State of Wisconsin

Labor and Industry Review Commission

Gary A. Thoreson Claimant **Thor's Wolverine Den LLC** Employer Hearing Nos. 18401886MD and 18401885MD	**Unemployment Insurance Decision**[1] **Dated and Mailed:** MAR 22 2019

The commission **reverses** the appeal tribunal decisions. Accordingly, the claimant is eligible for benefits, if otherwise qualified. There is no overpayment, no overpayment penalty, and no benefit amount reduction.

By the Commission:

David B. Falstad, Chairperson

Michael H. Gillick, 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 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 two decisions. The commission received a timely petition for review. The commission has considered the petition and the positions of the parties, and it has independently reviewed the evidence submitted at the hearing.

Findings of Fact and Conclusions of Law

1. The claimant opened a claim for benefits in February 2018 after being discharged from his employment with a shipbuilding business. His weekly benefit amount was $370 per week.
2. The claimant filed weekly claims for benefits for weeks 7 through 30 of 2018. He reported that he had worked nine hours and earned $207 from the shipbuilder in week 7 of 2018. In the weeks thereafter, the claimant reported that he did not work and, consequently, did not earn any wages.
3. The named employer is a tavern owned by the claimant's brother. The claimant has helped out his brother at the tavern since it opened in 2016.
4. In March or April 2018, the claimant obtained a bartender's license, so a licensed bartender would be on the premises if the claimant's brother needed to leave the tavern. The employer is subject to fines if a licensed bartender is not on site.
5. The employer and the claimant estimated that the claimant was in the tavern anywhere from ten minutes to nine hours per week during the time period at issue. There were some weeks in which the claimant was out of town and not in the tavern at all.
6. On June 18, 2018, the department received an anonymous report that the claimant was bartending and talking about collecting full unemployment as a supplement.
7. The employer and the claimant denied that the claimant worked as an employee or that the claimant was paid for helping out in the tavern. The claimant was not permitted to keep any tips that may have been received from customers while the claimant was minding the bar in his brother's absence.
8. The claimant did not conceal, within the meaning of Wis. Stat. § 108.04(11)(b), work performed or wages earned in weeks 7 through 30 of 2018 when filing benefit claims for those weeks.

Memorandum Opinion

In determinations dated September 4, 2018, a department deputy found that the claimant worked and earned wages from the named employer in weeks 7 through 30 of 2018 and concealed that information from the department when filing benefit claims for those weeks. Gross weekly wages of $501 were imputed to the claimant. The determinations resulted in an overpayment of $5,500, an overpayment penalty of $2,200, and a benefit amount reduction of $17,760. The claimant appealed those determinations.

Following a hearing, an ALJ affirmed the department's determinations, finding that the claimant worked for and earned wages from the named employer in weeks 7 through 30 of 2018 and intentionally failed to report his work to the department. The ALJ did not credit the parties' testimony that they did not consider the help the claimant gave his brother to be "work" and that no wages were paid to the claimant.

The issue before the commission is whether, when filing benefit claims for weeks 7 through 30 of 2018, the claimant concealed work performed or wages earned.

An employee is presumed eligible for unemployment insurance benefits.[2] The party resisting payment of benefits has the burden of proving that the case comes within a disqualifying provision of the law.[3] The burden to establish that a claimant concealed information is on the department.[4] As a form of fraud, concealment must be proven by clear, satisfactory, and convincing evidence.[5] Conceal means "to intentionally mislead the department by withholding or hiding information or making a false statement or misrepresentation."[6]

The unemployment insurance law does not define "work." Work is commonly understood to mean to perform services or fulfill duties for wages or salary.[7] The unemployment insurance law contemplates that individuals who work do so to earn wages. The law defines an "employee" as "any individual who is or has been performing services *for pay* for an employing unit...."[8] "Employment" is defined as "any service ... performed by an individual *for pay*."[9] The law considers an employee to be "totally unemployed" in any week for which he or she earns *no wages*.[10] An eligible employee "shall be paid benefits for each week of total unemployment" at the weekly benefit rate calculated from the employee's base period wages.[11] The law contains a partial benefit formula under which benefits are calculated for an employee who is not totally unemployed.[12]

The commission agrees with the ALJ that the claimant "worked" for the named employer during the time period at issue, in that the claimant performed services

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[2] Wis. Stat. § 108.02(11) ("an employee shall be deemed 'eligible' for benefits for any given week of the employee's unemployment unless the employee is disqualified by a specific provision of this chapter from receiving benefits for such week of unemployment, and shall be deemed 'ineligible' for any week to which such a disqualification applies").

[3] *Kansas City Star Co. v. ILHR Dep't*, 60 Wis.2d 591, 602 (1973).

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

[5] *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 299, 294 N.W.2d 437 (1980) (a higher burden of proof, i.e., to a reasonable certainty by evidence that is clear, satisfactory and convincing, is required 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).

[6] Wis. Stat. § 108.04(11)(g)1.

[7] *See, e.g.*, https://www.merriam-webster.com/dictionary/work.

[8] Wis. Stat. § 108.02(12)(a).

[9] Wis. Stat. § 108.02(15).

[10] Wis. Stat. § 108.02(25).

[11] Wis. Stat. § 108.05(1).

[12] Wis. Stat. § 108.05(3).

for his brother at his brother's tavern. The claimant and the employer admitted at the hearing that, when the claimant was in town, he bartended and helped out in the tavern anywhere from 10 minutes to nine hours per week. It was not established, however, that the employee earned wages for those services. The unemployment insurance law does not contain a provision whereby the reasonable value of the claimant's services may be imputed to him when determining his eligibility for benefits.[13]

The ALJ did not credit the parties' testimony that the employer did not pay the claimant for his services, but there is no competent evidence in the record to the contrary. The ALJ's personal knowledge of how the bar and restaurant industry generally operates as a whole cannot substitute for competent evidence upon which findings of fact may be made.[14] The anonymous report and the adjudicator's claimant statement were uncorroborated hearsay and contradicted by live testimony. The claimant and the employer testified, without rebuttal, that the claimant was not paid for performing services in the weeks at issue, and, given their familial relationship, their testimony was not inherently incredible.[15] Uncorroborated hearsay alone does not constitute substantial evidence,[16] and commission findings must be supported by credible and substantial evidence.[17]

Finally, the claimant's belief that he correctly answered "No" to the "During the week, did you work?" question on his weekly claims because he was not performing any services for pay was not unreasonable.[18] Under the law, a claimant is "totally unemployed" in any week for which he earns no wages. The department did not establish by clear, convincing, and satisfactory evidence that the claimant intentionally misled the department by withholding or hiding information or making a false statement or misrepresentation.

NOTE: The commission did not consult with the ALJ before reversing the appeal tribunal decisions. The commission reversed the decisions as a matter of law, based on the insufficiency of the evidence.

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[13] *Contrast* Wis. Stat. § 108.02(26)(b)5 ("wages" includes the reasonable value of services performed by an officer for a corporation if the officer receives no payment for the services or less than the reasonable values of the services).

[14] *See, e.g., State v. Peterson*, 222 Wis. 2d 449, 458 (Ct. App. 1998) (a fact-finder may derive inferences from testimony and take judicial notice of a fact not subject to reasonable dispute, but it may not establish as an adjudicative fact that which is known to the judge as an individual).

[15] Evidence is inherently incredible when it is in conflict with the uniform course of nature or with fully established or conceded facts. *Simos v. State*, 53 Wis. 2d 493, 495 (Ct. App. 1972).

[16] *Gehin v. Wis. Group Ins. Board,* 2005 WI 16, ¶ 56, 278 Wis. 2d 111, 692 N.W.2d 572.

[17] Wis. Stat. § 108.09(7)(f)

[18] *See, e.g., Gussert v. Springhetti's Landscaping & Lawn Care, Inc.*, UI Dec. Hearing No. 16400598AP (LIRC Jan. 27, 2017) (claimant did not think of small tasks completed for employer from home while laid off for the winter as "work"); *Karandjeff v. Community Living Alliance*, UI Dec. Hearing No. 11611430MW (LIRC June 20, 2012) (claimant did not think of personal care services performed in the home for a family member as had been done for 23 years as "work").

GEORGIA E. MAXWELL, Commissioner (dissenting):

I respectfully dissent from the majority's decision.

Georgia E. Maxwell, Commissioner

cc: ATTORNEY VICTOR FORBERGER