

Wisconsin Department of Workforce Development,
Plaintiff,

Case No. 2014-CV-752

v.

Wisconsin Labor and Industry Review Commission et al.,
Defendants.

Motion for Leave to File an *Amicus Curiae* Brief

Please take notice that the following claimants —

— move the court for permission to file an *amicus curiae*

brief in this matter. The reasons and grounds for this motion are:

1. have the following
addresses:

2. These four claimants are currently involved in litigation initiated by the Department of Workforce Development ("DWD" or "Department") in Kenosha County over their receipt of unemployment compensation benefits while also receiving Social Security Disability Income ("SSDI") benefits. The relevant Kenosha County Case Nos. by claimant are:

- Kenosha Case No. 2014-CV- / Appeal No. 2014-AP-

- Kenosha Case No. 2014-CV- / Appeal No. 2014-AP-

- Kenosha Case No. 2014-CV- / Appeal No. 2014-AP-

- Kenosha Case No. 2014-CV- / Appeal No. 2014-AP-

3. The case currently before this court and the cases involving these four claimants substantively concern the Department's appeal of Labor and Industry Review Commission ("LIRC" or "Commission") decisions finding that claimants who receive SSDI benefits are not prohibited from receipt of all unemployment benefits under Wis. Stat. § 108.04(12)(f), recently enacted pursuant to 2013 Wis. Act 36. See Kluczynski, UI Hearing No. 14400214AP (30 May 2014).¹
4. Even though none of these claimants reside in Kenosha County,² the Department appealed the Commission decisions regarding each claimant to Kenosha County circuit court. In a decision dated 3 November 2014, that court dismissed the appeals involving these four claimants as venue for them in Kenosha County was improper under Wis. Stat. § 102.23(1)(a). The issue of whether these four claimants could still receive unemployment benefits while also receiving SSDI was not addressed by the court in Kenosha.
5. As listed in ¶2, above, the Department has appealed these dismissals. The issue on appeal is whether the Kenosha County Circuit Court was the proper venue for the cases involving these four claimants under Wis. Stat. § 102.23(1)(a).
6. Because the Department failed to follow the venue requirements of Wis. Stat. § 102.23(1)(a), the substantive question of whether they can still receive some unemployment benefits while also receiving SSDI benefits has not been addressed and will likely not be addressed before another court such as this court will have examined and decided the issue.
7. In appealing the Commission's decisions allowing these four claimants to continue to receive in part unemployment benefits while also receiving SSDI benefits, the

1 Kluczynski is the lead SSDI case on which the others are based. It is available at <http://dwd.wisconsin.gov/lirc/ucdecsns/4016.htm>.

2 Mr. [redacted] is a resident of Washburn County. Mr. [redacted] is a resident of Dane County. Mr. [redacted] is a resident of Milwaukee County. Mr. [redacted] is a resident of Brown County.

Department wants to contend that receipt of unemployment benefits and SSDI benefits are mutually exclusive actions and that individuals who receive both kinds of benefits are "double dipping."

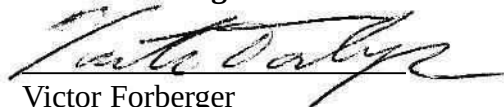
8. Because these claimants have been receiving SSDI benefits for some time while continuing to work in various ways, they can offer the court information about how their receipt of SSDI benefits is distinct from the unemployment due them for the work they have performed. In so doing, this information will reveal what support actually exists to the Department's claims of "double dipping" between SSDI benefits and unemployment benefits.
9. Without this opportunity to present this information to this court in this proceeding, these claimants will most likely NOT have the opportunity to defend their partial receipt of unemployment benefits while receiving SSDI benefits nor have the opportunity to explain how receiving unemployment benefits is based on the work they have performed and is compatible with receipt of SSDI benefits.

Wherefore, these four claimants —

— respectfully request permission from this court to file an *amicus curiae* brief in this case.

Respectfully submitted
on behalf o

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Wisconsin Department of Workforce Development,
Plaintiff,

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Defendants.

Amicus Curiae Brief

Introduction

are all recipients of Social Security Disability Income ("SSDI" or "DI") benefits for several years. They have also worked while receiving SSDI benefits, and until 2014 were eligible for unemployment benefits based on their work.

The Department of Workforce Development ("DWD" or "Department") sought to eliminate dual receipt of SSDI and unemployment benefits. Through the Unemployment Insurance Advisory Council ("Advisory Council"), the Department enacted a prohibition pursuant to 2013 Wis. Act 36 §§ 64 and 66 on collecting unemployment benefits when an individual is already receiving SSDI benefits. The newly formed Wis. Stat. § 108.04(12)(f)1 states:

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

In examining this statutory language, the Labor and Industry Review Commission ("LIRC" or "Commission") held in Kluczynski, UI Hearing No. 1400214AP (30 May 2014) (attached; also available at <http://dwd.wisconsin.gov/lirc/ucdecsns/4016.htm>) that receipt of SSDI benefits only affects unemployment benefits on the week when both unemployment and disability benefits are received. In other weeks where unemployment benefits can be received and for which no

disability benefits are paid, claimants are still eligible for their unemployment benefits. Subsequent Commission decisions involving claimants receiving SSDI benefits have followed Kluczynski, including the decisions involving _____ as well as the claimant involved in the action before this court, Kenton Morse.

Argument

A. The Department's proposed changes to unemployment law misleadingly presumed that those receiving both SSDI benefits and unemployment benefits are double-dipping.

In the proposal labeled D12-05 (included with the Knutson Affidavit attached to the Department's brief at Ex.1; also available at <http://dwd-uireform.vforberger.fastmail.fm/D12-05.pdf>),¹ the Department indicated that individuals who receive both SSDI and unemployment benefits were double-dipping. The Department explained:

To understand why such "double-dipping" may constitute fraud, please note the following general requirements for each program:

- To receive unemployment insurance benefit payments, claimants must state that they are able to work.
- To receive disability insurance benefit payments, claimants must state that they are unable to work.

1 Copies of numerous Department documents along with other unemployment decisions, proposals, reports, and analyses are available at <http://dwd-uireform.vforberger.fastmail.fm/>.

D12-05 at 2.² Accordingly, the Department proposed new statutory language that anyone applying for or receiving SSDI benefits be considered ineligible for unemployment benefits. D12-05 at 1.

The Department supported this proposal by pointing to GAO Report 12-764, Income Security: Overlapping Disability and Unemployment Benefits Should be Evaluated for Potential Savings (July 2012) (available at <http://www.gao.gov/products/GAO-12-764>). This report indicated that in fiscal year 2010 around 117,000 individuals received both SSDI and unemployment ("UI") benefits and implied that these concurrent benefits were somehow improper.

Although current program rules allow overlapping benefits under certain circumstances, concurrent receipt of DI and UI benefits can also be an indicator of improper payments. For example, some individuals who have a disability as determined by SSA may be receiving improper UI payments because they are not "able and available" for work. Similarly, some individuals receiving UI benefits may be receiving improper DI payments because they no longer have a disability as defined by SSA

GAO Report 12-764 at 11. Eight individuals who received both SSDI and unemployment benefits were subsequently examined in detail and it was discovered that one of those individuals

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- 2 In contrast to this statement by the Department, eligibility for SSDI benefits is NOT based on whether an individual is unable to work but rather, as noted by the Department itself, on whether an individual's work-related income rises to a level considered to be substantial gainful activity. See D12-05 at 2. See also 42 USC § 423(f) and 20 CFR §§ 404.1571-6 (setting forth various criteria for determining whether an individual is engaged in substantial gainful activity and thus eligible or ineligible for SSDI benefits) and 42 USC § 423(d)(2)(A):

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

had fraudulently collected unemployment benefits in Wisconsin by concealing work activity. Id. at 11-12 and n.30. The Department featured this example in D12-05 at 5 in showing how dual receipt of SSDI and unemployments was fraudulent. What the Department failed to note in D12-05, however, was the lengthy letter from the Social Security Administration attached to this GAO report, including:

GAO suggests that receipt of payments from UI and DI may be an indicator for improper payments. GAO acknowledges that under current law receipt of payments from both of these programs is permissible; therefore dual receipt alone is not a flag for improper payments.

* * *

Our detailed review of the cases hand-selected by GAO revealed no improper payments issued on the basis of concurrent receipt of DI and UI. Three of the nine cases did not involve work after onset, and our current processes identified these cases for review prior to the GAO report. We have applied work rules to these cases, and while some of the beneficiaries did not receive a payment for some months, all but one of them continue to be eligible for benefits under current law.

* * *

Congress encourages DI beneficiaries to return to work; thus, DI beneficiaries are permitted to work and receive DI benefits in accordance with the law. The report does not help us understand whether someone's pursuit of UI is an indicator that the person should not be eligible for DI. We reviewed the cases GAO picked and cannot make that connection based on the medical evidence.

GAO Report 12-764 at 18, 20, and 22. *See also* Frank Cristaudo, "Social Security Memorandum: Receipt of Unemployment Insurance Benefits by Claimant Applying for Disability Benefits — REMINDER" (9 August 2010) (attached) ("a person can qualify for Social Security disability benefits even though he or she remains capable of performing some work").

In January 2013, counsel for these four claimants prepared a lengthy, 50 page memorandum about all of the Department's proposed changes to unemployment law, and four pages of that memorandum were devoted to D12-05 (an excerpt of these four pages is attached). Copies of the full memorandum were posted on the labor and employment listserv for the Wisconsin bar, the Internet, and provided to members of the Advisory Council.

The Department was adamant that the Advisory Council limit dual receipt of unemployment and SSDI benefits, and so at its 21 February 2013 meeting the Advisory Council

"approved" D12-05 but mandated that any restriction on unemployment benefits NOT occur for those who have only applied for SSDI benefits. The Department was reluctant to follow this directive of the Advisory Council, however, and so D12-05 emerged for further discussion at the council's 1 April 2013 meeting.

Finally, there was continued discussion of proposal D12-05 — SSI disability and UI benefits. DWD complained to the council that its decision to allow UI benefits and SSI disability at the same time was raising problematic drafting issues and concerns from LRB. The council emphasized to DWD that the tests for whether someone is able and available for unemployment purposes is different from the disability criteria for social security disability (ed. note here: this issue of different laws having different tests is not new in employment law; for example, there are different tests for independent contractor status in tax law, labor law, common law, and Wisconsin UI law — to name a few, and there are different tests for showing discrimination in federal law, state law, or in the City of Madison).

For the council, it makes no sense in light of those different tests to prohibit receipt of unemployment benefits when someone has simply applied for social security disability and does not know if or when that application for disability benefits will be approved. The only change in the law adopted by the Council is that if the individual eventually succeeds in obtaining social security disability, then that individual can no longer receive unemployment benefits, and the Department can recover any benefits paid to that individual after the time when the disability application is granted. Because of federal law that prohibits states from recovering debts against social security benefits, the Council explained, DWD cannot seek to recovery UI benefits that were paid for the time from when the application was filed to when it was finally approved.

See Advisory Council Meeting — 1 April 2013 (available at <https://wisconsinui.wordpress.com/2013/04/01/advisory-council-meeting-1-april-2013/>).³ So, the Advisory Council intended that those receiving SSDI benefits could no longer collect unemployment benefits in order to constrain the Department's more far-reaching proposals to eliminate what the Department perceived as double-dipping. Given the many other changes in unemployment law proposed by the Department and additional changes being pushed by legislators, *see, e.g.*, the 1 April 2013 letter from numerous legislators to the Advisory Council

3 As the managing attorney for the Unemployment Compensation Appeals Clinic, Inc., I regularly attend Advisory Council meetings to keep abreast of changes and developments in unemployment law. On occasion, council members ask for my input.

(included with the Knutson Affidavit attached to the Department's Brief at Ex.10; also available at <http://dwd-uireform.vforberger.fastmail.fm/0401knodllaseeletter.pdf>), the Advisory Council was deeply concerned about proposed changes to misconduct criteria, a new substantial fault disqualification standard, and the elimination of numerous exemptions to the general quit disqualification.⁴ Accordingly, the Advisory Council did not conduct an independent or thorough examination of the merits of the Department's push to pass an SSDI benefits disqualification for unemployment benefits. The Advisory Council simply sought to limit the scope of what the Department was proposing and take some control over a change that could be far more onerous without the council's limited involvement. In this light, it is presumptuous to conclude that the Advisory Council sought and endorsed the specific statutory SSDI prohibition at issue in these unemployment cases.

Finally, at the 20 February 2014 Advisory Council meeting, the Department simply noted to the council that an appeal tribunal decision had, according to the Department, concocted a strange interpretation of the SSDI benefits prohibition that allowed partial payment of unemployment benefits and asked the Advisory Council to adopt a resolution affirming its original intent. The Advisory Council was not presented with any statutory language, copies of

4 Several of the Advisory Council's eventual recommendations on these issues were ignored by the Department and not included in the bills that eventually became 2013 Wis. Act 36.

appeal tribunal decisions, or memoranda regarding the issue.⁵ And so, the Advisory Council acted simply to accomplish what the Department requested of it.

B. SSDI benefit recipients are encouraged to work.

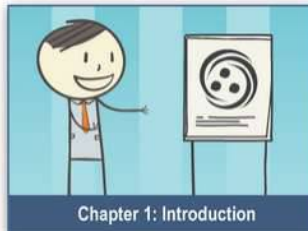
As noted by the Social Security Administration in its response to GAO Report 12-764, recipients of SSDI benefits are encouraged to work. To that end, numerous and extensive efforts have been developed, including what are called Ticket to Work programs.⁶

Ticket to work is a free and voluntary program by the Social Security Administration to assist SSDI benefit recipients with returning to the workforce. Presentations and training about the program are available on the web.

5 At subsequent meetings, the Department informed the Advisory Council that the Commission has decided the issue of unemployment benefit eligibility for recipients of SSDI benefits contrary to what the Department wants. But, the Department has yet to provide the Advisory Council with any memoranda regarding the Commission's Kluczynski decision or even a copy of the Kluczynski decision itself. Nor has the Department described to the Advisory Council the scope and extent of its efforts in appealing Kluczynski and its progeny. Finally, at the 19 February 2015 council meeting the Department indicated to the Advisory Council that it was working on statutory changes to "correct an unintended statutory interpretation contained in decisions by" the Commission, but no actual language was proposed. See D15-01 (available at <http://dwd-uireform.vforberger.fastmail.fm/D15-01-SSDI.pdf>). New statutory language was revealed at the 19 March 2015 Advisory Council meeting. See D15-01b (available at <http://dwd-uireform.vforberger.fastmail.fm/D15-01b-SSDI.pdf>).

6 As noted by the Commission in Tunisha Perkins, UI Hearing No. 11605816MW (11 January 2012) (attached), 2010 changes to the able and available regulations in Wis. Admin. Code § DWD 128.01(3)(a) added a reference to engaging "in some substantial gainful employment" and that this addition "was expressly chosen to mirror the 'disability' definition contained in the Social Security Act, 42 U.S.C. § 416."

Select a chapter to learn more



Audio



Restart



Captions

See <http://www.chooseworkttw.net/training/menu.html> (presentations for SSDI benefits recipients who are working or want to return to the workforce, including ticket to work, how to get ready to work, job search assistance, and how to report wages from a new job to avoid SSDI benefit over-payments); see also <http://www.chooseworkttw.net/index.html> (home page for Social Security Administration website for its ticket to work program). As noted in these presentations, the employment support efforts available for SSDI benefit recipients are extensive.

Employment Team

The infographic displays four categories of services provided by the Employment Team, each represented by a distinct shape and color:

- WIPA (Work Incentives Planning & Assistance):** Represented by a green circle. Services include WIPA projects and Benefits Counseling.
- EN (Employment Networks):** Represented by a blue triangle. Services include Career Planning, Job Leads and Job Placement, Ongoing Employment Support, and Benefits Counseling.
- VR (State Vocational Rehabilitation):** Represented by an orange triangle. Services include Intensive Training, Education, Rehabilitation, Career Counseling, Job Placement Assistance, and Benefits Counseling.
- PABSS (Protection and Advocacy for Beneficiaries of Social Security):** Represented by a purple diamond. Services include Individual Advocacy/Conflict Resolution.

At the bottom of the infographic is a navigation bar with icons for Audio, Restart, Captions, 4 of 10, Back, and Next.

See http://www.chooseworkttw.net/training/03_rtw/rtw4.html. As is obvious here, the Division of Vocational Rehabilitation within the Department of Workforce Development handles the vocational rehabilitation efforts funded and made available to SSDI benefit recipients. In light of these efforts to return SSDI benefit recipients back to the workforce, it is preposterous to conclude that any recipient of SSDI benefits cannot work simply because he or she is receiving SSDI benefits.

C. These four SSDI benefit recipients are only seeking the unemployment benefits due them for their work in covered employment.

Affidavits from these four claimants (attached to this brief) describe why and when they first became eligible for SSDI benefits as well as the work they performed on which they filed

their unemployment claims and which led to the cases now subject to litigation by the Department.

Mr. [REDACTED] began receiving SSDI benefits in 1988 because of back and neck injuries. After a few years, he recovered from those injuries to return to full-time laboring work. In 1995, the physical toll from that work led to his return to SSDI benefits, and he currently receives monthly SSDI benefits of \$1621 on the third day of the month.

These SSDI benefits do not mean that Mr. [REDACTED] has not worked. For the last several years, he watered plants and pulled weeds at [REDACTED] e, Inc., and earned around \$100 each week. This work was seasonal, however, and led to layoffs during the winter months. In December 2013, Mr. [REDACTED] was laid off and he applied for unemployment benefits. The Department determined that, based on his prior earnings, he was eligible for a weekly benefit rate of \$76. Before he could start collecting these unemployment benefits due him, the Department's ban on unemployment benefits for those receiving SSDI benefits went into affect. After appeals, the Commission concluded in a decision dated 12 June 2014 that Mr. [REDACTED] was eligible for unemployment benefits except on the same week he received his SSDI benefits.⁷ While the appeals were pending, Mr. [REDACTED] found part-time work at a Dollar General store for \$8.50 per hour.

Mr. [REDACTED] application for SSDI benefits was finally approved in 2004 after a two-year wait. He had been diagnosed with dysgraphia — a neurological disorder that limits his ability to write — and a degenerative disk disease of his back and had undergone extensive shoulder surgery as well. At present, he receives \$1942 in SSDI benefits on the third Wednesday of each month.

At the time he was approved for SSDI benefits, Mr. [REDACTED] worked as a school bus driver, and he has continues to work as a school bus driver to this day. He typically works 15 to 17

⁷ Mr. [REDACTED] did not collect the unemployment benefits due him, however, because the claimants handbook continues to state that recipients of SSDI benefits are not eligible for any unemployment benefits.

hours a week and at present earns \$14.25 an hour. Breaks in the school year lead to temporary layoffs for the drivers, and in March 2014 Mr. [redacted] had no work because of spring break. With other school bus drivers, he applied for unemployment benefits, and his weekly benefit rate was calculated at \$118. The Department, however, denied his claim because he was also receiving SSDI benefits. Mr. [redacted] appealed that denial, and the Commission held in a decision dated 12 June 2014 that he could collect unemployment benefits on the weeks he was not paid his SSDI benefits. While the Department appealed that decision, it also investigated whether Mr. [redacted] was able and available for work. Only after that investigation was complete did the Department finally pay him the one week of unemployment benefits that he had claimed. And, the Department again withheld his unemployment benefits for a week in December 2014 (another temporary layoff) because he was receiving SSDI benefits until he directed the Department's attention to the Kluczynski decision.

Mr. [redacted] became eligible for SSDI benefits in 2003 because he has been diagnosed with human immunodeficiency virus. He currently receives a monthly SSDI benefit of \$1118 on the third day of each month.

He continues to find work where he can, and in June 2012 he landed a part-time bartender and host job at [redacted] Lounge and Restaurant for \$8.25 per hour. In December 2013, he was let go and qualified for a weekly unemployment benefit of \$54 based on his prior earnings at [redacted] Lounge and Restaurant. Mr. [redacted] did not initially receive his unemployment benefits because at the start of 2014 the Department's ban on collecting unemployment benefits when also receiving SSDI benefits went into effect. After appeals, on 30 May 2014 the Commission partially overturned the Department's ban and found that Mr. [redacted]

could collect his unemployment benefits on the weeks he was NOT paid SSDI benefits. Soon after the Commission's decision, the Department then investigated Mr. [redacted]

able and available status and found him eligible. Only then did he begin collecting his unemployment benefits from his work at [redacted] Lounge and Restaurant. In January of this year, Mr. [redacted] suffered a minor stroke and has been recovering since then.

Mr. [REDACTED] was diagnosed with a learning disability at an early age. In 1988, he shattered his left ankle and fractured his lumbar spine, and in 2009 he tore his rotator cuff and can no longer lift more than fifteen pounds above his head. In 2010 he applied for and was found eligible for SSDI benefits. His monthly SSDI benefit is \$845, which he receives on the third day of each month.

Mr. [REDACTED] has been a truck driver since 1999 and continues to look for truck driving work. For the past several summers in 2013 and 2014, he hauled sweet corn waste on weekends from 5 AM to 5 PM at [REDACTED] Dairy Farms. In late 2013, he also hauled waste on an assignment from a temp agency, and when that assignment ended he applied for unemployment benefits. It was determined that he qualified for a weekly benefit rate of \$120. That determination, however, occurred when the Department's prohibition on those receiving SSDI benefits being eligible for unemployment benefits went into effect. After appeals, the Commission ruled on 12 June 2014 in his favor and he obtained partial eligibility for unemployment benefits on the weeks when he was not paid his SSDI benefits. In late 2014, when he again applied for unemployment benefits after his work with [REDACTED] Dairy Farms had ended, Mr. [REDACTED] was not eligible for unemployment benefits because he did not have enough earnings in his prior benefit year to qualify.

As demonstrated by these four individuals, their unemployment claims do not differ from the unemployment claims of others. Their claims are based on prior work they have done and which provided them with enough earnings to establish a benefit year and qualify for a weekly benefit rate. All that they ask is that they be treated in the same manner as their co-workers and have the same eligibility for unemployment benefits as they do. Such a request should presumably be more than acceptable under Wisconsin's unemployment law. Wis. Stat. § 108.01(1) states:

Unemployment in Wisconsin is recognized as an urgent public problem, gravely affecting the health, morals and welfare of the people of this state. The burdens resulting from irregular employment and reduced annual earnings fall directly on the unemployed worker and his or her family. The decreased and irregular

purchasing power of wage earners in turn vitally affects the livelihood of farmers, merchants and manufacturers, results in a decreased demand for their products, and thus tends partially to paralyze the economic life of the entire state. In good times and in bad times unemployment is a heavy social cost, directly affecting many thousands of wage earners. *Each employing unit in Wisconsin should pay at least a part of this social cost, connected with its own irregular operations, by financing benefits for its own unemployed workers. Each employer's contribution rate should vary in accordance with its own unemployment costs, as shown by experience under this chapter. Whether or not a given employing unit can provide steadier work and wages for its own employees, it can reasonably be required to build up a limited reserve for unemployment, out of which benefits shall be paid to its eligible unemployed workers, as a matter of right, based on their respective wages and lengths of service.*

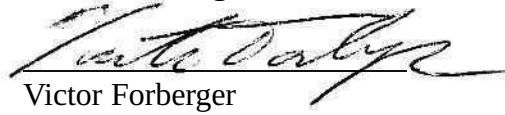
(emphasis supplied). By banning altogether recipients of SSDI benefits from unemployment benefits, the Department's proposed exclusion for SSDI benefit recipients is running afoul of the requirement that employers pay their share of their unemployment costs. If the Department's total ban on unemployment eligibility is sustained, then employer's are free to hire and discharge SSDI benefit recipients without any liability whatsoever because SSDI benefit recipients cannot collect the unemployment benefits due them for their work. This result is not yet contained within the unemployment statutes, and the court should reject the Department's assertions to the contrary.

Conclusion

For the reasons stated above, these four claimants respectfully request that the court affirm the Commission's decision allowing unemployment benefits for all weeks other than the week in which they receive their SSDI benefits.

Respectfully submitted
on behalf o

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Dated: 7 April 2015

Appendix Documents

Gary Kluczynski, UI Hearing No. 14400214AP (30 May 2014).

Frank Cristaudo, "Social Security Memorandum: Receipt of Unemployment Insurance Benefits by Claimant Applying for Disability Benefits — REMINDER" (9 August 2010).

Victor Forberger, "Memorandum RE: 27 November 2012 DWD legislative proposals to Advisory Council" (13 January 2013) at 34-7.

Tunisha Perkins, UI Hearing No. 11605816MW (11 January 2012).

Affidavit of

Affidavit of

Affidavit of

Affidavit of