State of Wisconsin

Labor and Industry Review Commission

Darrell J. Sommers Employee **Springhetti's Landscaping & Lawn Care Inc.** Employer Hearing No.16400642AP	**Unemployment Insurance Decision**[1] **Dated and Mailed:** MAR 2 1 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, the employee is eligible for partial unemployment benefits in weeks 6 through 14 of 2010 and 2 through 5 of 2011, in the weekly amounts set forth in the decision, if otherwise qualified. The employee is required to repay the sum of $31 to the Unemployment Reserve Fund. Repayment of the remainder is waived and will not be recovered by any other means. The appropriate employer accounts will be credited immediately with this portion of the overpaid amount. Federal additional compensation (FAC) was not overpaid.

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. An administrative law judge (ALJ) for the Unemployment Insurance Division of the Department of Workforce Development held a hearing and issued a decision. A timely petition for commission review was filed.

The commission has considered the petition and the positions of the parties, and it 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 ALJ, subject to the following:

Modifications

1. In the first full paragraph on page 8 of the appeal tribunal decision, delete the second sentence.

2. After the first full paragraph on page 8 of the appeal tribunal decision, insert:

   > The claimant received federal additional compensation (FAC) for weeks 6 through 14 of 2010. The FAC program was created as part of the American Recovery and Reinvestment Act of 2009 and provided a $25 weekly supplement to state unemployment insurance benefits paid to eligible claimants. The $25 supplement was funded completely by federal general revenues and was payable to individuals who were otherwise entitled under state law to receive regular unemployment benefits for weeks of unemployment. Because the claimant in this case was eligible for full or partial unemployment benefits in weeks 6 through 14 of 2010, he was also eligible for FAC in those weeks.

3. Delete the last two sentences of the first paragraph on page 9 of the appeal tribunal decision and substitute therefor:

   > The claimant was eligible for the FAC he received, so there is no FAC overpayment.

4. Delete the last two sentence of the DECISION paragraph and substitute therefor:

   > Federal additional compensation (FAC) was not overpaid.

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. The department argued that the ALJ's conclusion that the employee did not conceal his work, for which he was not paid, is contrary to law and unsupported by the record and, for those reasons, the

appeal tribunal decision should be reversed. The commission has considered the arguments advanced by the department in its petition and in its briefs, and the commission is not persuaded.

The employee had been working for the employer, a small business that provides seasonal landscaping services, since 2004, after retiring from his work as a semi driver. The employee began working for the employer to keep himself busy during his retirement. He typically worked 38 to 40 hours per week from mid-May until early December, when work would stop because of the weather. In 2010, the employee was earning $14 per hour, but he voluntarily took a pay cut in 2011 to $12 per hour, because the owner was complaining about money and the employee "wasn't there for the money." The employee wanted to make sure that the owner would not have to worry about paying "the younger guys with families."

The owner of the small business allowed the employee to use the shop during the winter months to restore two collector cars that the employee owned. While he was at the shop, the employee occasionally fueled up the employer's trucks or plowed snow. In response to estimates provided by the department that the employee deemed so far off they were "pathetic" and "mind-boggling," the employee estimated the hours he may have possibly plowed snow during his time with the employer.

The department conceded that the evidence in the record failed to establish that the employee worked or earned wages in eight of the thirteen weeks at issue,[2] yet the department requested that the ALJ's decision in this case 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 employee estimated that he may have performed services for the employer. Like the department's ALJ, the commission credits the employee's testimony, given under oath, that he did not believe that the few services he performed for the employer in the winter months without compensation constituted "work" that needed to be reported to the department. There were no wages for him to report.

The office manager's testimony corroborated that of the employee; that is, he was not paid for any services he performed during the employer's off season. Her testimony, along with that of the employee, provides credible and substantial evidence to support the ALJ's findings that were adopted, with modifications, by the commission.[3] The owner of the business assumed that the employee was paid in the winter, but he did not know that as a fact because the owner wintered in Florida.

The department argued that the only reasonable conclusion[4] and the only reasonable[5] inference the commission can come to under the circumstances of this case is that the employee provided false information to the department to obtain

---

[2] Reply Brief of DWD in Support of Reversal of the Appeal Tribunal Decisions, p. 2, fn. 1.
[3] *Xcel Energy Services, Inc. v. LIRC*, 2013 WI 64, ¶ 25, 329 Wis. 2d 234, 833 N.W.2d 665.
[4] Brief of DWD in Support of Reversal of the Appeal Tribunal Decisions, p. 7.
[5] Reply Brief of DWD in Support of Reversal of the Appeal Tribunal Decisions, p. 1.

benefits to which he knew he was not entitled. That is incorrect. The department's own ALJ found that the employee was not trying to hide from the department that he performed work in any of the weeks at issue, that he did not think the amount of unemployment benefits he received would change depending upon his answer to the "Did you work?" question, and that he believed his answer to that question was accurate when he provided it. The employee was born in 1947. He dropped out of school in the 11th grade and never obtained his GED. His only other claim for unemployment insurance benefits was in 1995, when he was laid off for two weeks. From those facts, the department's ALJ concluded that the employee did not intentionally mislead the department when filing his benefit claims. The commission agrees and, therefore, adopted the ALJ's findings and conclusion with minor modifications.

Historically, the department has not found concealment when a claimant reports wages when paid rather than when earned, and the commission is not aware of any cases in which the department has found concealment where a claimant received no wages at all from an employer. The department has also historically not found concealment when a claimant makes an error based on an honest mistake or misunderstanding. The unemployment insurance law provides that an employee is considered to be "totally unemployed" in any week for which he earns no wages.[6] Because the employee was not turning in any hours to his employer for pay, it was not unreasonable for him to believe that he was not working, was not earning wages, and was eligible for unemployment benefits.

The department argued in its brief that the employee "was previously warned to report the work,"[7] but no competent evidence of such a warning was provided at the hearing. The employee testified that he remembered getting a letter from the department back in 2010 saying that he made a mistake and that he had to repay $335. The employee thought the department was wrong, and he was not sure how the department figured that he somehow "overcharged them." Nonetheless, he did not argue about it and sent in a check for $335. Department records show that the department sent the employee a wage discrepancy notice on May 24, 2010, concerning week 14 of 2010. An examination of the document reveals the source of the employee's confusion:

[6] Wis. Stat. § 108.02(25).

[7] Brief of DWD in Support of Reversal of the Appeal Tribunal Decisions, pp. 1, 5-7.

May. 25. 2010 8:59AM No. 2634 P. 1/1

State of Wisconsin
Department of Workforce Development

WAGE DISCREPANCY
STATE DIRECTORY OF NEW HIRES

Date: 05/24/10

SS #:

DARRELL J SOMMERS

1. **Nature of Problem:** There is a discrepancy between wages reported by you and those reported by your employer.

CALENDAR WEEK ENDING	WEEK NUMBER	WAGES		EMPLOYER NAME	BENEFITS PAID	BENEFITS DUE	POTENTIAL OVERPAYMENT
		REPORTED BY YOU	REPORTED BY EMPLOYER				
04-03-10	14-10	518.00	518.00	SPRINGHETTI'S LANDSC	335.00	8.00	327.00

The wage discrepancy notice does not actually show a discrepancy between the wages reported by the employee and those reported by his employer. The two amounts shown are exactly the same, making the document internally inconsistent. In addition, nowhere in the notice does it indicate that the employee erred with respect to reporting work.

The department also argued in its briefs that the employee here was similar to the claimant in *Dahl v. Indianhead Community Action Agency*, UI Dec. Hearing Nos. 14609275MW through 14609278MW (LIRC Nov. 14, 2014). That argument is without merit. Ms. Dahl contended that she reported on all of her claims that she was working, but the evidence did not bear that out. Ms. Dahl worked for employers from whom she received regular paychecks, whereas the employee in this case was not paid for, and did not seek payment for, any services that he performed in the winter for a small business owner, with whom the employee had a close and friendly relationship. Ms. Dahl reported some work and some wages in various weeks, so she knew to report and knew how to report work performed and wages earned. The employee in this case did not have that knowledge. Additionally, the wage discrepancy and overpayment notices that Ms. Dahl received clearly informed her that she was not accurately reporting her work and wages to the department. The same cannot be said for the notice the employee in this case received. Ms. Dahl's claims history showed a pattern whereby she intentionally underreported wages she received or failed to report them. Here, the employee did not receive wages to report.

Finally, the department argued that the employee acted in willful and reckless disregard of his responsibilities as a claimant when filing his weekly claims,

because he testified that he remembered which buttons to push and did not really listen to the questions that were asked of him. While such practice is not condoned, it was not the manner in which the employee filed his clams that led to any benefit overpayment. Any overpayment resulted from the employee's ignorance that, for unemployment insurance purposes, services performed for an employer constitute "work," even if uncompensated, and that any wages he would have been paid had he turned in his hours constitute "wages earned." In the employee's mind, he was not working, because he was not charging the employer for the minimal services that he performed over the winter when hanging out at the shop, so there was no work and no wages to report. The employee's situation did not change from week to week, so, even if the employee had listened closely to the questions asked of him, his answers would not have been different. The employee did not file for benefits when he resumed his regular duties for the employer in the spring.

The case cited by the department to support its recklessness argument is plainly distinguishable. The claimant in *Felders v. Argus Technical Inc.*, UI Dec. Hearing Nos. 14609598MW and 14609599MW (LIRC Apr. 16, 2015), was an experienced filer. He had successfully filed for benefits in 2008, 2009, and 2010. The claimant had been found to have concealed information from the department in 2010. Yet, in 2014, the claimant failed to report that he was working between 20 and 50 hours per week, for which he was paid between $200 and $560. In contrast, the employee in this case was not an experienced filer. He had filed for two weeks back in 1995 when he was laid off. The employee was sent a Wage Discrepancy Notice in 2010 and was required to repay $335 to the department, but the notice he was sent was internally inconsistent. He remained confused as to what he was alleged to have done incorrectly. Finally, the employee "worked" at most a few hours per week, for which he was not compensated. The employee did not submit any hours to his employer and did not receive any wages for the weeks that he claimed benefits. He stopped filing when the employer's landscaping work started.

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.[8] Yet, the commission, like the courts, "cannot condone a system which does not inform a party in interest of proceedings affecting that interest...."[9]

Second, the employee raised an issue concerning the propriety of the ALJ's decision to grant a protective order preventing pages of the department's Disputed Claims

---

[8] *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)).

[9] *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).

Manual from being disclosed to the public. It is not disputed 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.[10] 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 reached its decision in this matter based on its determinations of credibility and intent. The confidentiality question did not need to be resolved in order to reach a decision, and the commission declines to take up the question at this time. However, the commission notes that there are federal regulations that address the confidentiality and disclosure of unemployment insurance information.[11] 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[12] and not subject to confidentiality.[13] The federal confidentiality and disclosure requirements apply to states and state agencies.[14]

Third, the employee disagreed with the ALJ's decision not to quash several subpoenas issued by the department. An ALJ scheduled to conduct a hearing for which a subpoena has been issued has the authority to quash or modify the subpoena if the ALJ determines that the witness subpoenaed is not necessary to a fair adjudication of the issues of the hearing or that the subpoena was not served in the proper manner.[15] In this case, the ALJ exercised her authority to compel the attendance of witnesses she believed were necessary for a fair adjudication of the issues. While the employee may disagree with the ALJ's decision, it cannot be found that the ALJ erroneously exercised her authority in compelling the attendance of certain witnesses whose testimony she determined was necessary.

The employee also argued that there is no basis for finding that the employee failed to report wages to the department because he was never paid for his work. The employee misses the point. While the employee may not have submitted his hours performing services for the employer for payment, he could have. As the employee noted, wages are defined in ch. 108, Wis. Stat., as every form of remuneration *payable* for a given period by an employing unit to an individual for personal services.[16] The employee performed personal services for the employer, and wages were payable to him. That the employee did not seek payment for his services does not change the fact that he earned those wages and had the right to collect them. The situation is analogous to the law governing work available. The law requires

---

[10] Wis. Admin. Code § DWD 140.09(2).
[11] 20 CFR § 603 et seq.
[12] 20 CFR 603.2(c).
[13] 20 CFR 603.5(a).
[14] 20 CFR § 603.1.
[15] Wis. Admin. Code § DWD 140.10(4).
[16] Wis. Stat. § 108.02(26)(a).

the department to treat the amount that a claimant would have earned as wages for a given week in available work.[17] A claimant is not entitled to receive benefits to replace wages for work that could have been done but was not. The department is required to estimate the wages the claimant would have earned, if it is not possible to compute the exact amount.[18]

Finally, with respect to the monies paid to the employee by the employer as an "insurance stipend," the employee admitted that he received $150 per month from the employer for insurance. He testified that he was receiving those payments at the time he first initiated his claims for benefits while working for the employer, which was in week 6 of 2010. The employee was not required to use that money to purchase insurance. He received that money because of his status as an employee of the employer. Under these circumstances, Wis. Stat. § 108.02(26)(c) is inapplicable, and the $150 is treated, for unemployment insurance purposes, as wages. The ALJ could not ignore the fact that the employee admitted to receiving these payments while receiving unemployment benefits. The payments had to be allocated in some manner, and the ALJ's choice of allocation has not been shown to be erroneous or adverse to the employee. The commission will not address the issue further.

cc: Attorney Victor Forberger
Attorney Kristin Shimabuku
Gill & Gill, SC

[17] Wis. Stat. § 108.04(1)(bm).
[18] *Id.*