From: Lewis, Devon [IWD]
Sent: Wednesday, July 17, 2013 5:19 PM
To: Donner, Lynette [IWD]; Mormann, Marlon [IWD]; Wise, Steve [IWD]
Cc: Wise, Debra [IWD]; Hillary, Teresa [IWD]

Subject: RE: Implementation of UC Program Integrity Amendments

I talked to Ryan West in Claims yesterday and he seemed resigned to remands on this issue. I think the discussion points are valid and we should proceed on that basis unless instructed otherwise. Steve and Lynette, would you please lead the discussion about this tomorrow? Could we develop a *very short* tutorial outline or flow chart for FF and DIA (and us) about this? Who would like to help provide training to FF and DIA?

From: Donner, Lynette [IWD]
Sent: Wednesday, July 17, 2013 12:53 PM
To: Mormann, Marlon [IWD]; Lewis, Devon [IWD]; Wise, Steve [IWD]
Cc: Wise, Debra [IWD]; Hillary, Teresa [IWD]
Subject: RE: Implementation of UC Program Integrity Amendments

The draft previously circulated had suggested overpayment ref. code and model paraphrased code language, hinged on the assumption that we were going to go ahead and do the determination on participation, and only focus on participation, not the other "hidden" issues, but until the policy decision is made, I don't know that it's ready to implement.

From: Mormann, Marlon [IWD]
Sent: Wednesday, July 17, 2013 12:40 PM
To: Lewis, Devon [IWD]; Wise, Steve [IWD]
Cc: Donner, Lynette [IWD]; Wise, Debra [IWD]; Hillary, Teresa [IWD]
Subject: RE: Implementation of UC Program Integrity Amendments

Does anyone have overpayment language for reasoning and conclusions so we can modify our shells??????????????? I want a one size fits all shell that hits all overpayment issues. Please advise.

Marlon Mormann, Administrative Law Judge
515-265-3512

From: Lewis, Devon [IWD]
Sent: Wednesday, July 17, 2013 10:50 AM
To: Wise, Steve [IWD]
Cc: Donner, Lynette [IWD]; Wise, Debra [IWD]; Mormann, Marlon [IWD]; Hillary, Teresa [IWD]
Subject: RE: Implementation of UC Program Integrity Amendments

Thanks for the info, Steve. Who would like to present the topic and answer questions at the staff meeting tomorrow?

From: Wise, Steve [IWD]
Sent: Tuesday, July 16, 2013 2:59 PM
To: Lewis, Devon [IWD]; Hillary, Teresa [IWD]
Cc: Donner, Lynette [IWD]; Wise, Debra [IWD]; Mormann, Marlon [IWD]
Subject: FW: Implementation of UC Program Integrity Amendments

Below is the email I sent to Joe W., Mike, Joe B. and Dave. There was a meeting after this that I attended by telephone conference that was inconclusive, although everyone agreed that the UI Division would have to have a process in place to handle remands on the issue of whether a claimant would be required to repay an overpayment and whether the employer's account would be charged for an overpayment because there are going to be cases where the fact finding materials would not be available. There was no conclusion that I am aware of that we absolutely could not remand these cases. UI Division was concerned about the computer programming issue of setting up a new ANDs decision or issuing a typed decision.

My main point was that if one of UI Appeals' goals is to reduce postage and copying, that would be defeated by having to send out fact-finding material to the parties in every case involved an employer appeal of a grant of benefits to a claimant. In addition, we are taking up valuable hearing time on a topic that may or may not be necessary since employer's participation is only relevant IF we reverse the grant of benefits, which cannot know in advance. No one was really persuaded and thought that we would not have to send out fact-finding information in advance, but could simply ask the parties about non-participation and tell them what was in the administrative file. Joe B. was not convinced that there would be a DOL compliance issue with our deciding the issue without remand as long as we gave parties a hearing. In a practical sense, he is probably correct that what we do will not be scrutinized that closely by DOL as long as the law was passed.

The last thing Joe told me was that he was going to send out instructions giving ALJs discretion in handling the issue of whether a claimant would be required to repay an overpayment and whether the employer's account would be charged for an overpayment. That is an ALJ could question the parties about the non-participation issue and making a decision on the issue, but would not be required to every case, and if the ALJ was uncomfortable with addressing the issue in a particular case, they could remand since the UI Division has to have a process in place in any event for deciding this issue. He said he was going to advise Mike W. of this plan. Obviously, Joe never got the instruction out and I have no idea if he told Mike W. of this plan.

I think South Dakota's approach is the most sensible and follows the DOL Program Letter, but I am obviously in the minority on this.

I think there is another issue as well, that I have not brought up before. We are focused on the employer non-participation issue, but for non-recovery of the overpayment from the claimant the law also states "the benefits were not received as a result of fraud or willful misrepresentation." So if claimant reported that she was laid off due to lack of work and you find that they quit, even where the employer failed to participate are we going to decide the overpayment must be recovered due to willful misrepresentation? Will Investigations and recovery then adopt that and treat as a fraud overpayment? Shouldn't the claimant then receive notice that a potential issue is willful misrepresentation? And of course, willful misrepresent and fraud cases normally go to DIA. Also interesting then is because of the inconsistent language of 96.3-7-b(1)(a) and (1)(b), you could have a case where an employer is charged for an overpayment that is not waived. Everybody loses.

Let me know if you have other questions.

Steve

From: Wise, Steve [IWD]
Sent: Wednesday, July 03, 2013 9:51 AM
To: Walsh, Joseph [IWD]; Wilkinson, Michael [IWD]; Bervid, Joseph [IWD]; Eklund, David [IWD]
Subject: Implementation of UC Program Integrity Amendments

At the Director's request at our last staff meeting, I sent email inquiries about implementation of UC Program Integrity Amendments to other states. I sent emails to contacts in Kentucky, South Dakota, Maryland, Idaho, Alaska, Arkansas, New Hampshire, Nebraska, Oklahoma, Wisconsin, Minnesota, Georgia, Utah, Wyoming, and Washington. I am still getting responses back.

Many states who have responded have laws that won't go into effect until October 2013 and have laws stating an employer will be charged for an overpayment (1) due to Employer's failure to timely or adequately respond to requests for information **AND** (2) where that employer has a "pattern of failing to respond," which they intend to track for a period of time following the effective date of the law. States have various measures for patterns of failing to respond. The Maryland Chief Hearing Officer said "I will likely be contacting you in another month or two as we approach October to see how you guys got this up and running."

South Dakota is the state that has responded so far who has a statute with language similar to ours that does not require a "pattern of failing to respond" and a law that went into effect July 1, 2013.

Here's South Dakota's new law. "However, no relief of charges applies if the department determines that an erroneous payment has been made because the employer, or an agent of the employer, was at fault for failing to respond timely or adequately to the department's request for information relating to the payment of benefits. For the purposes of this section, an erroneous payment is a payment that would not have been made but for the failure of the employer or the employer's agent to fully respond to the department's request pursuant to § 61-7-5."

Administrative Law Judge Shannon George-Larson after consulting with UI Director Pauline Heier, stated:

We will hold hearings as usual when an employer appeals a determination granting benefits. We will list the usual issues of "Is Claimant disqualified from receiving benefits because Claimant voluntarily quit employment without good cause or was discharged for work-connected misconduct?" and "Is Employer's experience-rating account subject to or exempt from charge?" If the ALJ decision reverses the Agency determination granting benefits, we will use the following language in the Conclusions and the Order to address the chargeability issue:

Employer's experience-rating account is exempt from charge unless the Agency determines Employer is subject to charge for benefits already paid to Claimant due to Employer's failure to timely or adequately respond to Agency inquiries.

The Agency will issue an overpayment determination to Claimant as usual if benefits have been paid. It will be up to the Agency to review the file and issue a determination finding Employer is subject to charge due to fault. If Agency does not issue a determination, our conclusion of no charge stands. If Agency issues a determination, the determination will go to Employer only with appeal rights. It would go to Employer only because in our view Claimant is not an interested party in this issue.

UI Director Pauline Heier, stated

Our UI department will be handling the issue of employer fault at the time we make a decision where an overpayment is created. The nonmonetary determination will include the following statement.
NOTICE TO EMPLOYER: Your experience rating account number {~15~} is charged for benefits paid from {beginning date} to {ending date} as you failed to respond timely or adequately to the department's request for information. Your account is exempt from charge after {ending date}.

The difference between South Dakota and Iowa is that South Dakota has always had a general waiver of overpayment rule that an overpayment can be waived if a claimant requests a waiver of overpayment and establishes that claimant (1) was not at fault in receiving the overpayment, and (2) does not have the ability to repay the overpayment. That is why in South Dakota they say the claimant will not be an interested party on the employer charge issue. Also South Dakota has never included "whether the claimant was overpaid unemployment insurance benefits" as an issue in a separation appeal hearing. The reversal of an award of benefits by an ALJ in South Dakota always triggers the Overpayment unit to issue an overpayment determination.