Memorandum

To:
From: Victor Forberger
Date: 6 November 2017
RE: Summary of testimony

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claim-filing (pp.1-3 of my memo) indicates that he filed weekly claims correctly prior to October 2012, before the Department changed a question on the weekly claim-filing process to introduce a compound question that asked claimants *whether they worked OR whether they will receive sick pay, bonus pay, or commission pay*. After a hiatus of several weeks when re-opened his unemployment claim in early November 2012, his weekly certifications only reported holiday or vacation pay during weeks when holiday pay seemed likely or in the latter weeks of September 2013 when some work and some vacation was reported across two separate weeks.

Based on my review of Commission case law and my own experience in unemployment litigation, there are four reasons for why these claim-filing mistakes by are consistent with the confusion found in other cases and are not comparable to the kind of intentional acts to keep unemployment benefits for which claimants knew they had no legitimate claim.

First, pattern of claim-filing closely parallels the kind of mistakes the Commission in numerous decisions (pp.13-16 of the memo) has found as unintentional, honest mistakes arising from confusion created by the compound question. As the Commission has explained, an incorrect answer to a compound question does not indicate a person intended to mislead others through that mistaken answer, nor does it seem logical that a person should somehow become self-aware of that mistake and contact a claims specialist to correct their (unknown to them) misconception about the compound question.

Second, a quotation of in the 25 August 2015 statement by David Starks — "I honestly thought they were just asking about Menard's." — implicates a common misconception by claimants about how unemployment benefits are paid and computed. As several Commission decisions have observed (pp.16-17 of the memo), some claimants mistakenly believe that part-time work done

while claiming benefits does not count because their unemployment claim is based on their wages connected to another employer. Because of that mistaken belief over what employment unemployment benefits are based, these claimants fail to report their other, part-time income statement to the investigator should have led to an examination by the Department of whether this confusion was also at issue with the mistaken weekly claim certifications, as this quotation certainly would have led to such an examination during an unemployment hearing over the alleged concealment.

Third, reporting of 19 hours of work in November 2012 for the first week of this re-opened claim reinforces the earlier conclusion that he was confused over the compound question. As a Commission decision has explained (pp.12-13 of the memo), the questions asked of a claimant during the first week of a re-opened claim are different from what is reflected on a DUCQ screen and usually detail separate questions about wages and work connected to each employer in the claimant's benefit year. So, it should not be surprising that reported wages and hours from Radio Shack during a weekly certification in which he was asked directly about those wages and hours of work with Radio Shack.

Fourth, the Department's own disputed claims manual (p.18 of the memo) explains that there generally is no concealment when there are conflicting answers on weekly claim certifications or when first-time, innocent mistakes occur. Rather, the disputed claims manual indicates that concealment generally should be found when a claimant has REPEATED a mistake for which a prior warning was issued. There is nothing in the Department records I have reviewed that indicat was previously warned about correctly reporting part-time wage information on the compound question.

For these reasons, I am 99% sure that the concealment charges against ould have been over-turned by the Commission if an appeal to the Commission would have been made.

Memorandum

To:

From: Victor Forberger

Date: 1 June 2017

RE: UI concealment an

I. Issues

1. What is unemployment concealment?

2. The Commission and the Department disagree about what conduct constitutes unemployment concealment.

3. Is there a significant number of claimants who have been adjudicated to have been genuinely confused by the compound question created by the Department? Are there statistics that could help back this up?

4. The commonality of the misconception that unemployment benefits are claimed from a specific employer? How could that misconception affect how someone understands the new compound question instead of the previously simple "did you work" query?

II. Relevant Facts

Beginning in week 43 of 2012, the week ending 27 October 2012, the Department of Workforce Development ("DWD" or "Department") modified Question No. 4 from “Did you work?” to “During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?” *See* Ex.1.

For his work with Radio Shack, it appears was paid $7.25 per hour plus a commission of some kind. The mechanism for calculating the commission is unknown, and it is unknown when was paid any commissions (with each pay period whatever that pay period is or on a monthly basis or some other time period). Radio Shack's pay periods are also unknown (weekly, bi-weekly, or twice a month?). If weekly or bi-weekly, the weekly pay period is unknown (Monday through Sunday, Saturday through Friday, Sunday through Saturday?).

DUCQ screens contain weekly claims certifications. A spreadsheet detailing those claims is set forth in Ex.2. The italicized rows in Ex.2 are for weeks not at issue. The non-italicized weeks are weeks for which the Department has charged with concealment. For these non-

italicized weeks, alleged wage information is taken from employer reports about the wages at issue. In his DUCQ screens, reported his hourly wages from Radio Shack on his weekly claims certification prior to the October 2012 change to the "Did you work?" question. Indeed, it appears that did not file any weekly certifications in October 2012, and so had to open a new initial claim (because there was a gap of two weeks or more in his weekly claim certifications) when he filed for the week ending 11/3/12 a claim for unemployment benefits. Other than this initital claim week, the week ending 12/29/12 (which included Christmas), the week ending 1/5/13 (which includes New Years), the week ending 9/21/13, and the week ending 9/28/13, did not report any hours of work with Radio Shack on his weekly certifications. In the Christmas and New Years weeks, holiday and vacation pay are reported. For the two weeks in September 2013, 8.1 hours of work are reported for the first week and twenty hours of vacation pay is reported for the second week.

Using only the weeks at issue and the employer's alleged wages for those weeks, in 2012 Mr. received $1,596 in unemployment benefits when he should only have received $928. As a result, if no concealment was charged, would have to repay $668 in benefits for 2012 as a non-fraudulent over-payment. In 2013 received $7,929 in unemployment benefits when he should have only received $4,430 in unemployment benefits if no concealment was alleged, a difference of $3,499. That is, if just a mistake was alleged, would have a total over-payment of $4,167 to repay. Because of concealment, however, the Department demands that he repay $9,525 in unemployment benefits plus another $1,428.75 in administrative penalties for a total fraud repayment of $10,953.75.[1] He also forfeits $23,878 in future unemployment benefits because of the concealment allegations, which means the Department collects a total $34,831.75 from before any criminal charges are assessed.

It should be noted that for four weeks, the Department alleges that received less than his weekly benefit rate. *See* Ex.2. For the week ending 4/27/13, received $115 and not $237. For the week ending 8/3/13, received $6 rather than the $237 allegedly due him, and

1 The $9,525 amount appears to be based on unemployment benefits actually received (detailed below) rather than the weekly benefit rate for each week when the alleged fraud took place.

for the weeks ending 8/24/13 and 9/7/13, [redacted] received $0 unemployment benefits. It is unknown why [redacted] received these lesser amounts. Finally, the initial determinations alleged concealment for 42 weeks (pp.11-14). The Department's UI fraud analysis (pp.8-9) alleges concealment for 41 weeks, as it does not include the week ending 9/14/13 that is part of the initial determinations alleging concealment.

III. Analysis

A. What is unemployment concealment?

In Holloway v. Mahler Enterprises, Inc., UI Hearing No. 11606291MW (4 November 2011), the Labor and Industry Review Commission ("Commission" or "LIRC") explained:

> From this background, what it means to intentionally mislead or defraud may be stated simply: it means the claimant is trying to get away with something the claimant knows he or she should not be getting away with. In most unemployment insurance cases where the issue is concealment, what the claimant will be alleged to have tried to get away with, is gaining unemployment benefits to which the claimant knows he or she is not entitled. By contrast, where a claimant's incorrect answer to a material question is due to ignorance or mistake, it will not be the case that the claimant is trying to get away with something, and that claimant will not be guilty of concealment.

Beginning in 2014, however, the Department began applying a strict liability standard against claimants for their claim-filing mistakes. That is, the Department presumed any over-payment of unemployment benefits constituted concealment unless the claimant could explain why the over-payment was really just a mistake. Concealment charges surged in 2014 as a result, rising to 2.79% of all unemployment benefits paid out that year. In the previous three years, concealment charges were always below 2% of the benefits paid out.

Over-payments assessed

	2011	2012	2013	2014	2015	2016
Total UI paid	$2,094,416,632	$1,612,616,543	$1,270,761,600	$732,327,104	$605,481,027	511,891,628
Fraud over-payments assessed	$41,607,913	$31,505,810	$24,796,194	$20,455,759	$13,384,998	$8,655,187
Non-fraud over-payments assessed	$46,396,840	$31,924,842	$26,736,198	$16,891,298	$11,878,072	$8,902,765
Total over-payments assessed	$88,004,753	$63,430,652	$51,532,392	$37,347,057	$25,263,070	$17,557,952
Ratio of fraud over-payment to total UI paid	1.99%	1.95%	1.95%	2.79%	2.21%	1.69%
Ratio of fraud over-payments to non-fraud over-payments	89.68%	98.69%	92.74%	121.10%	112.69%	97.22%

From Detection and Prevention of Fraud in the Unemployment Insurance Program: Annual Report to the Unemployment Insurance Advisory Council for the Calendar Year 2014 (15 March 2015) at 8, Wisconsin Unemployment Insurance: Supporting Integrity, Accountability and Re-employment, 2016 Report to the Unemployment Insurance Advisory Council at 10, and Wisconsin Unemployment Insurance: Supporting Integrity, Accountability and Re-employment, 2016 Report to the Unemployment Insurance Advisory Council (15 March 2017) at 11.

As benefit payments have plummeted in 2015 and 2016, the number of claimants who can be charged with concealment have declined as well. Accordingly, the ratio of fraud over-payments to benefit payments have declined, and are below 2% for 2016.

To understand how severe concealment penalties are, consider this example. Suppose a claimant with a weekly benefit rate of $200 reports part-time wages of $78 on a weekly claim instead of $87 he actually earned, a mistake of $9. So, instead of $167 in unemployment benefits that week, the claimant should have received only $161 in unemployment benefits, a difference of $6.[2] When concealment is at issue, however, neither the $6 difference nor the $167 actually received is the amount that needs to be repaid. Rather, the entire $200 potential weekly benefit must now be repaid for that week even though the claimant received less. Furthermore, there is now a 40% (15% prior to the 2015 state budget) administrative penalty ($80 in this case) that also must be immediately repaid. And, future unemployment

2 Unemployment benefits in a week are calculated as: (1) wages earned that week minus $30, (2) multiplied by 0.67, and (3) then subtracted from the claimant's weekly benefit rate.

benefits ranging from two, four, or eight times the weekly benefit rate for each week/act of concealment will be lost to the claimant (in this case, $400 for the 2X penalty, or two weeks of no unemployment benefits received). Finally, keep in mind that this example is only for one week. In almost all concealment cases, the Department does not allege concealment until months or years have passed, and so the concealment — since it is usually based on an ongoing mistake — concerns dozens of weeks of unemployment benefits. A claimant who did not report his tips income for six years, for instance, was subject to a repayment demand of $32,000+ and a forfeiture of $50,000+ in future unemployment benefits even though his weekly benefit rate hovered around $130.

In light of the Department's new standard for charging concealment, over-payment collections have surged, especially for concealment-related over-payments.

Over-payments collected

	2011	2012	2013	2014	2015	2016
Total UI paid	$2,094,416,632	$1,612,616,543	$1,270,761,600	$732,327,104	$605,481,027	$511,891,628
Fraud over-payments collected	$15,597,067	$25,223,873	$23,990,550	$21,773,656	$20,719,194	$18,057,745
Non-fraud over-payments collected	$28,099,276	$24,945,202	$25,112,055	$18,686,386	$14,787,703	$11,882,169
Total over-payments collected	$43,696,343	$50,169,075	$49,102,605	$40,460,042	$35,506,897	$29,939,914
Ratio of fraud over-payment to total UI paid	0.74%	1.56%	1.89%	2.97%	3.42%	3.53%
Ratio of fraud over-payment to total over-payments	35.69%	50.28%	48.86%	53.82%	58.35%	60.31%
Ratio of fraud over-payments to non-fraud over-payments	55.51%	101.12%	95.53%	116.52%	140.11%	151.97%

From Wisconsin Unemployment Insurance: Supporting Integrity, Accountability and Re-employment, 2016 Report to the Unemployment Insurance Advisory Council at 10 and 13, and Wisconsin Unemployment Insurance: Supporting Integrity, Accountability and Re-employment, 2016 Report to the Unemployment Insurance Advisory Council (15 March 2017) at 11 and 13.

As evident here, fraud collections have markedly grown even as the number of fraud charges have topped out and then started declining. From 2014 to 2015, fraud collections jumped from 2.97% of all benefits paid out to claimants to 3.42%. In 2016, despite the decline in fraud charges, fraud collections continued to climb, rising to 3.53% of all claimant benefits paid out. Furthermore, the growing significance of fraud collection to the Department is seen by how fraud collections are growing relative to non-fraud collections. Every non-fraud dollar collected by the Department is in 2016 matched by a $1.52 in fraud collection, up from $1.40 in 2015 and $1.17 in 2014.

The Department has also gained additional sources of income for pursuing alleged fraud charges against claimants. As part of 2015 Wisconsin Act 334, the Department enacted two provisions for funding

its "concealment" investigation efforts. In the first, the Department gained access to leftover special assessment funds for program integrity purposes instead of transferring those leftover monies to the balancing account. This leftover amount is approximately $9.3 million (for comparison, the federal funds the Department received in the 2015 fiscal year for administering the state's entire unemployment program is around $56 million). In the second, the Department gained the ability to siphon off 0.01% (i.e., 0.0001) of employers' UI taxes for program integrity purposes. Employers' accounts are still credited for these amounts, so employers see no increase in the UI taxes they pay. The balancing account, however, receives less because the funds are being diverted to cover program integrity costs. As of 12 December 2015, UI tax receipts amounted to $1.04 billion that calendar year. A portion of these tax receipts go into a general solvency account to cover benefit payments that are not chargeable to any employer (such as when a claimant is forced to quit a job because of a child care emergency). But, assuming $750 million of these tax receipts are going towards employers' UI accounts, then a 0.01% assessment will allow $75,000 annually for funding a staffer dedicated to "program integrity."

With these funding sources available to it, the Department has proposed in 2017 (Department Proposal D17-08) that $1,630,000 be used to fund five program integrity related positions and other program integrity related activities in additional to its already existing budget.[3]

B. The Commission and the Department disagree about what conduct constitutes unemployment concealment.

In 2014, the number of "concealment" cases skyrocketed. A table the Department prepared for members of the Unemployment Insurance Advisory Council noted that in 2014 the Department issued 11,040 initial determinations alleging concealment. *See* Ex.3. Less than 5% of those determinations — 470 — were appealed to an appeal tribunal. Appeal tribunals, however, reversed 216 of those 470 initial determinations alleging concealment. Furthermore, 196 of the 254 appeal tribunal decisions that affirmed a finding of concealment were appealed to the Commission, and the Commission subsequently reversed 123 of those cases and remanded for additional evidence another 39 cases. In other words, outright

3 The Department has also proposed in Department Proposal D17-06 to change the standard of proof in concealment cases from clear and convincing evidence to a preponderance of the evidence.

reversal of concealment cases occurred in 339 of the 470 concealment cases that were appealed, a reversal rate of 72%. If the remand cases are included, the reversal rate rises to 80%.

At an April 2015 meeting of the Advisory Council, the Department acknowledged this problem when it reported the following information:

> There was a significant increase in LIRC reversals of the appeal tribunal decisions in which concealment and fraud was found between 2013 and 2014. One factor in this change stems from LIRC's interpretation of statute which differs from the department's position. The law has not changed since 2008, but the penalties that apply have increased. Federal law required that the department charge a 15% penalty to claimants who commit fraud, which became effective in October 2013. The department was also required to make changes to the question a claimant must answer on earning wages when filing a weekly claim. In order to gather the required information, the following multifactor question is asked:
>
> > During the week did you work or did you receive or will you receive sick pay, bonus pay or commission?
>
> The department is exploring ways to separate this question into multiple questions for user ease; however, programming costs to make this change are estimated at $1 million.

Advisory Council Minutes for the 16 April 2015 meeting at 4-5. The Department did not describe for the Advisory Council the number of Commission decisions already issued about the confusion the compound question was creating for claimants. The following data is what the Department presented at this 16 April 2015 meeting:

LIRC concealment / fraud decisions Year	Total	ATD found fraud; LIRC reversed	ATD found fraud; LIRC affirmed	ATD found no fraud; LIRC affirmed	Remand for add'l evidence
2015*	44	14	23	3	4
2014	196	123	28	6	39
2013	147	25	77	34	11

* 2015 data only from January through 12 April 2015

Available Commission statistics indicate how significant the concealment cases in 2014 were:

Year	Appeal tribunal cases	Claimant appeals	Reversed by LIRC	%	Decisions published on LIRC website*	Concealment decisions published on LIRC website*
2012	25,102	2,702	270	9.99%	123	5
2013	22,875	2,302	230	9.99%	102	7
2014	21,354	2,016	194	9.62%	89	35
2015	18,172	1,420	125	8.80%	57	11
2016	18,532	1,205	70	5.81%	34	3

Source: Statistical reports published by LIRC or the LIRC UI decisions database available at http://lirc.wisconsin.gov/ui_decisions.htm

* Search of LIRC UI decisions using the following search criteria for each year – intext:concealment intitle:"UC decision" intitle:20XX (the total number of published decisions excluded the concealment criteria)

Of the 194 claimant appeals in 2014 that led to straight reversals of appeal tribunal decisions, 123 (63%) involved concealment allegations. In addition, the Commission's concealment decisions published on its website in 2014 were nearly 40% of all the decisions published, and the number of these LIRC concealment decisions that year — 35 — were 5x to 7x higher than the two previous years.

At this same 16 April 2015 meeting of the Advisory Council, the Commission also presented a memorandum to the members of the Advisory Council about its dispute with the Department over its interpretation of concealment. *See* Ex.4. In this memorandum, the Commission detailed numerous disputes with the Department's proposed changes to the statutory definition of concealment, including:

> **The proposal does not prevent improper payments before they occur.**
>
> In the several lawsuits filed by DWD against LIRC on these issues, the courts that have issued decisions to date have sided with LIRC. Many of these cases are directly the result of problems in the way the department asks questions of claimants — not with the definition of concealment.
>
> In October 2012, the department changed its **simple "Did you work?"** question on the weekly claim form **to "During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?"** One judge called this benefit claims question "a gobbledegook question" and suggested that the DWD change its script; he noted that "It's got two or's in it, and it switches from past tense to future tense ..... it's pretty standard for government but it's certainly not the simplest — I wouldn't call it a simple yes or no question."
>
> The compound question causes confusion for claimants, particularly cognitively disabled ones, because in trying to grasp the numerous parts to the question they often miss the "work" part of the question. Under the proposal, a claimant who was legitimately confused by the department's grammatically challenging question could be found to have concealed information in that they failed to read or follow instructions. Under the proposed statutory language, it will not matter that the claimant provided incorrect information unintentionally, inadvertently, or unknowingly.

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

Ex.4 at 8-9 (emphasis in original, footnote removed).[4]

Because of this dispute with the Commission, the Department first raided the Commission's budget for $400,000 and had the Commission's general counsel — the signatory to Ex.4 — demoted. *See* 2015 Wis. Act 55 § 146m and p.133. In 2017, the Department is behind a new proposal to eliminate the Commission entirely and transfer its review of appeal tribunal decisions to the Department's Division Administrator. *See* AB64 §§ 1417-43. The Department has taken this action for the following reasons:

- The Commission refuses to accept financial need as a reason for finding a claimant intended to steal unemployment benefits (unemployment benefits are by their very nature intended to address a financial need). Wallenkamp v. Arby's Restaurants, UI Hearing No. 13607281MW and 13607282MW (15 May 2014), *aff'd* DWD v. LIRC, 367 Wis.2d 749, 877 N.W.2d 650 (2 February 2016); Gussert v. Springhetti Landscaping and DWD, UI Hearing Nos. 16400598AP-16400609AP (27 January 2017).

- The Commission refuses to find concealment for non-reported wages when claimants subsequently report those wages a few weeks later. Bilton v. H & R Block Eastern Enterprises, Inc., UI Hearing Nos. 13605766MW and 13605682MW (9 Jan. 2014); Perlongo v. Joey's Seafood & Grill, UI Hearing Nos. 13610060MW & 13610061MW (22 July 2014).

- The Commission continues to find that an October 2012 transformation of a weekly claim certification question into a compound question was confusing and did not warrant a finding of concealment for mistaken claims based on that confusion (beginning in week 43 of 2012, the week ending 27 October 2012, Question No. 4 was modified from "Did you work?" to "During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?"). Harris v. Arandell Corp., UI Hearing Nos. 13606535MW and 13606536MW (9 Jan. 2014); Henning v. Visiting Angels, UI Hearing Nos. 13606277MW and 13606278MW (9 Jan. 2014); Chao v. Eagle Movers Inc., UI Hearing No. 13607069M and 13607071MW (17 Jan. 2014); Maurer v. Manpower US Inc., UI Hearing No. 13607416MW and 13607417MW (28 Jan. 2014); Wallenkamp v. Arby's Restaurants, UI Hearing No. 13607281MW and 13607282MW (15 May 2014), *aff'd* DWD v. LIRC, 367 Wis.2d 749, 877 N.W.2d 650 (2 February 2016); Audwin Short,

4 The Department finally removed the compound question from the on-line weekly certification process in April of 2016. As of March 2017. the phone system for filing weekly certifications still retains the compound question.

UI Hearing No. 14600693MW (10 July 2014); Smith v. Journal Sentinel, Inc., UI Hearing Nos. 13610174MW (31 July 2014); Jackson v. Securitas Security Services, Inc., UI Hearing Nos. 14606875MW and 14606876MW (9 June 2015).

- The Commission continues to raise questions about the conduct of administrative law judges who take it upon themselves to chastise claimants for their presumed concealment rather than hearing the evidence as presented and presuming claimant eligibility as the law requires. Henning v. Visiting Angels, UI Hearing Nos. 13606277MW and 13606278MW (9 Jan. 2014); Fera v. South East Cable LLC, UI Hearing Nos. 13607375MW (31 July 2014); Vasquez v. Fedex Smartpost Inc., UI Hearing Nos. 14602073MW and 14602074MW (24 September 2014); O'Neill v. Riteway Bus Service, Inc., UI Hearing Nos. 15600518MW and 15600519MW (28 May 2015).

- The Commission continues to find that claimants who are confused about what needs to be reported are just making mistakes and not committing concealment. Hollett v. Douglas Shafler, UI Hearing Nos. 13003690MW and 130003691MW (8 May 2014); Dabo v. Personalized Plus Home Health, UI Hearing No. 14609522MW and 14609523MW (16 April 2015); O'Neill v. Riteway Bus Service Inc., UI Hearing No. 15600518MW and 15600519MW (28 May 2015); Gussert v. Springhetti Landscaping and DWD, UI Hearing Nos. 16400598AP-16400609AP (27 January 2017).

- The Commission continues to find that claimants who are confused about their status as employees or independent contractors are not committing concealment. Haebig v. News Publishing Co. Inc. of Mt. Horeb, UI Hearing Nos. 13000910MD, 13000911MD, and 13000912MD (31 January 2014); David Mumm, UI Hearing No. 13003988MD (28 Feb. 2014); Martin R. Lash, UI Hearing No. 13403269AP (30 May 2014).

- The Commission refuses to give the Department three chances to prove concealment against claimants. Terry v. Jane Schapiro, UI Hearing Nos. 14601971MW and 14601972MW (12 Sept. 2014).

- The Commission refuses to find concealment for claimants who fail to report wages they do not know about when they file the weekly certifications. Bilton v. H&R Block Eastern Enterprises Inc., UI Hearing Nos. 13605766MW and 13605682MW (9 January 2014) (no concealment for employee who reported discovered income within 14 days of discovery as stated in the disputed claims manual); Marcus Johnson v. Sheraton Madison Motel, UI Hearings Nos. 15000002MD, 156000191MD, 156000193MD, 156000549MD, 156000623MD, 156000625MD, 156000628MD, and 156000630MD (2 Oct. 2015) (employee could not report tips he received on his weekly certifications because he did not know those tip amounts until he received his paycheck a week or two later and a Department representative told him that the employer would provide that tips amounts).

- The Commission refuses to find concealment for claimants who mistakenly report their earnings when received rather than when earned. Waoh-Tobin v. Banana Republic, UI Hearing No. 16602900MW (18 October 2016).

- The Commission even refuses to allow a finding of concealment when there is no information in the record about whether the employee worked any specific weeks, received any wages in those weeks, filed possible claims for those weeks, and then possibly provided information on those non-existent claims that were somehow mistaken

from the unknown work and wages allegedly done. Fera v. South East Cable LLC, UI Hearing Nos. 13607375MW (31 July 2014).

C. Are DUCQ records accurate?

In Jackson v. Securitas Security Services, Inc., UI Hearing Nos. 14606875MW and 14606876MW (9 June 2015), the Commission observed that it was previously unaware that:

> the department follow[s] special procedures when the week being claimed by a claimant is the week of an initial claim. The printouts introduced as department records which purport to show the questions asked of a claimant each week and the claimant's answers (the DUCQ screens) do not reflect when special procedures are followed. Therefore, in this case, it appeared that the employee answered the "During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?" question correctly for weeks 1 and 3 of 2014, when, in fact, that question was never even posed to him for those weeks. He was not asked that question until week 4 of 2014.
>
> Given that the employee was correct in contending that the questions he was asked changed and were not always those reflected on the DUCQ screens marked by the ALJ as exhibits, the commission cannot draw a reasonable inference of concealment. The commission finds the employee credible that he thought that he was filing correctly and did not intend to mislead or defraud the department. After the prompts and questions changed beginning in week 4 of 2014, he misunderstood what he was being asked. The employee made an honest mistake.
>
> The employee was an inexperienced claims filer. He had been working three part-time jobs and lost two of the three. The employee provided all required information to the department about his employment--who he was working for, how many hours he worked, how much he earned in wages, when he was fired--until he mistakenly answered the department's compound question on his claim certifications incorrectly. The employee was not aware that he was answering the question incorrectly and continued to make the same mistake week after week, month after month.

In Jackson, that is, the Commission discovered that the DUCQ screens presented as evidence for what the claimant was asked and answered when filing his weekly certifications did not reflect the actual questions and answers for the week when an initial claim was being made. In light of that discovery, the Commission reconsidered its earlier decision in which it found concealment to have taken place and reversed that finding, as explained above, and found NO concealment.

The DUCQ screens for [redacted] indicate that he reported work hours after the Department created a compound question for the week ending 11/3/2012, the week of his initial claim. In light of Jackson, there is no basis for determining what questions were asked of [redacted] for this week or what his answers to those questions actually were. In subsequent weeks, [redacted] either reported no

work hours or only vacation or holiday hours except for the week ending 9/21/13, when he reported 8.1 hours of work for a week for which no concealment is alleged.

D. Is there a significant number of claimants who have been adjudicated to have been genuinely confused by the compound question created by the Department? Are there statistics that could help back this up?

Reasons for a finding of no concealment are not categorized, and so data analysis for why no concealment is found cannot be specifically tracked. The best available Department data about concealment is what has already been described.

Published Commission decisions, however, indicate that the compound question automatically creates confusion and so prevents a finding of concealment. In Chao v. Eagle Movers Inc., UI Hearing No. 13607069M and 13607071MW (17 Jan. 2014), the Commission explained (footnotes omitted):

> The department's former question - "Did you work?" - was straightforward and not easily susceptible to misinterpretation. However, the department's modified version - "During the week, did you work or will you receive sick pay, bonus pay, or commission?" - presents two distinct, alternative questions within one compound question. There are inherent dangers in inviting an answer to a compound question, because it is often not possible to be certain to which part, or parts, a single response applies. This is especially true when a claimant files claims by telephone, where the last question heard is not "Did you work?"

See also Ex.5: Michele A. Peters, Litigating Cases involving the Issue of Concealment (20 October 2016) at 9 (when there is a mistaken certification answer because of the compound question, there is no fraud). In Wallenkamp v. Arby's Restaurants, UI Hearing No. 13607281MW and 13607282MW (15 May 2014), *aff'd* DWD v. LIRC, 367 Wis.2d 749, 877 N.W.2d 650 (2 February 2016), the Commission held:

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

In Hollett v. Douglas Shafler, UI Hearing Nos. 13003690MW and 130003691MW (8 May 2014), the Commission observed (footnotes omitted):

> Moreover, contrary to the ALJ's finding, Question No. 4 in its current incarnation is not simple and straightforward. While the department's former "Did you work?" version may have been straightforward and not easily susceptible to misinterpretation, the department's current version presents at least two distinct, alternative questions within one compound question. There are inherent dangers in inviting a "Yes" or "No" answer to a compound question, because it is often not possible to be certain to which part, or parts, a single response applies. This is especially true when a claimant files claims by telephone, where the last question heard is not "Did you work?" When the answer to a compound question relates to the substantive issues and the ultimate outcome in a case, as it does here, the commission will not infer an intent on the part of the claimant to mislead or defraud the department because both the question and the answer can be misunderstood.
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> Additionally, concerning the ALJ's finding that the employee should have consulted the Handbook for Claimants for guidance, it is not clear that the employee, even with a bachelor's degree, would have understood by reviewing the booklet that she erred on her first weekly claim certification and repeated the same error week after week. In the shaded areas on pages 5 and 6 of the booklet, the department lists the questions that claimants are asked weekly. For most questions, the department instructs claimants to "Answer 'Yes' if ..." However, for Question No. 4, the "During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?" question, claimants are not instructed to "Answer 'Yes' if they worked for any employer during the week." In fact, claimants are not instructed at all as to how to answer the question. Instead, following the question it states, "If yes, you will be asked if you worked for or receive/will receive sick pay, bonus pay or commission from more than one employer during the week." When a claimant believes that the correct answer to Question No. 4 is "No," the information provided thereafter on p. 6 of the Handbook for Claimants appears to be inapplicable.
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> The commission finds that it is somewhat illogical for the department to expect a claimant who believes that she is responding correctly to the questions asked of her on the weekly claims certification to call a claims specialist. If a claimant makes an honest mistake and is therefore unaware that a mistake has been made, then the claimant would not reasonably think that there is a need to contact the department.

In Shaw v. The Dr. Howard L Fuller Education Foundation Inc., UI Hearing Nos. 13609591MW, 13609592MW, and 13609593MW (12 June 2014), the Commission held:

> The evidence and all reasonable inferences drawn therefrom lead to the conclusion that, beginning in week 43 of 201[2], the employee misunderstood what Question No. 4 on the weekly claim certification was asking her. The employee had been working for the same employer since 2008. It was not as though she had begun new employment and did not report it to the department. Since at least week 4 of 2010, which is as far back as the evidence goes, the employee had dutifully reported that she worked and earned wages from the employer. Nothing changed in week 43 of 201[2], except for the department's

> question, which went from the simple "Did you work?" to the complex "During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?" Under these circumstances, it is most reasonable to infer that, had the employee not misunderstood the department's new compound question, she would have continued to report her work and her wages to the department on her weekly claims as she had been doing for several years.

In Audwin Short, UI Hearing No. 14600693MW (10 July 2014), the Commission stated:

> As outlined above, the claimant's incorrect answer to Question No. 4, without more, is insufficient evidence from which to infer an intent to mislead or defraud the department. *See, also*, McCleton v. Olson Carpet Tile and Design LLC, UI Dec. Hearing Nos. 13609472MW and 13609473MW (LIRC Apr. 30, 2014). The current form of Question No. 4 on the department's weekly claim certification contains more than one question and, as such, is more susceptible to misinterpretation. An inference of intent cannot be made where the only evidence is that the claimant answered a compound question incorrectly. Although past commission decisions have referenced a presumption of intent based upon an incorrect answer and receipt of the Handbook for Claimants, the claiming process has changed over time. The commission's earlier decisions involved in-person claims; a simpler, straightforward question ("Did you work?"); the fact that hardcopy handbooks were sent with initial claims and often at other points during the claims process; and the mailing of after-the-fact statements noting questions asked, answers given, and amounts deposited.
>
> In this case, the claimant has a long history of filing claims for unemployment benefits. There is no indication that he was ever previously alleged to have concealed information from the department. The claimant correctly answered Question No. 4 on his weekly claim certifications for weeks 44 through 48 of 2012 when he filed his claim certifications online. It was only after the claimant switched to filing his claim certifications using the telephone that he answered Question No. 4 incorrectly. He filed weekly claim certifications for weeks 10 through 19 of 2013 using the department's telephone system before he stopped filing because he was consistently working close to 40 hours per week. These circumstances, taken as a whole, do not lead the commission to infer any wrongful intent on the part of the claimant. Instead, the circumstances cause the commission to find that the claimant made an honest mistake.

See also Smith v. Journal Sentinel, Inc., UI Hearing Nos. 13610174MW (31 July 2014) (same). And, in Jackson v. Securitas Security Services, Inc., UI Hearing Nos. 14606875MW and 14606876MW (9 June 2015), the Commission explained (footnotes omitted):

> The employee did not file a claim certification for week 2 of 2014. He completed an initial claim (additional) on January 12, 2014 (week 3), and reported, as he consistently had, that he was working for the employer and for InStile. When the employee later filed his claim certification for week 3 of 2014, again the department's computer system followed a special procedure and, after acknowledging that he worked during the week, asked the employee if he worked for more than one employer, and prompted him to report his wages. The employee reported that he earned $166.00 from the employer and $130.00 from InStile.

> The employee was not required to reopen his claim before filing a claim certification for week 4 of 2014. Consequently, the department's computer system followed its regular procedure. It did not recognize that the employee was working and did not prompt him to report his wages. Instead, the department's computer system asked the employee a different, yet very similar, question than in earlier weeks. The employee was asked:
>
> > During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?
>
> The employee missed the "did you work" part of the question and thought that the question was referring to whether he received sick pay, bonus pay or commission. He had notified the department of his discharge from InStile on his claim certification for week 3 of 2014 and had provided information to the department about his work for the employer, so he thought that the department knew that he continued to work for the employer. The employee understood the first question on the claim certification-relating to whether he was able and available for full-time work-to be the question that asked him if he had worked during the week being claimed. The employee filed his claim certifications for weeks 5 through 29 of 2014 in the same manner he did for week 4 of 2014.

In light of these decisions, it is well-established precedent that mistaken weekly certification answers connected to the compound question are not fraudulent answers but only mistakes. The sudden failure to report information that was previously being reported correctly before the advent of the compound question is clear evidence of that confusion. *See also* Dabo v. Personalized Plus Home Health, UI Hearing Nos. 14609522MW and 14609523MW (16 April 2015) ("The employee, as a non-native English speaker, missed the 'did you work' part of the multi-part question. It is a common mistake, one long acknowledged by the department."). As noted above, however, the Department disagrees with these precedents and still charges claimants with concealment regardless of the compound question.

E. The commonality of the misconception that unemployment benefits are claimed from a specific employer? How could that misconception affect how someone understands the new compound question instead of the previously simple "did you work" query?

Questions over how unemployment benefits are paid for and how the benefits are connected to more than one employer is a separate source of confusion from the kind of mistakes the compound question creates. There are several published Commission decisions in which the claimant has been confused about how to file weekly certifications when more than one employer is involved. Moreover, I personally have been involved either as the representative or as a supervising attorney for a student representative in more than ten concealment cases in which the claimant is confused about the source of unemployment benefits and mistakenly believes the benefits at issue come from a former employer and

not from an unemployment insurance fund into which all employers contribute. Wallenkamp v. Arby's Restaurants, UI Hearing No. 13607281MW and 13607282MW (15 May 2014), *aff'd* DWD v. LIRC, 367 Wis.2d 749, 877 N.W.2d 650 (2 February 2016) presents a typical description of this problem.

> Throughout the process, the employee believed that she was filing for unemployment insurance benefits "against" Arby's and only Arby's. Consequently, she did not believe that it was necessary to inform the department that she was working for TRH Restaurants, Inc., or that she quit that employment, after attending school and working two jobs became too much for her. The employee handled her short-term employment with TRH Restaurants, Inc. in the same manner as her short-term employment with Sbarro, because she had not been informed that she had handled her employment with Sbarro incorrectly. The employee's misunderstanding of how and when employers become liable for benefits and what information the department needs to ascertain a claimant's eligibility for benefits is not uncommon.[21]
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> [21] *See, e.g.*, Thomas v. IndependenceFirst Inc., UI Dec. Hearing No. 13609613MW (LIRC March 4, 2014); Haebig v. News Publishing Co. Inc. of Mt. Horeb, UI Dec. Hearing Nos. 13000910MD, 13000911MD, and 13000912MD (LIRC Jan. 31, 2014); In re Mortensen, UI Dec. Hearing No. 05002751JV (LIRC Dec. 14, 2005); and In re Hein, Jr., UI Dec. Hearing No. 00605374MW (LIRC Dec. 13, 2001).

The Commission described similar employer-related filing confusion by a claimant in Maurer v. Manpower US Inc., UI Hearing No. 13607416MW and 13607417MW (28 Jan. 2014).

> The employee's actions and testimony revealed a fundamental misunderstanding of how the unemployment insurance program operates. Department records show that the employee was asked during the department's investigatory process to explain the discrepancy between the wages and hours of employment reported by the employer and the employee's failure to report any work or wages. The employee wrote that he "was not trying to claim for Manpower." He was filing against a previous employer only. The employee testified to the same.
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> The evidence reflects the employee's sincere belief that, when filing a weekly claim for benefits, he was filing directly against his former employer. Because the employee did not work for that employer in weeks 12 through 19, 21, 22, 24, 27, and 29 through 32 of 2013, he believed that he was answering Question No. 4, "During the week, did you work or will you receive sick pay, bonus pay, or commission?", correctly. The employee did not understand that he needed to answer that question in the affirmative for the weeks in which he worked for Manpower or for any employer. The employee was confused. He could not explain how the department would know to reduce his benefits if he did not inform the department that he was working, but he knew that his benefits were reduced. The employee had received a letter to that effect from the department. He thought his benefits had been reduced because he was working. The benefit reduction occurred two weeks after the employee began working for Manpower.

Because this kind of filing confusion occurs with such frequency, the portions of the Department's disputed claims manual for concealment indicate that the claimant's conflicting answers on weekly certifications during an initial and then continued claims are not by themselves evidence of fraudulent intent. Ex.6 at 3 (January 1993). To correct that confusion, then, Department personnel are directed to issue a letter to the claimant to alert him or her about the error so that it does not happen again, Ex.6 at 5 (January 1993) or at least explain the correct filing procedures to the claimant for future use, Ex.6 at 3 (12/16/2013). As a result, repetition of that same mistake could very well be considered concealment. Id. In other words, the Department's manuals allow claimants to be confused and make initial mistakes on their unemployment claims. Only after explanations of those mistakes, however, should the Department — according to its own manuals — allege concealment should those same mistakes recur. As these cases indicate, the Department does not follow its own policies and instead alleges concealment the first time a claimant is confused over some unemployment matter. Only when the claimant has the opportunity to appeal a concealment determination will Department policies be applied, albeit by the Commission.