

Volunteers Lawyers Project Annual UI Training – October 20, 2016

Litigating Cases involving the Issue of Concealment *Presented by Administrative Law Judge Michele A. Peters*

1. ***What is concealment?*** 2015 WI Act 334: for determinations issued after April 3, 2016.

SECTION 18. 108.04 (11) (g) of the statutes is renumbered 108.04 (11) (g) 1. and amended to read:

108.04 (11) (g) 1. ~~For purposes of~~ In this subsection, "conceal" means to intentionally mislead ~~or defraud~~ the department by withholding or hiding information or making a false statement or misrepresentation.

SECTION 19. 108.04 (11) (g) 2. and 3. of the statutes are created to read:

108.04 (11) (g) 2. A claimant has a duty of care to provide an accurate and complete response to each inquiry made by the department in connection with his or her receipt of benefits. The department shall consider the following factors in determining whether a claimant intended to mislead the department as described in subd. 1.:

- a. Whether the claimant failed to read or follow instructions or other communications of the department related to a claim for benefits.
- b. Whether the claimant relied on the statements or representations of persons other than an employee of the department who is authorized to provide advice regarding the claimant's claim for benefits.
- c. Whether the claimant has a limitation or disability and, if so, whether the claimant provided evidence to the department of that limitation or disability.
- d. The claimant's unemployment insurance claims filing experience.
- e. Any instructions or previous determinations of concealment issued or provided to the claimant.
- f. Any other factor that may provide evidence of the claimant's intent.

3. Nothing in this subsection requires the department, when making a finding of concealment, to determine or prove that a claimant had an intent or design to receive benefits to which the claimant knows he or she was not entitled.

2. ***Types of concealment:***

- work and wages (disqualifies claimant from receiving benefits in any week: Wis. Stats. §108.04(11)(b).)
- material facts (e.g. work search, able and available, quit/discharge, refusal an offer of work, vacation/holiday pay¹) (allows for partial UI benefits)

¹ Vacation pay and holiday pay are treated as "wages" for purposes of the partial benefit formula, but they are not wages. See Wis. Stat. § 108.05(3); UID-M 13-26, issued Dec. 6, 2013, and revised Dec. 9, 2013. If a claimant conceals vacation or holiday pay, it is considered concealment of a material fact under Wis. Stat. § 108.04(11)(a),

3. Consequences of a finding of concealment against a claimant:

- a. Overpayment** – reimburse the department for unemployment insurance benefits paid. (waiver permitted only when there is Department error and no employee fault or employer fault – *see* Wis. Stats. §108.04(13)(f); *see also* *See Barbara Blawat v. Personnel Specialist Ltd.*, UI Hearing No. 01610153RC (LIRC April 4, 2002)).
- b. Forfeiture or Benefit Allowance Reduction:**

The forfeiture, or benefit reduction, is an administrative penalty for concealment that the claimant is not required to pay out of pocket. However, the forfeiture/benefit reduction is assessed when the employee applies for unemployment benefits and rather than receiving those unemployment benefits as a credit/cash payment for any given week, it is assessed as a penalty for concealment until either the forfeiture/benefit reduction amount is reduced to zero or six years from the date of the determination lapses, whichever occurs first. (Wis. Stats. §108.04(11)(bm).)

For weeks before 43 of 2012 (week ending October 27, 2012), a claimant shall forfeit:

- 1 x WBR for each act that occurred on or before the date of the first concealment determination
- 3 x WBR for each act that occurred after the date of the first 1x level determination
- 5 x WBR for each act that occurred after the date of the first 3x level determination

For weeks after 43 of 2012 (week ending October 27, 2012), a claimant shall be assessed an ineligibility benefit reduction as follows:

- 2 x WBR for each act that occurred week 43/12 and later
- 4 x WBR for each act that occurred after the date of the first 2 x level determination
- 8 x WBR for each act that occurred after the date of the first 4 x level determination.

- c. Additional penalty:** when concealment is found for weeks 43/12 or later, in addition to the reduction penalty the claimant will also be assessed a 15% overpayment penalty which he/she must pay out of pocket, not offset with unemployment benefits and the dollar amount will not be rounded to the nearest dollar.

Effective with decisions issued 10/4/15 and later, the penalty is increased to 40% of

and the partial wage formula applies. *See also Charles O'Neill v. Riteway Bus Service Inc.*, UI Hearing No. 15600518MW & 15600519MW (LIRC May 16, 2015).

the overpayment amount resulting from concealment with week of issue 43/12 and later.

In *Leon Hoskins*, UI Hearing No. 15600854MW (LIRC June 3, 2015), LIRC rejected the employee's contention that the employee thought the benefit amount reduction is "double jeopardy. [He] paid what [he] owed with interest" and is no longer working. LIRC reasoned:

The commission agrees that the penalties for concealing work, wages, or material facts from the department when filing claims for unemployment insurance benefits are very steep. However, the legislature established the concealment penalties set forth in Wis. Stat. § 108.04(11)(be), and the commission is required to apply the statute as it is written. The harsh penalties for concealment reflect the legislature's intent to deter individuals from intentionally misleading or defrauding the department in order to obtain unemployment insurance benefits for which they are not eligible and to which they are not entitled.

4. Burden of Proof

A claimant is presumed eligible for unemployment insurance benefits, and the party resisting payment must prove disqualification. (Wis. Stat. § 108.02(11); *Kansas City Star Co. v. DILHR*, 60 Wis.2d 591, 602, 211 N.W.2d 488 (1973). The burden to establish that a claimant concealed information is on the department. (*In re Scott Lynch*, UI Dec. Hearing No. 10404406AP (LIRC Mar. 11, 2011); *Holloway v. Mahler Enter., Inc.*, UI Dec. Hearing No. 11606291MW (LIRC Nov. 4, 2011). Because it is a form of fraud, concealment must be proven by clear, satisfactory, and convincing evidence. (*Kamuchey v. Trzesniewski*, 8 Wis.2d 94, 98, 98 N.W.2d 403 (1959); *Schroeder v. Drees*, 1 Wis.2d 106, 112, 83 N.W.2d 707 (1957).) An inference of concealment is not created by a mere showing that a claimant provided an incorrect answer in filing a claim certification.

"A forfeiture of benefits may not be imposed against a claimant who makes an honest mistake, but only as a willful act of concealment, not due to ignorance or lack of knowledge. There must be an intent to receive benefits to which the individual knows he or she is not entitled." *Kamuchey v. Trzensniewski*, 8 Wis. 2d 94, 99 (1959) (citing 23 Am Jur. *Fraud and Deceit* § 77, para. 851).

"Direct evidence of intent is not necessary. Intent may be inferred from acts, words and statements. Further there is a rebuttable presumption that a person intends the natural and probable consequences of deliberate acts." *Brenda R. Mortensen*, UI Dec. Hearing No. 05002751JV (LIRC Dec. 14, 2005).

The evidence in the record does not show that the claimant, when filing claims for the weeks at issue, had the requisite intent to receive benefits to which he knew he was not entitled. This is the key component in finding concealment and was not addressed in the appeal tribunal decisions. See *Mark Haebig v. News Publishing Co. Inc. of Mt Horeb*, UI Hearing Nos. 13000910MD, 13000911MD & 13000912MD (LIRC Jan. 31, 2014).

The intent in question relates to the state of mind of the claimant. *Nestor Gutierrez*, UI Hearing No. 00005766MD (LIRC July 19, 2002).

An inference of intent cannot be made where the only evidence is that the employee answered a compound question incorrectly. *Eric Van De Loo v. Bemis Mfg Co.*, UI Hearing Nos. 13403969AP, 13403970AP (LIRC May 30, 2014).

5. *Direct evidence of concealment.*

See *William Shoch*, UI Hearing No. 14200752EC, 14200753EC, 4200754EC, 14200755EC, 14200756EC & 14200757EC (LIRC July 31, 2014): issue of whether in nine weeks in 2013 and four weeks in 2014, the claimant concealed that he did not conduct the required weekly work searches. LIRC affirmed, finding concealment, reasoning that: the claimant testified that he was not going to claim ignorance or anything like that because he needed the money. The claimant's admission constitutes direct evidence that he intended to receive benefits which he knew he was not entitled to because he did not comply with the statutory requirement of conducting reasonable work searches during the weeks in question. Finally, the claimant's incorrect answers on his weekly claim certification were not honest mistakes stemming from any misunderstanding or confusion but rather were intentionally made to mislead or defraud the department regarding work searches in the weeks at issue. See also *Leon Hoskins*, UI Hearing No. 15600854MW (LIRC June 3, 2015).

6. *Four steps to review indirect evidence to determine if there is concealment:*

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

See *Hollett v. Shaffer*, UI Dec. Hearing Nos. 13003690MW and 13003691MW (LIRC Apr. 30, 2014), *aff'd*, *Wis. Dept. of Workforce Dev. v. Wis. Labor & Indus. Rev. Comm'n and Hollett*, Case No. 14 CV 331 (Wis. Cir. Ct. Sauk Cnty. Jan. 22, 2015).

7. *Does the reason offered by the claimant overcome the inference of concealment?*

Kari Priebe v. Four Sisters Floral Co., UI Hearing Nos. 136010185MW, 136010184MW, 136010183MW & 136010182MW (LIRC Nov. 28, 2014), currently on appeal pending before Milw County Circuit Court, found as follows:

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

8. *The Department's Disputed Claims Manual provides instructions for adjudicators to establish why the claimant failed to report wages.*

- Does the claimant understand the allegation?
- Why did the claimant fail to report the wages or material fact(s)?
- Did the claimant understand the correct filing procedures?
- Did the claimant receive [read] a Handbook?
- What is the claimant's educational level?

In the past, adjudicators were instructed to find no concealment (1) if there were conflicting answers on an initial or continued claim which clearly establish the claimant was confused or that the claimant did not understand what was being asked or answered; (2) if there was first-time, non-conventional work; (3) if correct information was given to the claimant by agency personnel but the circumstances and facts establish that confusion or a misunderstanding reasonably occurred; (4) if the claimant has a history of mental or physical illness which, when facts are documented, explain the claimant's incorrect answers; and (5) if a review of prior and/or later claimant records show the claimant properly and accurately reported work and wages or answered questions, an omission, for example, of partial work and wages, supports a finding that an honest mistake was made. An omission could involve more than one employer.

Wisconsin Unemployment Compensation Manual, Vol. 4, Part II, Chap. 3, "Fraud," January 1993.

9. *Possible factors/defenses to overcome the inference of concealment for work and wages cases:*

a. Did the claimant work?

See Matthew Doughty v. Convergence Marketing Inc., UI Hrg. No. 14607136MW & 14607137MW (LIRC Jan. 30, 2015), The ER advised the EE that he was removed from the schedule for one month and thereafter, may not be given any hours. On March 4, 2014, the EE had a call with the ER's HR staff reporting his concerns about the reduction in hours and not being paid on time. The EE was initially told he would not be paid for his time for the phone call and after reporting that he would file an EEOC claim if he was not paid for his time, the ER's staff sent an e-mail that same day, advising the EE that he would be paid for the conference calls on 2/19 and on 3/4 on the employer's next payroll check issued 3/14. LIRC reasoned that this was not work, reasoning that "work" is not defined in Ch. 108. Employment is defined, with exceptions not applicable here, as any service performed by an individual for pay. (*See §108.02(15)(a) Wis. Stats.*) In this case, it was not established that the EE actually performed a service for pay, thus no concealment.

See also Christopher M. Raine v. V S & M, UI Hrg. Nos. 15601165MW & 15601166MW (LIRC July 29, 2015): EE reported for his first day of work, and was given a beverage and told the position was no longer available. EE did not complete any paperwork, receive any training, or perform any services. About two weeks later, ER sent EE a check for \$140 to compensate him for his time and

trouble. LIRC found that it was not established that the EE actually performed a service for pay, thus no concealment.

See Lisa Hollett v. Douglas Shaffer, UI Hearing Nos. 13003690MW AND 130003691MW (LIRC May 8, 2014): *Appealed to Circuit Court. Affirmed, January 30, 2015.* The commission finds that the employee's testimony that she was confused and did not intend to defraud the department credible. The employee established that she made an honest mistake in believing that she was filing for benefits "against" her previous employer, which had laid her off and caused her unemployment, and that the questions on the weekly claim certifications referred to that employment. Although the employee's belief was incorrect, her misunderstanding of how the unemployment insurance program operates is not uncommon. In addition, the employee did not think of the care she provided to Mr. Shaffer in her home as a job. Under the circumstances, this is not unreasonable. The employee's work history was comprised of work outside the home. It did not involve caring for individuals in the employee's own home. *A first-time failure to report non-conventional work has long been found not to evince an intent to conceal. (Citing to See, e.g., Wisconsin Unemployment Compensation Manual, Vol. 4, Part III, Chap. 3, "Fraud," January 1993.)* Finally, the fact that the employee filed for, and received, partial unemployment benefits in the past, most recently in 2007, does not preclude a finding that the employee was confused by the claims process in 2013. Several things about the claims process, including the wording of Question No. 4 on the weekly claim certification, changed between 2007 and 2013. In addition, there is nothing in the record to suggest that the employee was providing in-home personal care services or performing other non-conventional work when she filed claims for unemployment benefits in the past. The commission finds it more reasonable to infer that, because the employee properly reported work and wages in the past, she would have reported her services to Mr. Shaffer to the department if she knew such services were "work" under the unemployment insurance law. (Emphasis added.)

See Denise Bilton v. H & R Block Eastern Enterprises, Inc., UI Hearing Nos. 13605766MW & 13605682MW (LIRC Jan. 9, 2014): issue of whether claimant concealed work and wages in week 4 and 5 of 2013. The employee testified she did not think she would be paid for these weeks as it was training. LIRC reversed, finding *no concealment*, reasoning: "The department's Disputed Claims Manual provides that there is no concealment issue and no fraud investigation required when the claimant fails to report income on the weekly claim certification and notifies the department of such failure within 14 days following the date the certification was filed. When an investigation establishes that a claimant gave a false answer, two examples of acts that are not considered concealment are "[p]aid training not reported because claimant did not consider this to be work and wages" and "[c]laimant believes their work or labor is donated and is paid unexpectedly." It is not clear from the record in this case how the employee's actions with respect to weeks 4 and 5 of 2013 differ from these examples."

- b. Did the claimant earn wages? *See Anita Shaw v. The Dr. Howard Fuller Educ. Foundation Inc.*, UI Hearing Nos. 13609589MW & 13609590MW (LIRC June 12, 2014): issue of whether there was concealment of work and wages in week 42 of 2012. LIRC found ***no concealment***, reasoning that the employee filed a claim certification for week 42 of 2012 and reported that she had not worked during that week. Exhibit 1, the weekly earnings audit ostensibly completed by the employer, is the only evidence in the record purporting to establish that the employee did, in fact, work and earn wages during that week. However, Exhibit 1 shows that the employee, who is paid \$8.00 per hour, worked for four hours and was paid \$64.00 for that work. The information concerning week 42 of 2012 is inconsistent. No one appeared at the hearing on behalf of the employer to explain the inconsistency. Did the employee actually work four hours in week 42 of 2012? Did she actually get paid \$64.00 for that work, twice her regular wage rate? Did the employee not work but get paid for a reason other than work? Were the employer's records incorrect as to both work and wages? The evidence presented requires speculation and conjecture. Therefore, the evidence is not credible or probative, and it does not support a finding that the employee worked and earned wages in week 42 of 2012 and concealed the same from the department.

See also Marcus Johnson v. Sheraton Madison Hotel, UI Hearing Nos. 15000002MD, 156000191MD, 156000193MD, 15000549MD, 15000623MD, 15000625MD, 15000628MD & 156000630MW LIRC (Oct. 2, 2015): The Dept. & EE stipulated to the accuracy of the wage amounts reported for the two ER's for the weeks in which the EE reported to the Dept. that he worked and earned wages. Notwithstanding this stipulation, LIRC found that the evidence in the record is insufficient to determine whether the EE was entitled to partial benefits. The ER's audit report form is hearsay, and its reliability is questionable. Thus, the audit form does not constitute substantial evidence. No non-hearsay evidence was presented to corroborate the ER's audit form, such as payroll records, wage statements, or other business records.

- c. What constitutes an inexperienced versus an experienced filer? *See Donovan Jackson v. Securitas Security Services Inc.* Hrg. No. 14606875MW & 14606876MW (LIRC June 9, 2015) (inexperienced filer); *see also Adam Stroede v. Valvoline Instant Oil Change*, Hrg. No. 13004244MD & 13004245MD (LIRC June 11, 2015) (inexperienced filer); *but see See Deidre Ueal v. UPS Ground Freight Inc.* Hrg. No. 15600751MW & 15600752 MW (LIRC May 28, 2015)(experienced filer).

What weight is placed on whether the claimant reported work and wages him/herself, without any assistance, from the same employer in previous weeks? How many weeks does a claimant need to report work and wages before he/she becomes "experienced"?

What weight is placed on whether the claimant reported work and wages him/herself, without any assistance, from previous multiple employers and now is underreporting by reporting only one employer's work and wages?

d. What efforts, if any, were made by the claimant to self-report work and wages or to correct any incorrect answer on the weekly claim certification? LIRC has recognized that an employee's efforts to correct information from a prior incorrect claim certification can rebut an inference of concealment. See *Bilton v. H &R Block Eastern Enterprises, Inc.*, UI Dec. Hearing No. 13605682MW (LIRC Jan. 9, 2014); *Harris v. Arandell Corporation*, UI Dec. Hearing No. 13606536MW (LIRC Jan. 9, 2014).

e. Does it matter if the claimant testified that the Department would correct the underreporting with a UCB-37 Overpayment Notice for him/her to pay the difference/make the wage correction?

See *Marcus Johnson*, UI Hrg. Nos. 15000622MD, 15000626MD & 15000629MD (LIRC Oct. 2, 2015), LIRC disagreed that the blank form overpayment notices are “extremely clear” and sufficient to warn the claimant of potential concealment penalties.

See also *Robert Vasquez v. Fedex Smartpost Inc.*, UI Hearing Nos. 14602073MW & 14602074MW (LIRC Sept. 24, 2014): LIRC found no concealment, in part, although the claimant may have received documents from the department cautioning him about carefully reporting his weekly wages and noting that incorrect numbers might result in overpayments that must be repaid or, if intentional concealment is found, penalties might be assessed. However, those blank documents have also noted that intentional concealment has not been found in the employee's reporting of his work and wages. *But see Michelle Dahl v. Indianhead Community Action Agency*, UI Hearing 14201364EC & 14201367EC (LIRC Nov. 14, 2014): issue of whether there was concealment of work and wages in week 51 of 2012, weeks 5 and 6 of 2013, and weeks 16 through 38 of 2013. LIRC, after remanding the case, found **concealment**, reasoning that: The employee was familiar with the claims system and was not confused by any of the questions asked of her. She had successfully filed for partial benefits for weeks in which she had worked part-time. The employee had been put on notice of the need to report accurate information on her weekly claim certifications. Prior to the weeks at issue, the employee had been required to repay a number of overpayments. Those overpayments resulted from the employee failing to provide complete or accurate information to the department on her weekly claims. A close review of the employee's claims history between week 51 of 2012 and week 38 of 2013 reveals a pattern whereby the employee grossly underreported her wages or failed to report any wages at all on her weekly claim certifications. This pattern leads the commission to infer that the employee intentionally made false statements or misrepresentations concerning her work and wages for the weeks at issue in a deliberate effort to mislead or defraud the department and to receive full benefits to which the employee knew she was not entitled.

f. Is there a difference if it was a UCB-37 Notice of Overpayment versus a UCB-38, Notice of Overpayment with fraud warning, which resolves first-time unreported

work and wages with overpayments of \$1,000 or less, unless there is an indication employer aiding and abetting may be involved? Effective 10/26/15, the UCB-38 Notice was eliminated. What about the factor under Wis. Stats. §108.04 (11) (g) 2e? What effect, if any, is there when prior UCB-37 Notice of Overpayments have been rescinded by the Department and then those same weeks a concealment determination was issued?

g. What weight is given to prior acts of fraud/concealment? Does it matter if the prior concealment act(s) was/were appealed? What weight, if any, is given to the outcome (s) of the prior appeal(s)? What period of time in proximity to the weeks at issue should be considered as relevant for the UCB-37, UCB-38 notices and/or prior acts of fraud? When is it too remote? Does it matter what type of prior act of concealment: the same (e.g. work and wages) or different (e.g. material fact) occurred other than what the pending matter involves?

h. Is there any difference for a claimant who files weekly claim certifications on the Department's Interactive Voice Response (IVR) telephone system versus with the assistance of a claim specialist (DUCE) or via the department's on-line internet (IWC) or via the department's claimant's portal (as of March 30, 2016)(IWC CPortal)?

See William Chao v. Eagle Movers Inc., UI Hearing No. 13607069M and 13607071MW (LIRC Jan. 17, 2014): EE believed that, if he answered "yes" to question number 4, he would be saying that he received sick pay, bonus pay, or commission, and he did not want to lie about that. The employee gave an honest answer to a compound question relayed to him on a pay phone via interactive voice response technology. He did not have the benefit of seeing the compound question in writing before or after responding to it.

Up to week 42 of 2012 (week ending October 20, 2012):

Did you work?

Beginning week 43 of 2012 (week ending October 27, 2012) and onward, the question was changed to:

Please listen carefully (two second pause). During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission? If yes, press 9. If no, press 6.

As of March 30, 2016 (week 14 of 2016), the Department's on-line claimant's worker's portal, asks:

During the week, did you work?

Note: there is no change to the Department's interactive voice response system question, it is still the compound question listed above.

- i. Does it matter if the internet claim was filed via a desktop computer, laptop, I-Pad/tablet or smart cell phone/I-phone? Do you ask the claimant if s/he scrolled to see the entire question? *See Donovan Jackson v. Securitas Security Services Inc.* Hrg. No. 14606875MW & 14606876MW (LIRC June 9, 2015): he did not see the “Did you work...” portion of the question when he filed via the internet.
- j. What effect is there on whether a claimant does or does not read the Handbook for Claimants? The Handbook for Claimants is available on-line and in English, Spanish and Hmong.
 - o *See Anita McGee v. Crossmark Inc.*, UI Hrg Nos. 14609275MW, 14609276MW, 14609277MW & 14609278MW (LIRC May 28, 2015): EE was not new to the UI system; she expressed no confusion about how to answer the questions on the dept’s claim forms; and was aware from past encounters that she was required to report work & wages. EE knew her second job could affect her UI benefits, yet she chose not to read the Handbook for Claimants and chose not to contact the dept but relied upon a supervisor who said that the out-of-state ER wages didn’t need to be reported. EE had called Dept to ask other questions but did not do so in this case. EE has a master’s degree. “The EE in this case may not avoid responsibility for her actions by deliberately remaining ignorant of her duties and obligations under the unemployment insurance law.”

See also Jose Atilano v. SBM Site Services LLC, UI Hrg. Nos. 16000036MD & 16000037MD (LIRC March 11, 2016), where the employee speaks Spanish. His highest level of education is the sixth grade in Mexico. He is taking English as a Second Language classes here. When he initiated his claim for benefits in April 2015, he received a notice in Spanish from the department directing him to access and read its *Handbook for Claimants*. The employee did not access the handbook online, because he "is not that good at the internet." He did not ask the department to send him a printed copy. The employee filed his claim for week 44 of 2015, the week ending October 31, on Sunday, November 1. He answered "No" when asked, "During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?" The employee reported that he did not work in that week, even though he had worked 40 hours, because he was trying to collect for an earlier week in which he did not work but for which he was not paid benefits. The employee did not contact a claims specialist to ask about benefits that were "held back" or to ask what he needed to do to obtain those benefits if he were, in fact, entitled to them.

LIRC found concealment reasoning that although the employee agreed that he worked and earned wages in week 44 of 2015, and he agreed that he failed to report that work and those wages on his weekly claim certification, he denied that he concealed that information from the department. He contended, rather, that

there was a language barrier and he simply made a mistake. The commission is not persuaded.

The employee never claimed that he misunderstood or was confused by the questions that were asked of him on the weekly claim certification. Instead, he thought, erroneously, that he had one week of unemployment benefits on hold and that he had the right to collect those benefits. To obtain those benefits, the employee purposely reported that he did not work in week 44 of 2015, even though he had worked 40 hours in that week.

The employee's actions embody the statutory definition of concealment: he intentionally misled and defrauded the department by making a false statement or misrepresentation (that he did not work in week 44 of 2015). As a result of his actions, the employee received benefits for week 44 of 2015 for which he was not eligible and to which he was not entitled.

The employee did not rebut the inference of concealment through affirmative proof of good faith. He did not make an honest mistake in reporting that he did not work when he had. He did not misinterpret information received from the department or make a good faith effort to meet his responsibility to provide accurate information to the department. The employee was instructed in Spanish to access the *Handbook for Claimants* online or to request a printed copy, but he chose not to do so. Had the employee read the *Handbook for Claimants*, he would have learned that Wisconsin has a waiting week, which is the first week of an individual's benefit year for which the individual is otherwise eligible for regular benefits. Unemployment insurance benefits are not paid for the waiting week. So, while the employee may have misunderstood his benefit rights under the unemployment insurance law, it was because he never made the effort to learn why one week's benefits were "held back."

- L. Claimant did not file the on-line weekly claim certifications due to unavailability/incarceration.

See Corey L. Weed, Hrg. No. 15600903MW & 15600904MW (LIRC May 5, 2015): EE wrote down his PIN and placed that paper in his wallet. A month later, he was arrested and his housemate picked up the items the EE surrendered. Three days later, the EE was transferred to a jail in Illinois, where he was not permitted to make telephone calls. The EE did not authorize anyone to file claims on his behalf. NOTE: Internet claims were not added as a method to file initial applications or weekly claim certifications until January 1, 2007. EE endorsed UI benefit checks for weeks 21, 22 and 23 of 2006. Subsequent benefit checks were not endorsed by him, and paid to his housemate's mother and a person he did not know. Dept. did not establish that EE filed claims for the weeks at issue.

See Sandra Solomon v. Erik Buell Racing LLC, Hrg. No. 15600681MW & 15600682MW (LIRC May 28, 2015): EE filed claims via the internet. [NOTE: Order does not reference any geo-data for what electronic device was utilized and

location of that electronic device for weeks at issue as compared to previous filings.] Roommate had access to the EE's personal information [Inquiry: is this the same as her security credentials?]. EE has TRO against her former roommate. LIRC accepted the EE's testimony she did not file a claim for week 21 of 2014, it would have been illogical for her to do so, reasoning that she had started a new full-time job; received a notice from the department she had exhausted her benefits; and knew that there were no extended benefits available.

But see Sebastian Bellante v. Knauer Plumbing Heating & Cooling, UI Hearing Nos. 14609353MW, 14609354MW, 14609355MW & 14609356MW (LIRC April 10, 2015); issue of whether there was concealment of work and wages in week 16 of 2014 and a material fact, A & A, for weeks 17 through 33 and 42 through 44 of 2014. LIRC found **concealment** in week 16 of 2014. The employee asserted that he did not file a weekly claim for week 16 of 2014. However, there is no other explanation as to how a claim would have been filed for that week. The employee did not report his work and wages when filing his weekly claim for week 16 of 2014. The employee has provided no explanation for failing to report his work and wages. The employee filed his claim just days after having performed work for the employer in week 16 of 2014. The commission must therefore presume that the employee intended to conceal his work and wages when filing for benefits for that week. The employee has failed to rebut that presumption.

- m. Does the employee's education level and/or any cognitive impairments affect the claimant's ability to comprehend the lack of understanding of how to file and report work and wages? Under Wis. Stats. §108.04(11)(g)2c, a claimant "provided evidence to the department of that limitation or disability". What evidence is sufficient? Note the difference under Wis. Stats. §108.04(7)(c), of a "verified illness or disability".

In *Adam Stroed v. Valvoline Instant Oil Change*, UI Hrg. Nos. 13004244MD & 13004245MD (LIRC June 11, 2015): no concealment: EE was 28 y.o. He completed 8th grade, did not attend H.S. and does not have a GED. He is dyslexic, suffers from attention deficit disorder, hyperactive disorder, and he does not read or write well. He can print but he cannot write in cursive. He was confused by the compound question. No concealment.

See also Christopher Wiberg v. Curative Care Network Inc., UI Hrg. Nos. 14605801MW & 14605802MW (LIRC Dec. 26, 2014): EE was not A & A due to a knee surgery scheduled for July 23 and EE's incapacitation was expected to last 12 to 16 wks after the date of the surgery. EE advised the ER's supervisor he did not think he would be back for the rest of the season for the lawncare work. EE completed H.S., where all his classes were designed for students with learning disabilities. EE received services from DVR, which included a psychological examination in 2011. LIRC found no concealment finding that it was not unreasonable for the EE to believe that he was A & A. Although, it was clear that EE's knee injury prevented him from performing his job duties as lawn maintenance or warehouse worker, it was not clear

that he was prevented from performing *any work*. LIRC reasoned for the finding of no concealment that “given the EE’s cognitive limitations, his failure to comprehend the nuances of the UI law relating to one’s “ability to work” and “availability for work” is understandable. “

But see Karmalah Hutson v. Captel Inc., UI Hrgs. No. 14607698MW & 14607699MW (LIRC Feb. 20, 2015): EE could not explain how her claim certifications for the weeks at issue did not include work and wages from either of her employers nor why she did not report her discharge from one of those ER’s. “She asserted comprehension issues, but provided no evidence supporting the existence of such issues. Given her lengthy experience filing previous claim certifications for UI benefits and her understanding of the UI benefits programs, the commission cannot find that her repeated reporting inaccuracies were due to honest mistakes on her part. She has not rebutted the inference of concealment by affirmative proof of good faith on her part.”

n. Not knowing the number of hours worked.

In *Charles Hale*, UI Hearing No. 05403511GB (LIRC April 19, 2006): With the prior “Did you work question?”, LIRC found concealment reasoning: EE’s explanation, that he did not report the correct amount of his weekly earnings because he did not know what he earned in each week, was not believable. The question concerning wages that the claimant was asked when he filed his weekly claims was simple and straightforward. The claimant knew his hourly wage rate in the part-time employment he was engaging in while claiming benefits. He also knew the number of hours that he worked in each week. He could have easily come up with a much more realistic estimate of his earnings in each week. He did not present a valid explanation for his failure to do so.

See also Wade Salton v. Community Advocates, UI Hearing Nos. 15600034MW & 15600035MW (LIRC May 28, 2015): With the compound question “During the week, did you work or...” question, LIRC found no concealment from subject ER and found concealment from Caloutte Construction in weeks 43 and 44 of 2014 (with the compound “Did you work....?”). EE knew how to report work and wages from multiple ERs, and he had done so in the past. EE may have not known the exact rate of pay for the work he was performing for Calouette, but he knew how many hours he worked. *EE could have estimated his rate of pay based on his knowledge of union jobs, and he could have filed his claims accordingly. Later, after he was actually paid, the EE could have contacted the dept to correct his estimated earnings. Instead, EE chose not to report anything at all, because he did not physically receive a pay stub and the project he was working on was “short-lived”.* Neither of those factors excuses the EE’s decision not to report his work and wages at all. Choosing not to report his work for and pay from Caloutte Construction Services – thereby withholding info from the dept – was not a reasonable or defensible choice. Note: LIRC found no concealment of wages from Community Advocates as EE inadvertently failed to report his work and wages – just honest mistakes. EE said he completed his claims in a rushed manner. EE had consistently reported work and wages from Community Advocates.

o. Reporting hourly rate versus gross wages.

See Kristi Bartman, UI Hearing No. 10006053MD (LIRC May 13, 2011): issue of whether there was concealment of work and wages in weeks 27 through 52 of 2009 and weeks 1 through 15, and 19 through 21 of 2010. The employee contends that she was ignorant during her weekly filing when she incorrectly reported her hourly wage in place of her weekly gross wages. The employee argues in her petition for commission review that she believed the department would calculate her gross wages based on her reporting of her hourly wage and the number of hours she worked, even though the weekly claims required entering the gross amount of wages earned from each employer. LIRC affirmed, finding **concealment**, reasoning that: the employee admitted that she thought it was odd she was receiving full weekly benefits each week even though she was earning weekly wages that ranged from \$60 to several hundred dollars during those weeks. The administrative law judge noted that had there been only several weeks of improperly made claims before the employee figured out her error, a finding of a simple mistake may have been made. Here, however, the employee failed to correct her method of claiming after it became clear to her that there was something wrong and entered the incorrect information on **44 weekly claims**. As such this failure supports a conclusion that the employee misled the department with the intent to receive benefits to which she was not entitled by improperly reporting her wages earned during the numerous weeks at issue.

See also Nicole Suchowski v. Golden County Foods Inc., UI Hearing Nos. 13202496EC & 13202497EC (LIRC Jan. 9, 2014): issue of whether claimant concealed work and wages in weeks 13 through 16, 18 through 22, 24 through 31, 33, and 34 of 2013. LIRC affirmed, finding **concealment** reasoning that: EE argues that she should not be found to have concealed work performed and wages earned, because the department never informed her that its policy had changed with respect to verifying work and wages. The employee argues that she has been filing for unemployment insurance benefits since 2007 and the department always "checked the hours with the employer before sending out a check." The employee agrees that she may have "misfiled [her] hours," but she argues that "unemployment is just as responsible to check hours reported before sending any payment to make sure hours reported were not in error." The commission is not persuaded by these arguments and affirms the appeal tribunal decisions. After receiving full benefits for weeks in which she worked for a period of time **greater than five months**, evinces an intent to receive benefits she was not entitled.

10. **Concealment of Material Facts Cases**

A. **Quit:** *see Christine Lambert v. Waunakee Manor Health Care Ctr*, UI Hearing No. 14000936MD & 14000937MD (LIRC Sept. 19, 2014): issue of whether there was concealment of work and wages in weeks 44 and 45 of 2013 and quit a job in week 44 of 2013. LIRC **found concealment** reasoning that: A reasonable inference can be made that the employee acted purposefully in order to receive benefits. The employee acknowledged having read the *Handbook for Claimants* when she began filing claims, and acknowledged that she understood that she was required to report her work and wages on her weekly certifications. By week 44

of 2013, she was not new to claiming unemployment benefits; she had opened claims a couple of times in 2013 prior to filing her claims for the weeks at issue. ***She expressed no confusion about the meaning of the claim certification question asking whether she had quit a job, and the question itself is straightforward and not difficult to understand. Her only explanation for incorrectly answering the question was that she was not paying attention.*** Similarly, the employee's only explanation for answering no to the question concerning whether she had worked during weeks 44 and 45 was that she was not paying attention. Although the question concerning whether she had worked is problematic because of its compound nature,⁽¹⁶⁾ making it more susceptible to misinterpretation, the employee denied being confused by the part of the question asking whether she had worked. In her testimony, the employee stated that she was unsure about when to report wages--when they were earned or when they were received--but that uncertainty does not explain her answering no to the question of whether she had worked during the week. Because she answered no, the system would not have prompted her to report her wages at all. Under the circumstances described above, it is fair to infer that the employee's acknowledged carelessness in filing her claims masked an intent to withhold information in order to obtain benefits.

See also Scott Flynn, UI Hearing No. 07003689JV (LIRC Nov. 21, 2007): issue of whether there was concealment of a quit. LIRC affirmed, finding ***concealment***. In his petition for commission review the claimant argues, as he did at the hearing, that he was focused on the separation from his manufacturing job and the fact that he quit the job with the postal service was not in his thoughts. The claimant contends that he did not intentionally omit this fact when filing his unemployment claim. The commission does not find this argument persuasive. The claimant was aware that he had submitted notice that he was resigning from the job with the postal service, and should have reported that fact to the department when asked. Unemployment benefits are paid almost entirely on the basis of information provided by claimants and there is an obligation on claimants to accurately disclose material facts to the department. The commission agrees with the appeal tribunal that the claimant intentionally concealed a material fact relating to his eligibility for benefits. However, in an accompanying decision, hearing #07003690JV, the commission found the claimant to be eligible for benefits notwithstanding the fact that he quit. Consequently, there is no overpayment. Because the department will generally recommend a forfeiture of .25 of the weekly benefit rate where there is no overpayment and no prior fraud, the commission has reduced the forfeiture to .25 of the weekly benefit rate.

Abel Rodriguez, UI Hearing No. 99600259MW (April 22, 1999): Pursuant to authority granted in Wis. Stat. § 108.09 (6)(c), the commission sets aside the February 3, 1999 appeal tribunal decision in this matter and remands the matter to the Department of Workforce Development for hearing and decision on the merits. The basis for the commission's action in this case is the department's having found concealment of a quit by the employee, because the employee

engaged in conduct inconsistent with an intent to maintain an employment relationship. To find concealment is to find that a claimant intentionally misstated a material fact in order to obtain unemployment insurance he or she was not entitled to. *Where, for example, an employee admits he or she quit, but has either no or an obviously self-serving justification for having failed to report the quit, then a finding of concealment is easily maintained. Here, on the other hand, the finding of concealment was based solely upon the employee's having engaged in conduct inconsistent with an intent to maintain an employment relationship.* There was no interview with the employee and, while "conduct inconsistent" often does constitute a quit within the meaning of Wis. Stat. § 108.04 (7)(a), there also are occasions when it does not. In any event, the evidence before the department in this case was insufficient for the department to conclude that the employee concealed a quit of employment. For these reasons, the commission believes the merits are best heard. This order concerns only this case, and not the three other cases the employee has pending before the commission.

Jeffrey Cutter, UI Hearing No. 10607155MW (LIRC June 2, 2011): issue of whether concealment of a quit. LIRC found *no concealment*. On the UCB-16 Separation Notice, the employer's president indicated that the employee "quit, could no longer make it to work due to car problems." It was this statement, coupled with the employee's failure to have responded to the department's request for information, that led the department to find that the employee had concealed a quit from the employer. This evidence is legally insufficient to establish concealment, however.

First, the employer's statement is ambiguous because it might mean only that the employee no longer could work for the employer because of a lack of transportation, and that in itself is not a quit of employment. Second, as a matter of law, "[m]ere silence is not a representation. It implies no purpose or design. Active concealment consists of a suppression of a fact and implies a purpose or design." *Kamuchey v. Trzesniewski*, 8 Wis. 2d 94, 99, 98 N.W.2d 403 (1959), citing 23 Am. Jur., Fraud and Deceit, p. 851, sec. 77. The employee's failure to have responded to the department's request for information is no more than silence and, even if construed as a lack of cooperation, is insufficient to establish the fraud of concealment. See *Lubow v. LIRC*, slip op. at 5, Case No. 91-CV-427 (Washington Cty. Cir. Ct. January 30, 1992) ("The mere lack of cooperation by the plaintiff is not sufficient to meet [the] burden [of establishing fraud].").

The department has the burden of proof to establish concealment, see *Lubow*, slip op. at 5, and , as a form of fraud, concealment "must be proven by clear and satisfactory evidence," a higher degree of proof than in ordinary civil cases. *Kamuchey v. Trzesniewski*, 8 Wis. 2d 94, 98. The evidence before the department did not meet this standard.

B. *Work Searches: Erika Gibbs v. Care Animal Hospital of Pleasant Prairie Inc.*, UI Hearing Nos. 13610293MW 13610294MW (LIRC Dec. 19, 2014): issue of whether the claimant concealed required work searches in weeks 25 through 47 of 2013. LIRC, after a remand hearing, reversed, finding ***no concealment***, reasoning that: the employee believed after contacting the department adjudicator to discuss the work search issue, that the department sanctioned her work search actions because she was pursuing her work search efforts in good faith and the adjudicator told her to continue certifying her weekly claims as she had been doing. Wis. Admin. Code § DWD 127.01(2)(j) grants the department the discretion to find "other actions" aside from applying for work to constitute reasonable work searches. Indeed in the facts, adjudicator Toche conceded that some of the employee's unconventional methods met the statutory requirements of a reasonable work search. However, despite speaking with adjudicator Toche on these two occasions regarding her work search efforts, the employee was not asked to present evidence of her work search logs. Based on these findings, the commission finds the employee's mistaken belief that she was complying with the work search requirements credible. This credible finding is further supported by the employee's immediate contact of the adjudicator following ALJ Rakowski's instructions to do so after the separation hearing in October 2013. While the employee's efforts considered in their entirety failed to meet the statutory requirements associated with a weekly work search, the commission finds that the employee's failure to comply with the statute was due to a genuine misunderstanding of the sufficiency and adequacy of her work searches, rather than an intent by the employee to mislead or defraud the department.

William Shoch, UI Hearing No. 14200752EC, 14200753EC, 4200754EC, 14200755EC, 14200756EC & 14200757EC (LIRC July 31, 2014): issue of whether in weeks 39 through 40 of 2013, week 42 of 2013, weeks 44 through 46 of 2013, weeks 49 through 51 of 2013 and weeks 3 through 6 of 2014, the claimant concealed that he did not conduct the required weekly work searches. LIRC affirmed, finding ***concealment***, reasoning that: the claimant testified that he was not going to claim ignorance or anything like that because he needed the money. The claimant's admission constitutes direct evidence that he intended to receive benefits which he knew he was not entitled to because he did not comply with the statutory requirement of conducting reasonable work searches during the weeks in question. The claimant offered reasons for answering the question regarding work searches incorrectly such as the futility in searching for work he believed was not in line with his previous employment or transportation problems. These explanations however fail to rebut the evidence that he intended to receive benefits he was not entitled to receive. The claimant also explained that his health conditions prevented him from searching for work. However, when the department provided the claimant

with an opportunity to submit credible and substantial medical evidence, a UCB-474, regarding his health conditions, the claimant failed to do so. The medical documentation submitted by the claimant, an uncertified discharge note from a medical center, at the hearing is insufficient to establish the claimant's work search should have been waived or that he was incapable of conducting a reasonable work search in each week he failed to do so. Finally, the claimant's incorrect answers on his weekly claim certification were not honest mistakes stemming from any misunderstanding or confusion but rather were intentionally made to mislead or defraud the department regarding work searches in the weeks at issue.

Kelly Roloff, UI Hearing No. 99002098BO (LIRC Aug. 12, 1999): issue of whether there was concealment of failure to do a work search for weeks 9 through 16 of 1999. LIRC affirmed, finding ***concealment***, because the administrative law judge was persuaded that the employee's intent to conceal was minimal, the minimum forfeiture allowed under the law will be assessed in this case. LIRC reasoned that: "The claimant had no specific explanation as to why he had certified that he made a work search during the weeks in question. However, the claimant did appear to believe that he had complied with all of the requirements for benefit eligibility during the time in question. His belief was not reasonable, given the nature of his work search contacts, and his certifications did amount to a concealment of the fact that he had not made a reasonable work search. However, the claimant was somewhat confused as to what was required and as to how he should complete his claim forms and therefore any affirmative intent to conceal was minimal."

- C. ***Able and Available: Daniel Godoy Medina v. Fahrner Asphalt Sealers LLC***, UI Hrg. No. 16000211MD (LIRC May 26, 2016): On Saturday, January 3, 2015 (week 1), the employee traveled to Germany to be with his girlfriend. Prior to his travel on January 3, the employee was able and available to work 32 hours in week 1 of 2015. The employee returned to the United States on June 15, 2015 (week 25). The employee also traveled to Spain and the United Arab Emirates. The claimant filed his weekly claim certifications, during weeks 1 through 22 of 2015, while traveling outside of the United States. There is no evidence the employee was aware that there were geographical restrictions with respect to the availability question for unemployment purposes. By application of Wis. Stat. § 108.04(2)(ae), LIRC found EE was not A & A for weeks 2 through 22 of 2015 as since the employee was located outside of the United States or Canada for more than 48 hours in each week he claimed benefits he was not available for work in his general labor market. Also, the employee did not establish he had authorization to work in the countries he traveled to. The claimant's lack of awareness or ignorance of the existence of Wis. Stat. § 108.04(2)(ae) does not constitute departmental error, within the meaning of Wis. Stat. § 108.02(10e). While the employee's failure here is not equivalent to willfully concealing

information from the department, the overpayment was created by the employee's responses and waiver is not permitted pursuant to Wis. Stat. § 108.22(8)(a) and (c). **No concealment** while claiming benefits in weeks 2 through 22 of 2015 as there is no evidence the employee was aware that there were geographical restrictions with respect to the availability question for unemployment purposes. The employee honestly believed he was available for work because he was ready, willing and able to accept work when he answered the relevant weekly claiming question. The record supports the ALJ's findings and conclusions made pursuant to Wis. Stat. § 108.04(11). Therefore, there is no overpayment penalty imposed.

Reigne Brown v. Milwaukee Branch of NAACP, UI Hearing Nos. 14601711MW and 14601712MW (LIRC July 15, 2014): issue of whether concealed A & A in weeks 4 of 2013 through 18 of 2013. LIRC affirmed, finding **concealment**, reasoning that: The claimant reported a layoff from both her full-time and part-time employers in week 49 of 2012. See Exhibit 1. This reported information triggered a department investigation in week 50 of 2012, at which time the claimant reported still working for her part-time employer. The claimant also admitted that as of week 4 of 2013 she was no longer able to work because of her medical condition stemming from complications from her pregnancy. Despite the change in her medical condition and her inability to work in week 4 of 2013, the claimant continued to claim she was able to and available for full-time work in that week and in each week claimed thereafter. The claimant also understood that if she responded "No" to the question she would not be eligible for benefits and if she responded "Yes" to the question she would be eligible for benefits. The commission therefore can reasonably infer the claimant intentionally provided incorrect answers, in weeks 4 of 2013 through 18 of 2013, in order to obtain benefits which she knew she was not entitled to receive. The next inquiry is whether the claimant's explanation successfully rebuts this reasonable inference.

At the hearing, the claimant argued she was given incorrect information by a department adjudicator in week 50 of 2012, when he told the claimant to answer "Yes" to the question "Were you able to work full-time and were you available for full-time?" However, as previously discussed, the claimant admitted this information was based on her statement that she was still working for her part-time employer as of week 50 of 2012.

The claimant did not argue that the question was confusing and the department provides detailed information instructing claimants on how to answer the relevant question. The claimant admitted she did not click on the link that provided additional information in regard to the able and available question in any week she claimed benefits. She also admitted receiving, reading and understanding the *Handbook for Claimants* which also contained the same information regarding how to answer the question.

Had the claimant consulted this information when her condition substantially changed, she would have read that a "Yes" answer should be entered if the claimant could have and would have worked full-time, if work had been available to the claimant. The claimant would have also read that a "No" answer should be entered if the claimant could not work full-time because the claimant was physically unable to work or unavailable for work.

The claimant's argument that she committed an honest mistake or good faith error in judgment is contradicted by her own testimony when she admits she was unable to work because of complications stemming from her pregnancy as of week 4 of 2013 and neglected to report this changed condition to the department, despite indicating she would do so during her interview in week 50 of 2012.

When the claimant's circumstances changed in week 4 of 2013 and she was no longer able to work, she continued to claim she was able to work and available to work full-time when in fact she was not. She made this claim for 14 weeks, until her doctor released her to full-time work in week 19 of 2013.

In view of the above, the claimant failed to rebut the inference of concealment. The claimant's testimony was inconsistent with her actual reporting behavior in regard to week 49 of 2012. The claimant also failed to report to the department that her condition changed in week 4 of 2013. Thus, the claimant's incorrect answers were not honest mistakes stemming from any misunderstanding or confusion but rather were intentionally made to mislead or defraud the department regarding her inability to work in weeks 4 of 2013 through 18 of 2013.

Mark Seidel, UI Hearing No. 11605862MW (LIRC Feb. 17, 2012): issue of whether claimant concealed from the department any material fact relating to his benefit eligibility, specifically, A & A, when filing a benefit claim in weeks 49 of 2010 through 4 of 2011. LIRC reversed finding *no concealment*, reasoning that: The claimant credibly testified that he was notified by the judge at his sentencing that he would be eligible for Huber release if he was required to serve his stayed sentence. He answered the question regarding his availability on his weekly claim certification consistent with his good faith belief that the judge had made this provision. The jail did not formally make him eligible for Huber privileges until January 21, 2011, but the employee was unaware of this when he filed his weekly claim certification. The claimant did not intend to defraud the department by answering yes to this question.

Christopher Saygo, UI Hearing No. 10605416MW (LIRC Nov. 12, 2010): issue of whether there was concealment of A & A in weeks 11 thru 14 of

2010, as EE was incarcerated. LIRC affirmed, finding *concealment*, reasoning: The ALJ did not credit the claimant's testimony that he did not give his wife permission to file his claims. The commission likewise does not credit his testimony particularly since he testified that neither he nor his wife were aware that he could not file for benefits while incarcerated.

The employee states that he and his wife use the same PIN number. However, the employee was instructed in the Handbook for Claimants:

Your PIN is a 4-digit number you make up before you apply. The UI Telephone System and Internet applications will use your PIN and social security number to identify you when you apply. The same PIN must be used for all UI services.

Your PIN protects you from having another person file your claim or obtain information about your claim. Make up a PIN that you will remember but that is unusual enough so others will not guess it. Do not give your PIN to ANYONE. You are responsible for all claims filed and all information given to this department using your Personal Identification Number and Social Security Number.

Brenda Mortensen, UI Hearing No. 05002751JV (LIRC Dec. 14, 2005): issue of whether claimant concealed material fact of A & A in weeks 13 through 15 of 2005. EE underwent surgery on March 21, 2005 (week 13); she could not do any work that week. Before she was laid off she asked her foreman if she should take sick leave for the time she was laid off or whether she should file for unemployment insurance payments. The claimant's foreman asked a benefit representative and later informed the claimant to collect unemployment. She had the surgery and was "unable to work and was unavailable for work" as that phrase is defined for unemployment insurance eligibility purposes for the period from week 13 through week 18 of 2005. In her mind, the only reason she was not working was because her employer had laid her off for a definite period. As she anticipated, when the layoff was over in week 16, she returned to work and worked full-time doing light duty work. She did not understand that in order to be eligible for unemployment insurance benefits, with her uncontrollable restrictions she had to be able to work in at least 15 percent of all the full-time suitable work with all the employers in her labor market area. She did not realize that the fact she could have worked full-time with her employer, (had she not been on layoff) was irrelevant. She received two copies of the claimant's handbook in 2005; she did not read them. LIRC reversed, finding *no concealment*, reasoning that: The claimant had been told to file for benefits by her foreman. The claimant did not understand, that as a result of her surgery and limitations, she was not able to perform at least 15 percent of the suitable work in her labor

market. The claimant should have thought the situation over more carefully.

D. An offer of work: *Jacqueline Tyler*, UI Hearing No. 13609813MW (LIRC March 6, 2014): issue is whether, in week 39 of 2013, the claimant concealed from the department a material fact concerning her eligibility for benefits, namely the refusal of an offer of work. LIRC reversed, finding ***no concealment***, reasoning that: In this case, the department did not meet its burden to prove concealment. There is no competent evidence in the record to establish that work was offered to the claimant in week 39 of 2013 or that she refused such work. In finding concealment, the ALJ relied on documentation purportedly showing an email exchange between the president of Lockstep Solutions LLC and the claimant. However, the documentation was hearsay. It was a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. No one from Lockstep Solutions LLC appeared at the hearing to authenticate the documentation. The claimant questioned its legitimacy and denied the veracity of the information contained therein. There was no corroborating evidence, and no hearsay exception was identified by the ALJ. Furthermore, while the claimant was faulted for failing to appeal the companion determination, that determination allowed benefits and was, thus, not clearly adverse to the claimant.

Rudy Mundinac*, UI Hearing No. 02006240BO (LIRC Feb. 12, 2003):** issue of whether claimant concealed an offer of work in week 26 of 2002. LIRC reversed finding ***no concealment, reasoning that:

The claimant last worked for the employer [a temporary staffing agency] in late April of 2002. In June, the employer left a message on the answering machine of the claimant's mother, telling the claimant a job was available to the claimant. Shortly thereafter, the claimant responded to the message by telephoning the employer and indicating that he was starting a full-time job on July 1, 2002, and that he therefore no longer was interested in working for the employer. Because of this statement, the employer did not provide the claimant with details of the assignment.

In this kind of case, the claimant's immediate statement that he is no longer interested in working for the employer, is known as "blocking" an offer of work. That is, the employer would have made the complete offer of work to the claimant but for the claimant's blocking the offer by immediately stating he was not interested in such. In treating this scenario as an offer of work under Wis. Stat. § 108.04(8)(a), the law employs what is known as a "legal fiction." That is, the law finds an offer of work that in fact was never made, on the ground that it would have been made but for

the claimant's blocking of the offer. In this context, however, concealment by a claimant will rarely be found.

In a case where, as here, a claimant has blocked an offer of work, the claimant would not be guilty of concealment in failing to report the offer because the claimant would have no idea that the circumstances legally constituted an offer of work. There also is unlikely to be concealment where, as here, the failure to accept the underlying offer of work is not disqualifying. In the present case, the assignment was approximately three hours away from the claimant's residence, and that factor gave the claimant good cause for "refusing" the offer. But where the underlying circumstances are not disqualifying, the intent to receive benefits to which the individual knows he or she is not entitled, generally is lacking.

E. Self-Employment: David Mumm, UI Hearing No. 13003988MD (LIRC Feb. 28, 2014): issue is whether the claimant concealed a material fact relating to his eligibility for benefits when he failed to report that he was self-employed when filing his weekly claim certification for week 39 of 2013. The claimant owns nine or ten vehicles. He used his employee discount at the auto parts store to purchase parts for those vehicles and for his family's vehicles until the employer clarified that the employee discount was limited. The claimant has a shop near his residence where he works on his vehicles, keeps his tools, and stores some things. He has room to work on one vehicle at a time in his shop. The claimant had a cell phone voicemail greeting that said, "You've reached Todd at TJS Truck Parts and Fabrication. Leave your name and number, and I will call you back." The claimant denied having a business and explained that the voicemail greeting was a joke between a couple of friends and his family because he works so much on his vehicles. The claimant also works on family members' vehicles, but he does not take any money to work on anything. The claimant's cell phone number was not available to the general public.

The claimant's former employer contested the claimant's eligibility for unemployment insurance benefits. It was alleged that the claimant sold vehicles for profit, sold used parts for profit, and ran a business with business cards and informal advertising. Members of the public reportedly sought out the claimant at the auto parts store concerning used parts. The claimant denied engaging in the selling of used parts or advertising TJS Truck Parts and Fabrication. The claimant frequently took time off of work to attend swap meets, where he would buy truck parts, but he did not sell parts at those meets.

LIRC reversed, finding *no concealment*, reasoning that: The evidence in the record did not establish that TJS Truck Parts and Fabrication existed as an actual, ongoing business from which the claimant received income. It

was not established that the claimant engaged in activities as a for-profit venture as opposed to engaging in activities as a hobby. The only income about which there was testimony the claimant had received years prior to week 39 of 2013. Furthermore, while the department determined that the claimant was self-employed in week 39 of 2013, department records show that the self-employment issue was "washed out" and not investigated. The commission notes that the department did not find that the claimant was self-employed in any week other than in week 39 of 2013.

- F. Discharge: Sandra Parr, UI Hearing No. 13604808MW (LIRC Nov. 1, 2013):** Issue of whether the claimant concealed material fact of discharge in week 50 of 2012. LIRC reversed, finding *no concealment*, reasoning that: First, the ALJ had found, in a decision that was a companion to this one, that the claimant's separation occurred in week 48, not in week 50. That finding has been affirmed by the commission. The claimant's separation from employment occurred only once, and since it has been established that it occurred in week 48, the claimant cannot be cited for concealment for indicating that she was not separated in week 50.

Second, as to whether the claimant committed an act of concealment by not disclosing her separation in week 48, when she moved, the commission finds, as it did in the companion case, that in week 48 the claimant sincerely believed that her employment had not been severed because she hoped the employer would assign her to work at a location that was closer to her new home. The ambiguity of the situation regarding the claimant's separation prevented a finding that the claimant's failure to report a separation in week 48 constituted an act of concealment as defined in the law. Finally, after the claimant received the employer's letter dated December 13, 2012, indicating that her employment had been severed as of week 48, she could have notified the department of the separation retroactively, but there was insufficient evidence presented at hearing to prove that her failure to make a retroactive correction was a willful act of concealment.

- G. Expiration of work visa: Nestor Gutierrez, UI Hearing No. 00005766MD (LIRC July 19, 2002):** issue of whether there was concealment of the material fact that the claimant's H-2B work visa had expired. The employer's HR manager spoke with a department representative, who was unfamiliar with the H-2B visa category; however he believed, based upon his knowledge of similar visa categories, that the employees in question would be eligible for unemployment insurance at the end of the work season. The employer's HR manager held a meeting with her workers, informed them of their potential eligibility for benefits, and told them to file claims for those benefits with the department. The claimant filed his claim, using his H-2B visa number. Since the claimant's visa was no longer valid, the department issued the above- mentioned initial determination of

concealment. LIRC reversed, finding *no concealment*, reasoning that: intent is not present in this case. The intent in question relates to the state of mind of the claimant. Given the department representative's assessment that the workers in question should be eligible for benefits, and the relaying of that information to the workers by the employer's manager, however, the claimant (and the co-workers who also filed claims) cannot be said to have known they were not eligible for the benefits for which they filed claims.

TEN PRACTICE TIPS FOR UNEMPLOYMENT INSURANCE HEARINGS:

1. Obtain a copy of the unemployment insurance file either in person, via U.S. mail or send a request with a signed release of information via facsimile to the Milwaukee Hearing Office (fax: 414-227-4264). Review the initial determination, the employer's and claimant's statements prepared by the department representative, as well as any quit questionnaire, discharge questionnaire, or other documents in the file completed or supplied by either party.
2. Read and review the both the claimant's and employer's statements prepared by the department representative during the department's fact-finding investigation with your client. Does your client agree with the department representative's statements? Are there any portions that the client disagrees with? Are there any pertinent facts that the client told the department representative which are omitted from the statement? If the client changes any facts from the client's original statement until the date of the hearing, is there a plausible explanation for the change in the facts?
3. Read and review the appeal, if applicable, and any rebuttal statement provided by the employer. Does the client agree or disagree with the assertions made therein?
4. If the initial determination identifies the issue as the separation of employment and communication was via text messages, e-mail or by cell phone, does the client have copies of the cell phone/text/e-mail messages records from its service provider that can be printed or obtained to corroborate his/her testimony? If no records exist to corroborate, does the client have a plausible explanation for that?
5. If the separation of employment occurred via e-mail or text messages, print out a copy of the e-mail/text messages or provide in a .mp4 (MP4) format as outlined in the "**Attending an Unemployment Insurance Hearing What Employees and Employers Need to Know**" pamphlet.
6. Review "**Attending an Unemployment Insurance Hearing What Employees and Employers Need to Know**" pamphlet that is available on-line at <http://acc.dwd.wisconsin.gov/dwd/publications/ui/hearing.htm>.
7. Obtain the client's first day worked, last day worked and if applicable, date of discharge. Go through a time line of events including the date of the last incident, the details of the last incident and any warnings issued to the client for similar conduct, which led up to the separation of employment.
8. If attendance is the reason for the discharge, review dates of when the client was absent/tardy, amount of tardiness/early departure, if notice was provided and why the client was absent or tardy, especially for the final incident.
9. For the final incident that caused the separation of employment, is there any corroborative evidence (e.g. e-mail, receipt, medical excuse, confirmation of a dental appointment, notice of court appearance, photographs), that the client provided the employer that corroborates the client's position? If the employer's defense is that the employee quit but not due to any reduction of work hours, bring copies of timecards and/or pay stubs and review them to ensure that those records substantiate what the client asserts.
10. Bring the appropriate documents (e.g. discharge letter or form, copy of policy/work rules, prior discipline, video surveillance or photos from video surveillance either printed copies or in a .mp4 (MP4) format, dates of attendance violations) and first hand witness(es) to the hearing that witnessed the final incident to the scheduled hearing.

Note: Labor and Industry Review Commission (LIRC) caselaw is available at <http://dwd.wisconsin.gov/lirc/>.