

State of Wisconsin



Labor and Industry Review Commission

Jacob W. La Fleur  
Claimant

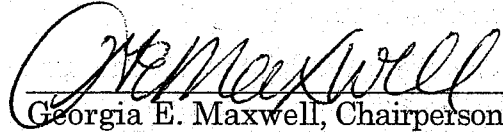
Unemployment Insurance  
Decision<sup>1</sup>

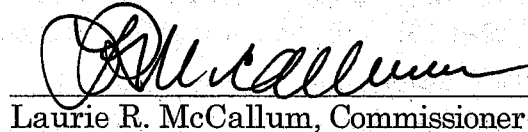
Hearing Nos. 18001133MD, 18001135MD,  
18001136MD, 18001137MD,  
and 18001138MD

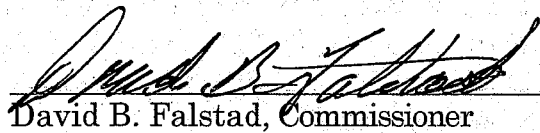
Dated and Mailed:  
**SEP 26 2018**

The commission **modifies and affirms in part and reverses in part** the appeal tribunal decisions. Accordingly, the claimant is eligible for benefits for weeks 52 of 2015 through 17 of 2016; week 50 of 2016; weeks 53 of 2016 through 17 of 2017; weeks 48 through 51 of 2017; and weeks 3 through 5 of 2018, if otherwise qualified. As a result of this decision, there are no overpayments.

By the Commission:

  
Georgia E. Maxwell, Chairperson

  
Laurie R. McCallum, Commissioner

  
David B. Falstad, Commissioner

<sup>1</sup> **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

These cases are before the commission to consider the claimant's eligibility for unemployment insurance benefits. An administrative law judge (ALJ) of the Unemployment Insurance Division of the Department of Workforce Development held a hearing and issued six decisions, five of which are at issue here. The commission received a timely petition for review. The commission has considered the petition, and it has reviewed the evidence submitted at the hearing.

### Findings of Fact and Conclusions of Law

1. The claimant has been employed with Tri-County Paving, a road construction business since 2004. His current position is that of a paving foreman.
2. Road construction work is weather dependent. The claimant is usually laid off at the end of November each year and returns to work the following April or May. Throughout his employment with Tri-County Paving, the claimant has not sought work referrals through his union during periods of seasonal lay off.
3. The claimant is a member in good standing of the Operating Engineers Union Local 139.
4. The union provides an "out-of-work list" as a service to its members. The union does not require members who are laid off to get on the list. There is no penalty for not getting on the list.
5. The union's out-of-work list is its record of unemployed members. The union routinely works with the department in their efforts to verify members' presence on the list.
6. The claimant initiated claims for unemployment insurance benefits in 2015, 2016, and 2017, just as he had in previous years. The claimant reported that he was laid off by Tri-County Paving, belonged to the Operating Engineers Union Local 139, and was a member in good standing.
7. The department determined in 2015, 2016, and 2017 that the claimant qualified for a waiver of the requirement that he complete four work search actions each week while laid off. The waiver was in place for weeks 52 of 2015 through 17 of 2016; week 50 of 2016; weeks 53 of 2016 through 17 of 2017; weeks 48 through 51 of 2017; and weeks 3 through 5 of 2018 (collectively, "the weeks at issue").
8. The claimant acted in reliance on what he had been told by the department regarding his work search waiver and did not search for work in the weeks at issue. He returned to work when recalled by his employer.
9. The claimant received benefits of \$370 for each of the weeks at issue, with the exception of his waiting weeks and weeks 3 through 5 of 2018.
10. On February 12, 2018, department personnel contacted the claimant's union to verify that he was a member in good standing and on its out-of-work list. The issue of the claimant's presence on the out-of-work list had come up during an investigation following his request to backdate benefit claims for week 52 of 2017 and weeks 1 and 2 of 2018.

11. The claimant was not on the union's out-of-work list in 2015, 2016, or 2017. The claimant added his name to the list on February 5, 2018 (week 6), after speaking with fellow union members. He was not aware prior to that date that he was required by the department to be on the union's out-of-work list in order to receive a work search waiver applicable to union members.
12. On February 14, 2018, the department issued six determinations finding that the claimant intentionally concealed information pertaining to his work search efforts during the weeks at issue, because "on his initial claim, the claimant indicated that he was on the union's out of work list, so his work search was waived. However, the claimant was not on the out of work list, so he doesn't qualify for the work search waiver previously given to him." The department denied benefits for the weeks at issue and created overpayments. The department also assessed concealment overpayment penalties.
13. The department's *Handbook for Claimants* provides:
 

**Work Search** – You are required to perform at least four work search actions for each week you want to be paid unemployment benefits, unless the department clearly tells you that your work search is "waived" and you do not have to look for work.
14. The claimant did not recall being asked by the department if he was on his union's out-of-work list when he filed initial claims in 2015, 2016, and 2017.
15. There is no evidence in the record establishing that the claimant was asked by the department if he was on his union's out-of-work list when he filed initial claims in 2015, 2016, and 2017.
16. The claimant was not asked by the department if he was on his union's out-of-work list when he filed weekly claims for the weeks at issue.
17. The claimant did not conceal, within the meaning of Wis. Stat. § 108.04(11)(g), a material fact when he filed initial claims in 2015, 2016, and 2017.
18. The claimant did not make a reasonable search for suitable work in the weeks at issue.
19. The claimant was informed by the department in 2015, 2016, and 2017 that the requirement that he make a reasonable search for suitable work was waived. The claimant was granted waivers under Wis. Admin. Code § DWD 127.02(4).
20. The claimant was not entitled to work search waivers under Wis. Admin. Code § DWD 127.02(4) for the weeks at issue, because he did not satisfy the requirements of that provision.
21. The claimant is entitled to work search waivers under Wis. Admin. Code § DWD 127.02(8) for the weeks at issue, because his failure to search for work in those weeks was due to an error made by personnel of the department.
22. The claimant had been erroneously informed by personnel of the department that his circumstances qualified him for a waiver of the work search requirement, and he relied on that misinformation.

23. The claimant did not receive benefits for the weeks at issue to which he was not eligible and for which he was not entitled.

24. There are no overpayments and no overpayment penalties.

### Memorandum Opinion

To be eligible for unemployment insurance benefits for any given week, a claimant must meet the requirements of Wis. Stat. § 108.04(2). Relevant in this case is Wis. Stat. § 108.04(2)(a)3., which requires claimants to undertake a “reasonable search for suitable work,” unless the work search is waived.

The circumstances under which the department shall waive a claimant’s requirement to conduct at least four actions to search for suitable work are set forth in Wis. Admin. Code § DWD 127.02. One circumstance requiring waiver of the work search requirement is that in which a claimant has been laid off from work and routinely obtains work through a union referral and all of the following are met:

- (a) The union is the primary method used by workers to obtain employment in the claimant’s customary occupation.
- (b) The union maintains a record of unemployed members, and the referral activities of those members, and allows the department to inspect such records.
- (c) The union provides, upon the request of the department, any information regarding a claimant’s registration with the union or any referrals for employment it has made to the claimant.
- (d) Prospective employers of the claimant seldom place orders with the public employment office for jobs requiring occupational skills to those of the claimant.
- (e) The claimant is registered for work with a union and satisfies the requirements of the union relating to job referral procedures, and maintains membership in good standing with the union.
- (f) The union enters into an agreement with the department regarding the requirements of this subsection.<sup>2</sup>

The department had granted the claimant work search waivers under Wis. Admin. Code § DWD 127.02(4) for the weeks at issue. The department subsequently determined in February 2018 that the claimant did not qualify for the waivers he had been granted, because he was not “registered for work with a union.”<sup>3</sup> Since the department had notified him that his work search requirement was waived, the claimant had not searched for suitable work in the weeks at issue.

Another circumstance under which the department shall waive a claimant’s requirement to conduct at least four actions to search for suitable work is set forth in Wis. Admin. Code § DWD 127.02(8). That provision applies to claimants who have not made a search for suitable work because of an error made by personnel of

<sup>2</sup> Wis. Admin. Code § DWD 127.02(4).

<sup>3</sup> The commission also notes that the claimant did not “routinely obtain work through a union referral.”

the department. The phrase “an error made by personnel of the department” is not defined. However, the unemployment insurance law defines “departmental error” in Wis. Stat. § 108.02(10e)(am). The statutory definition of departmental error includes “misinformation provided to a claimant by the department, on which the claimant relied.” Wisconsin Stat. § 108.02(10e)(bm) excludes from the statutory definition of departmental error any error made by the department that results from “a false statement or representation by an individual.”

In this case, the claimant was erroneously told by the department that his work search requirement was waived between week 52 of 2015 and 5 of 2018, and the claimant relied on that misinformation. Under these circumstances, the claimant is entitled to a work search waiver for the weeks at issue under Wis. Admin. Code § DWD 127.02(8). Although the department determined that waivers were erroneously granted under § DWD 127.02(4) because the claimant concealed a material fact from the department on the initial claims he filed in 2015, 2016, and 2017, the evidence in the record does not support a finding of concealment. In fact, the evidence in the record does not establish that the claimant made any false statement or representation, expressly or implicitly, whether intentionally, negligently, or otherwise, to the department when filing his initial and weekly claims.

The claimant had allegedly concealed information from the department by indicating on the initial claims he filed in 2015, 2016, and 2017 that he was on his union’s out-of-work list when he was not. For unemployment insurance purposes, conceal means “to intentionally mislead the department by withholding or hiding information or making a false statement or misrepresentation.”<sup>4</sup> The burden to establish that a claimant concealed information is on the department.<sup>5</sup> The Wisconsin Supreme Court has required that concealment, as a form of fraud, be proven by clear, satisfactory, and convincing evidence.<sup>6</sup>

Exhibit 1 shows that the claimant reported on his initial claims that he was a member of union local 139 and that he was a member in good standing.<sup>7</sup> There is no evidence in the record establishing that the claimant was asked if he was on his union’s out-of-work list. The claimant credibly testified that he did not recall being asked by the department about being on his union’s out-of-work list prior to February 12, 2018. Consequently, the record does not support a finding that the

<sup>4</sup> Wis. Stat. § 108.04(11)(g)1.

<sup>5</sup> *In re Joseph W. Hein, Jr.*, UI Dec. Hearing No. 00605374MW (LIRC Dec. 13, 2001).

<sup>6</sup> *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).

<sup>7</sup> Federal law provides that “member in good standing,” when used in reference to a labor union, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.” 29 U.S.C. § 402(o).

claimant misled the department by withholding or hiding information or making a false statement or misrepresentation concerning his presence on that list.<sup>8</sup>

Exhibit 4 shows that the claimant's work search was waived for the weeks at issue and that he was not asked as part of the weekly claims process if he had contacted at least four employers to try to find work. Because his employer had recalled him each spring since 2005, the claimant did not search for other work during periods of seasonal lay off. The claimant believed that, given his history with the employer, he did not need to look for other work. The claimant was unaware that, as a result of a 2015 law change, he was required to be on his union's out-of-work list while laid off in order to qualify for a work search waiver applicable to union workers.

The department's *Handbook for Claimants* informs claimants that they need to do a work search, unless the requirement is waived by the department. The handbook is silent with respect to the circumstances under which the department grants work search waivers. Nothing in the handbook informs claimants that, if they want to be eligible for the work search waiver applicable to union members, they are required to be on their union's out-of-work list.

Therefore, the commission affirms the ALJ's conclusion that the employee did not conceal a material fact from the department while filing his unemployment insurance benefits claims and reverses the ALJ's conclusion that no waiver of the work search requirement applied to the claimant's circumstances for the weeks at issue. The ALJ did not address in her appeal tribunal decisions whether the claimant was entitled to waivers under Wis. Admin. Code § DWD 127.02(8).

Counsel for the claimant raised a number of issues in the claimant's petition for commission review. First, counsel objected to the ALJ's failure to address in UI Dec. Hearing No. 18001138MD the department's finding that "the claimant intentionally concealed information pertaining to his work search effort." The commission issued its own decision in these matters and found that the claimant did not conceal any information on his initial or weekly claims.

Second, counsel objected to "the confusing and unorthodox nature of all the initial determinations at issue in these proceedings." Counsel had attempted to ask the ALJ about "why the initial determinations include some weeks and not others and how the concealment penalties were calculated" and had presented the ALJ with several spreadsheets "to facilitate those questions." Counsel argued that the ALJ erred in refusing to accept his spreadsheets into the record and erred in refusing to have a discussion with him about the manner in which the initial determinations were issued. The commission disagrees.

The spreadsheets proffered by counsel did not constitute competent, relevant, and material evidence and lacked any reasonable probative value. Therefore, the ALJ did not err in rejecting their introduction. Nonetheless, the best practice for an ALJ, when a party offers documents during a hearing, is to accept the documents and

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<sup>8</sup> Findings of fact must be supported by credible and substantial evidence. Wis. Stat. § 108.09(7)(f).

make them part of the record, provided the size or number of the documents is not unduly burdensome. This ensures a complete record for purposes of appeal.

The ALJ likewise did not err by refusing to participate in a discussion wherein counsel wanted her to explain the rationale behind the department's initial determinations. The questions raised by counsel should be directed to personnel within the department who work with disputed claims.

The commission does recognize, however, that it was not completely clear at the outset which weeks were at issue. The commission notes, for example, that the hearing notice sent to the claimant for Hearing No. 18001134MD identified the issue for hearing as: "Did the claimant conceal any material fact or wages from the department when filing for benefits?" The hearing notice identified the beginning week of issue as week 52 of 2017. Yet, the underlying initial determination (ID No. 180021312) found that the claimant had concealed a material fact on the initial claims he filed in the weeks ending 12/19/15, 11/26/16, 12/24/16, 11/25/17, 12/23/17, and 12/30/17. It would appear, then, that the beginning week of issue should have been week 51 of 2015, the week ending December 19, 2015, rather than week 52 of 2017.

Third, counsel objected to the admission of Exhibits 1 through 6 into evidence. Counsel argued at the hearing, and again in the claimant's petition for review, that those exhibits should not have been admitted due to a lack of foundation. The commission disagrees.

Statutory and common law rules of evidence applicable to courts of record are not controlling with respect to unemployment insurance hearings.<sup>9</sup> Exhibits 1 through 6 are department records. An ALJ may take administrative notice of any department records, provided parties are given an opportunity to object and to present evidence to the contrary.<sup>10</sup> Counsel was given the opportunity to object to the documents marked as Exhibits 1 through 6 and to present evidence to the contrary. Contrary to counsel's argument, whether the claimant ever saw the marked documents or had any knowledge of them did not affect or control their admissibility.

NOTE: The commission did not discuss witness credibility and demeanor with the ALJ who held the hearing. The credibility of the claimant, the sole witness in this matter, is not in dispute. The commission reversed portions of the ALJ's decisions strictly on the sufficiency of the evidence.

cc: ATTORNEY VICTOR FORBERGER

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<sup>9</sup> Wis. Admin. Code § DWD 140.16(1).

<sup>10</sup> Wis. Admin. Code § DWD 140.16(2).