

STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
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<http://dwd.wisconsin.gov/lirc/>

CAROLYN J HENNING, Employee

UNEMPLOYMENT INSURANCE
DECISION AND ORDER

Soc. Sec. No. ***-**-2274
Hearing Nos. 13606277MW
13606278MW

VISITING ANGELS, Employer
% G. DILLES, STOP 1B

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 the positions of the parties, 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 since February 2006 as a caregiver/companion for the employer, a home health care business. The employee has been filing for partial unemployment benefits periodically since May 2011. She files her weekly claims via the telephone. The employee was sent a *Handbook for Claimants* in May 2012 and again in February and April 2013.

Beginning with week 43 of 2012, the question on the weekly claim certification concerning whether the employee had worked during the week for which benefits were being claimed was modified. The department changed the question from "Did you work?" to "Did you work or will you receive sick pay, bonus pay, or commission?"

The employee routinely reported work performed and wages earned from the employer on her weekly claim certifications prior to week 43 of 2012.

When filing claims for weeks 43 of 2012 through 28 of 2013, the employee responded "no" to the modified "Did you work or will you receive sick pay, bonus pay, or commission?" question, although she had, in fact, worked for the employer in those weeks. The employee worked with one client for five hours per week and was paid

\$9.15 per hour. Department records show that, beginning in December 2012, the employer notified the department that the employee was working but was not reporting her work and wages while filing claims for partial benefits. reporting her work and wages while filing claims for partial benefits.

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 July 25, 2013, the department issued two determinations finding that, when filing for benefits for weeks 5 through 28 of 2013, the employee concealed work performed and wages earned.⁶ The first determination resulted in an overpayment of \$2,501 and an overpayment penalty of \$375.15. The second determination reduced the employee's benefit amount by \$5,634 for benefits payable through July 20, 2019.

The employee appealed the department's determinations. Both parties appeared at the hearing before the ALJ. The employer reported that the employee earned weekly wages of \$45.75 in weeks 5 through 28 of 2013. The employee did not dispute the work and wages reported by the employer, and she acknowledged that there was a requirement to report all work performed and wages earned when filing claims for unemployment benefits. The employee explained that she had made a mistake by answering "no" to the question "Did you work or will you receive sick pay, bonus pay, or commission?" on her weekly claim certifications. The employee answered "no" because she had not received any sick pay, bonus pay, or commission. The employee answered the same way every week beginning in week 43 of 2012 and did not realize that she was answering the question incorrectly until on or about August 20, 2013 (week 33), when a claims specialist walked her through the weekly claims process. Department records show that the employee received assistance

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 The department did not find concealment for weeks 43 of 2012 through 4 of 2013.

filing her weekly claim certifications for the following four consecutive weeks (weeks 34 through 37 of 2013).

The ALJ affirmed the department's determinations, finding that the employee concealed her work and wages from the department when filing claims for weeks 5 through 28 of 2013. The ALJ specifically found that the employee "failed to provide any credible explanation for why she failed to report her work and/or wages to the department or that her 'mistake' was reasonable under the totality of the circumstances."

The employee petitioned for commission review. The issue to be decided is whether the employee concealed work performed and wages earned when filing her weekly claim certifications for weeks 5 through 28 of 2013.

The burden to establish that a claimant concealed information is on the department.⁷ As a form of fraud, concealment must be proven by clear, satisfactory, and convincing evidence.⁸ Concealment will not be found where a claimant makes an honest mistake or misinterprets information received from the department.⁹ Concealment requires an intent or design to receive benefits to which the claimant knows he or she is not entitled.¹⁰

After reviewing all of the evidence in this case, the commission is not satisfied that concealment was established. The employee's credible, un rebutted testimony was that she made a mistake when filing her claim for week 43 of 2012 and in each week thereafter. The employee's payment history demonstrates that she had reported work performed and wages earned on her weekly claim certifications prior to week 43 of 2012, when the department modified the "Did you work?" question and changed it to "Did you work or will you receive sick pay, bonus pay, or commission?"

The evidence in the record does not support a conclusion that the employee intentionally replied "no" to both parts of the modified question. The former question was straightforward and not easily susceptible to misinterpretation.¹¹ The modified version presents two distinct alternative questions within one compound question. There are inherent dangers in inviting an answer to a compound question. It is often not possible to be certain to which part, or parts, a single response applies.¹²

⁷ *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).

⁸ *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).

⁹ *Joseph W. Hein, Jr.*, UI Dec. Hearing No. 00605374MW (LIRC Dec. 13, 2001); *Scott G. Lynch*, *supra*.

¹⁰ *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).

¹¹ *Candace K. Pitts*, UI Dec. Hearing No. 95000045DV (LIRC May 25, 1995).

¹² *See, e.g., Asani v. INS*, 154 F.3d 719, 727 (7th Cir. 1998), *citing* 81 Am. Jur. 2d Witnesses § 714 (2008)(the vice of the compound question is generally recognized; a question which embraces several questions is improper).

Interestingly, the department did not find that the employee concealed work performed and wages earned in weeks 43 of 2012 through week 4 of 2013, although she had worked and earned wages in those weeks and answered “no” to the now-she had worked and earned wages in those weeks and answered “no” to the now-bifurcated “Did you work ...?” question. The employee’s answer to the question did not change between week 4 and week 5 of 2013, but the department’s treatment of the employee’s answer did. This disparate treatment was not explained.

There is a reference in the record¹³ to a letter having been sent to the employee in February 2013 about her failure to report work and wages. The letter itself is not in the record, nor is there any evidence as to what information was contained in the letter. The employee denied receiving a letter from the department in February 2013 and credibly testified that she remained unaware of the problem with her weekly claims until August 2013, when a claims specialist walked her through the process. Department records show that the employee resumed reporting work and wages on her weekly claim certifications with week 33 of 2013, the week ending August 17, 2013, and that she received assistance filing her weekly claims for the succeeding four weeks (weeks 34 through 37 of 2013).

Finally, the standard in concealment cases is not that applied by the ALJ: whether the employee could establish a reasonable explanation for her mistake. The standard in concealment cases is whether there is substantial and persuasive evidence of an intent or design by the claimant to receive benefits to which the claimant knows he or she is not entitled. Here, evidence to support a conclusion that, in making the claims for benefits for the weeks 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 is absent.

The commission therefore finds that, in weeks 5 through 28 of 2013, the employee worked and earned wages, but she did not conceal from the department the work performed and the wages earned in those weeks, within the meaning of Wis. Stat. § 108.04(11), and is thus entitled to partial benefits for those weeks, pursuant to Wis. Stat. § 108.05(3).

The commission further finds that the employee’s failure to report work and wages from the employer on her weekly claim certifications for weeks 5 through 28 of 2013, while not fraudulent, prevents waiver of recovery of the overpayment, under Wis. Stat. § 108.22(8)(c). The matter will be remanded to the department for a recalculation of the employee’s overpayment in light of her eligibility for partial benefits for the weeks at issue.

DECISION AND ORDER

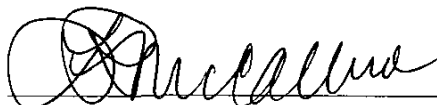
The appeal tribunal decisions are reversed. Accordingly, the employee is entitled to partial unemployment insurance benefits for weeks 5 through 28 of 2013. As a

¹³ Exhibit 9.

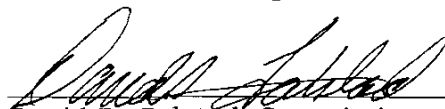
result of this decision, the employee's unemployment insurance benefit amount shall not be reduced, and there is no overpayment penalty.

This matter is remanded to the department for a calculation of the employee's entitlement to partial unemployment benefits for the weeks at issue and any corresponding overpayment.

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 the weeks at issue.