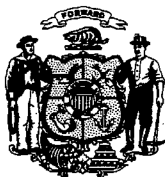
State of Wisconsin



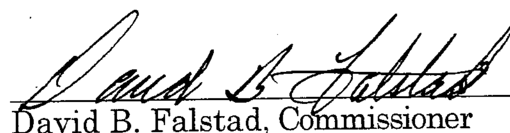
Labor and Industry Review Commission

Matthew D. Springhetti Employee **Springhetti's Landscaping & Lawn Care, Inc.** Employer Hearing No.16400661AP	**Unemployment Insurance Decision**[1] **Dated and Mailed:** FEB 21 2017

The commission **affirms** and adopts as its own the findings and conclusions of the appeal tribunal decision, subject to the **modifications** set forth herein. Accordingly, for weeks 1 through 4, 6 through 10, and 12 of 2012, the employee is eligible for a weekly benefit payment. The employee is required to repay the sum of $39 to the Unemployment Reserve Fund.

By the Commission:

Laurie R. McCallum, Chairperson



David B. Falstad, Commissioner

[1] **Appeal Rights**: See the blue enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, all other parties in the caption of this decision or order (the boxed section above), and the Department of Workforce Development.

Appeal rights and answers to frequently asked questions about appealing an unemployment insurance decision to circuit court are also available on the commission's website http://lirc.wisconsin.gov.

Procedural Posture

This case is before the commission to consider the employee's eligibility for unemployment insurance benefits for weeks 1 through 4, 6 through 10, and 12 of 2012. The Bureau of Benefits in the Unemployment Insurance Division of the Department of Workforce Development (department) issued an initial determination, finding that the employee concealed work performed and wages earned in those weeks when filing claims for unemployment insurance benefits. The employee requested a *de novo* hearing before an appeal tribunal.

An administrative law judge (ALJ) for the department held a hearing in this matter and issued an appeal tribunal decision, reversing the department's initial determination and finding that the employee did not conceal from the department work performed and wages earned when filing benefit claims for the weeks at issue. The department petitioned for commission review of the appeal tribunal decision.

The commission has considered the department's petition, the positions of the parties, and the briefs submitted, and the commission has conducted an independent and thorough review of the evidence submitted at the hearing. Based on its review, the commission agrees with the decision of the department's ALJ, subject to the following:

Modifications

1. In the first sentence of the first full paragraph on page 3 of the appeal tribunal decision, delete "every winter beginning in 2001" and substitute therefor "at some point between 2001 and 2009, after learning about the program from a co-worker".

2. In the second sentence of the second full paragraph on page 3 of the appeal tribunal decision, insert "be" between "not" and "compensated".

Memorandum Opinion

The department petitioned for review of the ALJ's decision finding that the employee did not conceal, as that term is defined in Wis. Stat. § 108.04(11)(g), work performed and wages earned in the weeks at issue. Despite conceding that the evidence in the record failed to establish that the employee worked or earned wages in six of the ten weeks at issue,[2] the department requested that the ALJ's decision be reversed in full. There can be no finding of concealment for weeks in which the employee performed no work, and the commission agrees with the analysis and conclusions of the department's ALJ with respect to the weeks in which the evidence established that work was performed. Like the department's ALJ, the commission credits the employee's testimony that he relied on the information he received from his father/employer and did not intend to deceive the department when filing his benefit claims. The employee's testimony provides credible and

[2] Reply Brief of DWD in Support of Reversal of the Appeal Tribunal Decisions, p. 2, fn. 1.

substantial evidence to support the ALJ's findings that were adopted, with minor modifications, by the commission.[3]

The employee has been working for the employer, a small business that provides seasonal landscaping services, since he was 12 or 13 years old. The owner of the small business is his father. The employee became a full-time seasonal employee in 2001, after he graduated from high school. The employee did not learn about the unemployment insurance program until several years later. The employee was paid hourly until April 2011, when his father made him a salaried employee. The employee was told by his father, after his father discussed the issue with an accountant, that he could collect unemployment insurance benefits in the winter months. Because the employee did not receive any paychecks in the winter months, he applied for and collected full weekly unemployment benefits. The employee did not report the few hours of snowplowing he performed for the employer on his weekly claims, because it was his understanding, based on what he had been told by his employer, that he should not do so because he was not receiving a paycheck. The employee did not file for benefits for any week for which a paycheck was forthcoming.

The department did not dispute the work and wage estimates provided by the employee for the weeks at issue, so the only issue before the commission is whether the employee "concealed" work and wages on his weekly claims. For unemployment insurance purposes, "conceal" means "to intentionally mislead or defraud the department by withholding or hiding information or making a false statement or misrepresentation."[4] The burden to establish that a claimant concealed information is on the department.[5] The Wisconsin Supreme Court has required that concealment, as a form of fraud, be proven by clear, satisfactory, and convincing evidence.[6]

In this case, the department did not establish that the employee intentionally misled the department in an attempt to "cheat the system." The employee's failure to report as work the few hours that he spent plowing snow for the employer for which he received no corresponding paycheck was the result of erroneous advice he received from his employer. Historically, the department has not found concealment when a claimant makes an error based on incorrect information received from an employer, and a finding of concealment in this case is not supported by the evidence.

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[3] *Xcel Energy Services, Inc. v. LIRC*, 2013 WI 64, ¶ 25, 329 Wis. 2d 234, 833 N.W.2d 665.

[4] Wis. Stat. § 108.04(11)(g). The statutory definition of concealment changed slightly after 2015 Wis. Act 334, which went into effect on April 4, 2016. The determination in this matter was issued prior to that date.

[5] *In re Joseph W. Hein, Jr.*, UI Dec. Hearing No. 00605374MW (LIRC Dec. 13, 2001).

[6] *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 299, 294 N.W.2d 437 (1980) (supreme court requires a higher burden of proof, i.e., to a reasonable certainty by evidence that is clear, satisfactory and convincing, in the class of cases involving fraud); *Kamuchey v. Trzesniewski*, 8 Wis. 2d 94, 98, 98 N.W.2d 403 (1959) ("fraud must be proven by clear and satisfactory evidence, which requires a higher degree of proof than in ordinary civil cases").

The unemployment insurance program provides a source of income to workers who are unemployed through no fault of their own. It was not unreasonable for the employee in this case to believe that, for any week he received no wages (because he was salaried during the landscaping season and did not receive any paychecks during the off season), he was eligible for full unemployment insurance benefits.

The cases cited by the department in its brief to support its arguments are not persuasive and are distinguishable from the case at hand. The department, for example, argued that the employee here was similar to the claimant in *McGee v. Crossmark, Inc.*, UI Dec. Hearing Nos. 14609275MW through 14609278MW (LIRC May 28, 2015). That is not so. McGee intentionally did not report any wages she earned from a part-time employer. She knew from past encounters with the department that she needed to report all hours worked and all wages earned. In fact, McGee had been previously found to have concealed work and wages while working for a different employer. Therefore, the commission determined that McGee's failure to report her work and wages from Crossmark was not the result of an honest mistake, a misinterpretation of information received, or a good faith misunderstanding of her obligations.

Here, the employee, his knowledge, and his history with the unemployment insurance program are completely different than McGee's. The employee had only ever worked for one employer, his father's business; McGee worked for multiple third-party employers. The employee's testimony in this case was found to be credible; McGee's testimony was not. The employee did not file for unemployment benefits for any week for which a paycheck was forthcoming; McGee did, despite an earlier finding by the department of concealment.

The employee worked for a small, family-owned business. There was no human resources department or benefits office to provide him guidance. The employee's father consulted with an accountant, and the employee's father assured the employee that he was eligible for full benefits in the off season. The employee was new to unemployment and consistently filed his claims the same way, albeit incorrectly, year after year. The employee did not discuss with his employer/father how to answer specific questions asked of him during the claims process and did not know that he was filing his claims incorrectly until the department initiated its investigation in 2014.

In his brief, the employee raised several issues of concern. First, the employee questioned the propriety of the department's decision to issue the initial determinations in this matter concerning work and wages without naming and providing notice to the employer. Although the department's failure to name the employer is unusual, the issue is moot. The hearing office provided the employer with notice of the proceedings. The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful

manner.[7] Yet, the commission "cannot condone a system which does not inform a party in interest of proceedings affecting that interest...."[8]

Another issue raised by the employee in this case concerns the propriety of the ALJ's decision to grant a protective order preventing pages of the department's Disputed Claims Manual from being disclosed to the public. It is clear that the ALJ had the authority to issue a protective order to prohibit the parties and their representatives from disclosing any evidence and exhibits listed as confidential in the protective order if the interests of justice so require,[9] and the ALJ accepted the department's representation that it was in the interests of justice to issue a protective order because the evidence and exhibits at issue were confidential. The commission did not need to resolve the confidentiality question in order to reach a decision in this matter, because the commission's decision is based on its determinations of credibility and intent.

However, the commission notes that there are federal regulations that address the confidentiality and disclosure of unemployment insurance information.[10] Those regulations provide that "information about State UC law (and applicable Federal law) provisions, rules, regulations, and interpretations thereof, including statements about general policy and interpretations of general applicability" is public domain information[11] and not subject to confidentiality.[12] The federal confidentiality and disclosure requirements apply to states and state agencies.[13]

cc: Attorney Victor Forberger
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[7] *Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 701, 530 N.W.2d 34 (Ct. App. 1995) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).
[8] *Griesbach v. Seek Career/Staffing Inc.*, UI Dec. Hearing No. 10402551AP (LIRC Nov. 30, 2010), citing *Cornwell Personnel Associates, Ltd. v. DILHR*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979).
[9] Wis. Admin. Code § DWD 140.09(2).
[10] 20 CFR § 603 et seq.
[11] 20 CFR 603.2(c).
[12] 20 CFR 603.5(a).
[13] 20 CFR § 603.1.