

STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
P O BOX 8126, MADISON, WI 53708-8126
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<http://dwd.wisconsin.gov/lirc/>

CHRISTINE HARRIS, Employee
[REDACTED]

UNEMPLOYMENT INSURANCE
DECISION

Soc. Sec. No. ***-**-5426
Hearing Nos. 13606535MW
13606536MW

ARANDELL CORPORATION, Employer
[REDACTED]

Dated and mailed:

JAN 09 2014

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SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL

An administrative law judge (ALJ) for the Division of Unemployment Insurance of the Department of Workforce Development issued two appeal tribunal decisions in this matter. The employee timely petitioned for commission review.

The commission has considered the petition, and it has reviewed the evidence submitted to the ALJ. Based on its review, the commission makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The employee has worked for the employer, a retail catalog printing company, as a bindery worker since September 2006. She is periodically laid off and files claims for partial unemployment insurance benefits, pursuant to Wis. Stat. § 108.05(3).

In week 28 of 2013, the employee worked 22.5 of her regular 37.5 hours. She earned wages of \$297.33. When she filed her claim for that week, she answered "no" to the question, "Did you work or will you receive sick pay, bonus pay, or commission?" The employee answered "no" because she did not receive any sick pay, bonus pay, or commission. The employee realized that she had done something wrong when the system did not ask her to provide her hours and wages. The employee attempted to reach a "claims adjuster" but was not able to get through on the telephone to correct her mistake. The employer reported to the department that the employee had worked and earned wages in week 28 of 2013.

Claimants who file for unemployment insurance benefits are responsible for correctly and completely reporting information for each week they claim benefits, because benefits are initially paid based on the information claimants provide. Claimants who conceal information from the department when filing for benefits may be subject to overpayments and penalties. 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.”¹

A claimant who conceals work performed or wages earned when filing a weekly claim certification is ineligible to receive benefits for the week claimed.² In addition, the claimant is ineligible for benefits in an amount equivalent to two, four, or eight times the claimant’s weekly benefit rate for each act of concealment.³ This ineligibility is applied against benefits and weeks of eligibility for which the claimant would otherwise be eligible after the week of concealment.⁴ Furthermore, consistent with federal directives, the department assesses a penalty against the claimant in an amount equal to 15 percent of the benefits erroneously paid to the claimant as a result of one or more acts of concealment.⁵

On August 8, 2013, the department issued two determinations finding that, when filing for benefits for week 28 of 2013, the employee concealed work performed and wages earned from the employer. The first determination resulted in an overpayment of \$275 and an overpayment penalty of \$41.75. The second determination reduced the employee’s benefit amount by \$550 for benefits payable through August 3, 2019.

The employee appealed the department’s determinations. Both parties appeared at the hearing before the ALJ. The employee did not dispute that she had worked for the employer in week 28 of 2013 and earned wages of \$297.33. She explained that, when filing her claim for that week, she got confused, made a mistake, and could not get through to anyone in the department to correct it. The ALJ found that the employee concealed her work and wages in week 28 of 2013, because the employee knew her answer to a question asked of her for that week was wrong. The ALJ affirmed the department’s determinations.

The employee petitioned for commission review. The issue before the commission is whether the employee concealed from the department the work she performed and the wages she earned in week 28 of 2013, the week ending July 13, 2013.

The burden to establish that a claimant concealed information is on the department.⁶ As a form of fraud, concealment must be proven by clear, satisfactory, and convincing evidence.⁷ Concealment will not be found where a claimant makes

¹ Wis. Stat. § 108.04(11)(g).

² Wis. Stat. § 108.05(3)(d).

³ Wis. Stat. § 108.04(11)(b) and (be).

⁴ Wis. Stat. § 108.04(11)(bm).

⁵ Wis. Stat. § 108.04(11)(bh).

⁶ *Scott G. Lynch*, UI Dec. Hearing No. 10404406AP (LIRC Mar. 11, 2011); *Holloway v. Mahler Enter., Inc.*, UI Dec. Hearing No. 11606291MW (LIRC Nov. 4, 2011).

⁷ *Kamuchey v. Trzesniewski*, 8 Wis. 2d 94, 98, 98 N.W.2d 403 (1959); *Schroeder v. Drees*, 1 Wis. 2d 106, 112, 83 N.W.2d 707 (1957).

an honest mistake or misinterprets information received from the department.⁸ Concealment requires an intent or design to receive benefits to which the claimant knows he or she is not entitled.⁹ knows he or she is not entitled.⁹

After reviewing all of the evidence in this case, the commission is not satisfied that concealment was established. The employee's credible, unrebutted testimony was that she made a mistake and attempted, unsuccessfully, to get through to a claims specialist to correct her error. The employee's payment history demonstrates that she has routinely filed for partial benefits and has done so correctly for weeks both before and after week 28 of 2013. The employee had reported work and wages when filing claims in 2011, 2012, and in weeks 18, 19, and 24 of 2013. The record shows that, on July 8, 2013, the employee had correctly reported, with the assistance of departmental staff, work performed and wages earned and holiday pay for week 27 of 2013. The record also shows that the employee properly reported work and wages when filing weekly claim certifications for weeks 29 and 30 of 2013.

All of the evidence in this case points to an honest mistake. Noticeably absent is evidence to support a conclusion that, in making the claim for benefits for the week at issue, the employee intentionally misled or defrauded the department by withholding or hiding information or making a false statement in order to receive benefits to which the employee knew she was not entitled.

The final issue to be decided is whether the employee must repay the benefits she received in error or whether recovery of the overpaid benefits must be waived. Wisconsin Stat. § 108.22(8)(c) provides that the department shall waive the recovery of overpaid benefits if the overpayment was the result of departmental error and the overpayment did not result from the fault of the employee.

The employee's weekly benefit rate was \$275. Based on her wages of \$297.33 in week 28 of 2013, the employee was entitled to a partial benefits payment of \$95. Because the employee had been paid \$275 for that week, she received benefits of \$180 in error.

The erroneous payment was due to employee fault. While not fraudulent, the employee's failure to report correctly her work and wages in week 28 of 2013 caused the overpayment.

The commission therefore finds that in week 28 of 2013 the employee worked and earned wages of \$297.33, but she did not conceal, within the meaning of Wis. Stat. § 108.04(11)(g), the work she performed and the wages she earned in that week.

⁸ *Joseph W. Hein, Jr.*, UI Dec. Hearing No. 00605374MW (LIRC Dec. 13, 2001); *Scott G. Lynch*, *supra*.

⁹ *Karandjeff v. Cmty. Living Alliance Inc.*, UI Dec. Hearing No. 11611430MW (LIRC June 20, 2012); *Nestor Gutierrez*, UI Dec. Hearing No. 00005766MD (LIRC July 19, 2002).

The commission further finds that the employee was overpaid benefits for week 28 of 2013 in the amount of \$180, because she was only eligible for and entitled to receive partial benefits in the amount of \$95 for that week, pursuant to Wis. Stat. § 108.05(3), and that recovery of the overpayment cannot be waived, pursuant to Wis. Stat. § 108.22(8)(c).


DECISION

The appeal tribunal decisions are reversed. Accordingly, the employee is entitled to partial unemployment benefits for week 28 of 2013 in the amount of \$95. As a result of this decision, the employee's overpayment for week 28 of 2013 is reduced from \$275 to \$180. The employee's unemployment insurance benefit amount shall not be reduced, and there is no overpayment penalty.

BY THE COMMISSION:


Laurie R. McCallum, Chairperson


C. William Jordahl, Commissioner


David B. Falstad, Commissioner

NOTE: The commission did not consult with the ALJ before reversing the appeal tribunal decisions. The commission must only consult with an ALJ with respect to his or her impressions and conclusions regarding the credibility of witnesses in situations where the ALJ heard conflicting testimony and the commission reverses the ALJ and makes contrary findings. See *Braun v. Indus. Comm'n*, 36 Wis. 2d 48, 57, 153 N.W.2d 81 (1967). In this case, there was no conflicting testimony. The employee agreed that she performed work and earned wages in week 28 of 2013.