

State of Wisconsin



Labor and Industry Review Commission

Unemployment Insurance
Decision¹

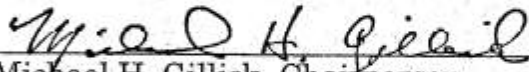
Hearing No. 2201

Dated and Mailed:
JUN 29 2023

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The commission **affirms in part, and reverses in part**, the appeal tribunal decision. Accordingly, the claimant must repay the erroneously received benefits as set forth in the appeal tribunal decision. The claimant is not required to repay an administrative penalty of \$480 to the department.

By the Commission:


Michael H. Gillick, Chairperson


Georgia E. Maxwell, Commissioner


Marilyn Townsend, Commissioner

¹ **Appeal Rights:** See the blue enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, all other parties in the caption of this decision or order (the boxed section above), and the Department of Workforce Development. Appeal rights and answers to frequently asked questions about appealing an unemployment insurance decision to circuit court are also available on the commission's website, <http://lirc.wisconsin.gov>.

Procedural Posture

This case is before the commission to consider whether Lost Wage Assistance ("LWA") benefits that were overpaid due to fraud may have a 40% fraud penalty attached. An administrative law judge (ALJ) of the Unemployment Insurance Division of the Department of Workforce Development held a hearing and issued a decision. The commission received a timely petition for review. The Department of Workforce Development ("Department") submitted a brief in support of affirming the ALJ's decision.

After its initial review of the record, the commission requested further briefing from the claimant and the Department. The commission has considered the petition, briefs of the claimant and Department, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission makes the following:

Findings of Fact and Conclusions of Law

On September 27, 2022, an appeal tribunal decision was issued finding that the claimant intentionally concealed work and wages from the department while working as a self-employed real estate agent. The decision resulted in a \$1,200 overpayment of LWA benefits.

The issue presented in this case is whether the department may assess a 40% penalty on the LWA overpayment because of the concealment of the hours worked and income received by the claimant from his self-employment.

The commission finds that the Department does not have the legal authority to charge a penalty on fraudulently obtained LWA benefits. The LWA program is not an unemployment benefit program, and the associated benefits are not unemployment benefits.² As such, the legal authority that requires a penalty to be charged on fraudulently obtained regular unemployment benefits and the federally provided pandemic unemployment benefits does not extend to the LWA program and benefits.³

² Ex. 7 at U78; Hearing Tr. at 39 (Department witness testified that "LWA is not an unemployment benefit.") The LWA program was created by a Presidential Memorandum on August 8, 2020, under the Robert T. Stafford Disaster Relief and Emergency Assistance Act 42 U.S.C. § 5174 (the "Stafford Act").

³ The Department of Labor ("DOL") initially advised states that a fraud penalty could not be charged on Pandemic Unemployment Assistance ("PUA") benefits that were obtained fraudulently. UIPL 16-20, Change 2, Attachment I, I-9, issued July 21, 2020. However, the DOI subsequently changed its stance on whether a penalty could be charged on PUA benefits that were obtained fraudulently. UIPL 16-20, Change 4, issued January 8, 2021. The DOL provided further guidance that informed states that the fraud penalty must be charged to all CARES Act unemployment benefits obtained fraudulently. This included PUA, Federal Pandemic Unemployment Compensation ("FPUC"), Mixed Earners Unemployment Compensation ("MEUC"), and Pandemic Emergency Unemployment Compensation ("PEUC") benefits. UIPL 20-21, p 4-5 issued May 5, 2021. As justification for this change, the DOL cited Section 251(a) of the Trade Adjustment Assistance Extension Act of 2011 ("TAAEA") (Pub. L. 112-40), which created section 303(a)(11) of the Social Security Act ("SSA") (42 U.S.C. § 503(a)(11)). Section 251(a) of the TAAEA applies to unemployment benefit programs. 42 U.S.C. § 503(a)(11) states, "At the time the State agency determines an erroneous payment from its unemployment fund was made to an individual due to fraud committed by such individual, the



The claimant was paid LWA for weeks 31, 33, 34, and 36 of 2020 in the amount of \$1,200.00, for which the claimant was not eligible and to which the claimant was not entitled, and that the payment of such benefits was due to fault on the part of the claimant and/or repayment would not be contrary to equity and good conscience, and that recovery of the benefits paid shall not be waived, within the meaning of Section 262 of the Continued Assistance for Unemployed Workers Act of 2020.

The department may not assess an administrative penalty equal to 40% of the LWA overpayment.

Memorandum Opinion

The claimant does not challenge the appeal tribunal's conclusion that he concealed information from the department and must repay the LWA benefits to which he was not entitled. However, in his petition for commission review, the claimant contends that the Department does not have the legal authority to charge a 40% penalty on overpaid LWA benefits. The claimant contends that LWA is not an unemployment benefit and that LWA overpayments cannot be treated in the same manner as other federal pandemic unemployment benefits. The commission agrees.

In its briefs to the commission in support of affirming the appeal tribunal decision, the Department argues that it is statutorily obligated to charge a penalty on fraudulently obtained benefits. Further, it argues that guidance it has received from the Department of Labor ("DOL") and the Federal Emergency Management Agency ("FEMA"), as well as information provided by the DOL in Unemployment Insurance Program Letters ("UIPL"), provides authorization for charging a penalty on overpaid LWA benefits that were fraudulently obtained.

The Department entered into a State Administrative Plan ("SAP") with FEMA to administer the LWA program. The Department contends the SAP required it to charge a penalty against an individual who committed fraud during the pandemic. However, the commission can find no support for the Department's contention. The SAP made the Department "responsible for recovering assistance awards from the eligible individuals obtained fraudulently...and for returning funds to FEMA in accordance with 2 C.F.R. § 200.345." Ex. 1 at U93. There is no mention of a fraud penalty anywhere within the SAP.

The Department also contends that federal law requires it to assess LWA fraud penalties as defined by state law. The LWA benefits paid to the claimant were paid out of the State Unemployment Trust Fund ("UTF"). Hearing Tr. at 14. The Department paid all LWA benefits out of the UTF until October 26, 2020. *Id.* After October 26, 2020, the state had established a system to request LWA funds directly from FEMA. *Id.* at 15. The Department argues that since the claimant was paid out

assessment of a penalty on the individual in an amount of not less than 15 percent of the amount of the erroneous payment."

of the UTF, 42 U.S.C. 503(11)(a) applies, which provides that the Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State...includes provision for:

At the time the State agency determines an erroneous payment from its unemployment fund was made to an individual due to fraud committed by such individual, the assessment of a penalty on the individual in an amount of not less than 15 percent of the amount of the erroneous payment...

Further, Wisconsin Stat. § 108.04(11)(bh) states:

In addition to ineligibility for benefits resulting from concealment as provided in par. (bc), the department shall assess a penalty against the claimant in an amount equal to 40 percent of the benefit payments erroneously paid to the claimant as a result of one or more acts of concealment described in pars. (a) and (b).

The Department contends that the plain language of Wis. Stat. § 108.04(11)(bh) applies the penalty to all benefits paid by the Unemployment Insurance Division.

The commission finds that the Department should not have paid LWA benefits out of the UTF. The DOL provided the following guidance to states in UIPL 27-20, Change 1:

17. Question: Will the funds to pay LWA flow into the state unemployment account in the Unemployment Trust Fund (UTF)?

Answer: No. **States may not use the funds in their state unemployment account in the UTF to process funding for LWA payments.** A state must establish a separate account to receive the funding to pay LWA. The state must be able to account for the funds separately from its state unemployment accounts. The state is reminded that it may only use its state unemployment account, including the benefit payment accounts (which are considered part of the state's trust fund) to pay regular unemployment compensation or for other statutorily authorized purposes, such as those authorized under the Reed Act or other special distributions that flow into the state's trust fund.

(emphasis added.) This guidance was provided on August 17, 2020. However, the Department continued to pay LWA out of the UTF until October 26, 2020.

According to the Department's LWA program expert witness, who testified at the hearing, the Department paid the LWA benefits out of the UTF because it was required to pay the benefits promptly. Hearing Tr. at 17. The Department reiterates this argument in its brief to the commission. While the commission agrees that the



Department has a duty to “insure full payment of unemployment compensation when due,” because LWA benefits are not unemployment benefits the federal statute cited by the Department is not applicable here. SSA § 303(a)(1); *See California Dept. of Human Resources v. Java*, 402 U.S. 121, 91 S. Ct. 1347, 28 L.Ed.2d 666 (1971). In addition, it should be noted that FEMA expected that the states would have to pay some LWA benefits retroactively due to the complexities of establishing the program.⁴

The Department’s argument that since it paid LWA out of the UTF it is required to charge a penalty is unconvincing. As indicated above, LWA benefits should not have been paid out of the UTF, and the Department’s mistake does not provide it with authority to charge a penalty under 42 U.S.C. 503(11)(a).

The commission further disagrees with the Department’s contention that Wis. Stat. § 108.04(11)(bh) applies to all benefits it has paid. Chapter 108 defines “benefits” as:

The money allowance payable to an employee as compensation for the employee’s wage losses due to unemployment as provided in this chapter.

Wis. Stat. § 108.02(6). As discussed above, LWA benefits are not unemployment benefits. In addition, the Stafford Act provides for LWA, not Chapter 108. Therefore, the commission finds that the Department has failed to establish any legal authority that allows it to charge a penalty on LWA benefits that were erroneously paid due to fraud. Having reached this conclusion, the commission believes that the issue is resolved. However, the commission will nonetheless address the remaining arguments in the Department’s brief.

First, the Department argues that LWA should be treated the same as other federal pandemic unemployment programs administered by the state. The Department cites UIPL 20-21 as support for its contention that it must apply a monetary penalty to overpayments made due to fraud. However, UIPL 20-21 deals exclusively with CARES Act programs. LWA benefits are not provided for by the CARES Act. There is no mention of LWA in UIPL 20-21, and the commission finds that it is not applicable to LWA.⁵

The Department next contends that it defies common sense to treat LWA and FPUC differently. It argues that both programs provide supplemental payments, and that there is nothing in the law or guidance that indicates the programs should be treated differently. Again, the commission disagrees.

⁴ See FEMA LWA Frequently Asked Questions. Available at <https://www.fema.gov/disaster/historic/coronavirus/governments/supplemental-payments-lost-wages/frequently-asked-questions>

⁵ The commission notes that at the appeal hearing, the Department argued that UIPL 20-21 doesn’t apply to LWA. Hearing Tr. at 52.



First, while both FPUC and LWA are supplemental payment programs, they were created differently. As discussed at length above, LWA was created under the Stafford Act, specifically under a provision of the Stafford Act entitled "Federal assistance to individuals and households." 42 U.S.C. § 5174. By creating the LWA program in this manner, the federal government declined to make LWA an unemployment program. *See* Ex. 7 at U78.

Second, the commission does not agree that it defies common sense to treat FPUC and LWA fraud penalties differently. The DOL, on behalf of FEMA, provided the following guidance to the Department:

13. Do the fraud provisions of FPUC carry over to LWA (i.e. claimant is ineligible for future FPUC if they commit fraud on FPUC.) Are they also ineligible for LWA if ineligible for FPUC?

Answer: No, these are two separate programs. Also, whereas FPUC statute referred to the terms and conditions for regular compensation, LWA is not an unemployment benefit.

Ex. 7 at U78. The commission finds this guidance to be persuasive evidence that the LWA and FPUC programs are not the same and that the DOL and FEMA expected the two programs to be treated differently.

Finally, the Department contends that two pieces of guidance that it received from the DOL and FEMA acknowledge its authority to issue a penalty on LWA benefits that were overpaid as the result of fraud. First, the Department received the following guidance from the DOL in 2020:

9. What other non-offset recovery mechanisms can we use to collect LWA overpayments? The tools we use for other UI programs are: administrative (non-court ordered) wage garnishment, TOP, offsets from State Income Tax returns (like a state-level TOP). Are these mechanisms all permitted for recoupment?

Answer: States/territories may pursue administrative, civil, or criminal actions to collect LWA overpayments and recover fraudulent claims related to the Lost Wages Assistance program, along with any associated remedies, such as penalties and interest, subject to the laws of that state.

Ex. 7 at U77.

Second, in 2022 the Department reached out to the FEMA LWA technical assistance email address for further guidance with the following inquiry:



Wisconsin, like other states, has determined that some recipients of Lost Wages Assistance benefits have committed fraud in connection with their receipt of LWA benefits. Our understanding of FEMA guidance is as follows: FEMA defers to the state's authority to assess any interest and/or penalties to individual claimants who received improper payments **in accordance with the state's debt recovery laws**. A state is not required to return erroneous payments to FEMA beyond the amount of actual LWA program benefit funding the state paid to any individual.

Please confirm that this is FEMA's position with respect to penalties assessed for LWA fraud.

FEMA's response was as follows:

Your understanding is correct. FEMA does not require a state to provide to us any interest and/or penalties assessed in accordance with the state's debt recovery laws, just the actual amount of the overpayment of LWA benefit funding.

Ex. 2 at U82 (emphasis added).

The commission is unpersuaded that the guidance referenced above supports a conclusion that the Department can charge a penalty for fraud involving the LWA program. The DOL's guidance pertains to a state's ability to collect LWA overpayments. The commission is not persuaded that a monetary fraud penalty assists a state in collecting an LWA overpayment. The guidance received from FEMA in 2022 specifically refers to interest and/or penalties assessed in accordance with the state's debt recovery laws. Although the commission requested further briefing on whether Wis. Stat. § 108.04(11)(bh) was a debt recovery law the Department's brief did not convince the commission that Wis. Stat. § 108.04(11)(bh) is such a law. As such, the commission does not find either piece of guidance to be persuasive evidence that the Department is allowed to charge a penalty on LWA benefits that were overpaid because of fraud.

NOTE: The commission did not consult with the ALJ who held the hearing prior to reversing because its reversal is not based on a differing view of the credibility of witnesses whose testimony conflicted. Instead, the reversal is based on a differing interpretation of the relevant law.

cc: Atty. Victor Forberger
Atty. Ryan Farrell

