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

MARCUS S JOHNSON, Employee

SHERATON MADISON HOTEL, Employer
%TALX UCM SERVICES

UNEMPLOYMENT INSURANCE DECISION

Soc. Sec. No.
Hearing Nos. 15000002MD
15000191MD
15000193MD
15000549MD
15000623MD
15000625MD
15000628MD
15000630MD

Dated and mailed:
OCT 02 2015
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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 (UI) of the Department of Workforce Development held a combined *de novo* hearing on March 23, 2015, to address whether the employee worked and earned wages; whether holiday and vacation pay must be treated as wages for benefit purposes; whether he was overpaid UI benefits that must be repaid or whether recovery of any overpayment may be waived; whether he concealed work performed, wages earned, and material facts; and whether he voluntarily terminated one of two jobs in the fall of 2014. The hearing covered claims filed by the employee for UI benefits in 2008, 2009, 2010, 2011, 2012, 2013, and 2014. The employee appeared at the hearing in person and was assisted by an advocate from the University of Wisconsin UI Appeals Clinic. The employee's employers, Sheraton Madison Hotel and the Edgewater Hotel, appeared by their directors of human resources. The department appeared by counsel, with one witness, a disputed claims analyst.

On April 3, 2015, the ALJ issued appeal tribunal decisions covering 20 hearing numbers involving the employee, eight of which are addressed in this decision:

- For Hearing No. 15000002MD, the ALJ found that, in issue weeks 45 of 2008 through 22 of 2010, the employee concealed from the department work performed and/or wages earned or paid or payable for those weeks. The employee was determined to be ineligible for benefits in those unspecified weeks and required to repay $4,424.00 to the Unemployment Reserve Fund. The ALJ did not address that part of the department's

determination finding that the employee was overpaid federal additional compensation (FAC).

- For Hearing No. 15000191MD, the ALJ found that, in issue weeks 45 of 2008 through 22 of 2010, the employee concealed from the department work performed and/or wages earned or paid or payable for those weeks. The employee was determined to be ineligible for benefits in those unspecified weeks and required to repay $7,589.00 to the Unemployment Reserve Fund. The ALJ did not address that part of the department's determination finding that the employee was overpaid FAC.

- For Hearing No. 15000193MD, the ALJ found that, in issue weeks 23 of 2010 through 42 of 2012, the employee concealed from the department work performed and/or wages earned or paid or payable for those weeks. The employee was determined to be ineligible for benefits in those unspecified weeks and required to repay $6,233.00 to the Unemployment Reserve Fund.

- For Hearing No. 15000549MD, the ALJ found that, in issue weeks 23 of 2010 through 42 of 2012, the employee concealed from the department work performed and/or wages earned or paid or payable for those weeks. The employee was determined to be ineligible for benefits in those unspecified weeks and required to repay $5,428.00 to the Unemployment Reserve Fund.

- For Hearing No. 15000623MD, the ALJ found that, in issue weeks 23 of 2010 through 42 of 2012, the employee concealed from the department work performed and/or wages earned or paid or payable for those weeks. The employee was determined to be ineligible for benefits in those unspecified weeks and required to repay $1,860.00 to the Unemployment Reserve Fund.

- For Hearing No. 15000625MD, the ALJ found that, in issue weeks 44 of 2012 through 51 of 2013, the employee concealed from the department work performed and/or wages earned or paid or payable for those weeks. The employee was determined to be ineligible for benefits in those unspecified weeks and required to repay $3,187.00 to the Unemployment Reserve Fund. A penalty of 15 percent of that amount was also assessed.

- For Hearing No. 15000628MD, the ALJ found that, in issue weeks 44 of 2012 through 51 of 2013, the employee concealed from the department work performed and/or wages earned or paid or payable for those weeks. The employee was determined to be ineligible for benefits in those unspecified weeks and required to repay $1,928.00 to the Unemployment Reserve Fund. A penalty of 15 percent of that amount was also assessed.

- For Hearing No. 15000630MD, the ALJ found that, as of week 3 of 2014, the employee concealed from the department work performed and/or wages earned or paid or payable for those weeks. The employee was determined to be ineligible for benefits in those unspecified weeks and required to repay $2,086.00 to the Unemployment Reserve Fund. A penalty of 15 percent of that amount was also assessed.

- In all of the above appeal tribunal decisions, the ALJ did not make specific findings of fact as to the weeks involved or the wages earned and unreported or underreported in any given week.

The employee filed a timely petition for commission review of the ALJ's appeal tribunal decisions. The commission has considered the petition, the positions of the parties, and the briefs submitted by counsel for the employee and the department, and it has reviewed the evidence in the record. Based on its review, the commission makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The employee began working as a banquet server for the Sheraton Madison Hotel (Sheraton) on September 10, 2005. The employee is paid an hourly base rate plus a portion of "service charge commissions." The Sheraton's witness did not know what the employee's base rate of pay was in any given week, but it was estimated to be between $3.25 and $5.00 per hour.

The Sheraton charges event sponsors 22 percent of their total costs as a service charge. It keeps 11 percent "for the house" and splits the remaining 11 percent among the banquet staff working the event. The pro rata shares are paid to banquet staff as "service charge commissions" on their bi-weekly payroll checks. These commissions differ from tips, as tips are paid in cash. The employee never received cash tips. There are separate line items on employees' wages statements for base pay and service charge commissions. There is no breakdown for service charge commissions earned per event, per day, or per week. There is a single amount listed for a two-week period. The Sheraton's pay periods end every other Thursday, with checks issued the following Friday.

The employee never knows how much he will receive in service charge commissions for any given event. As a banquet server, he is not privy to the costs charged by the Sheraton to an event sponsor. The only wages the employee is able to ascertain are those he earns as base pay (current hourly wage multiplied by the number of hours worked).

While working part-time for the Sheraton, the employee frequently filed claims for partial unemployment insurance benefits. He began filing benefit claims as early as 2007.[1] He reopened his claim for benefits on June 3, 2008 (week 23).

After reopening his benefits claim in June 2008, the employee had a phone interview with a department representative. He explained that he never knew how much he would be paid by the Sheraton in service charge commissions, and he asked how he was supposed to report his wages on his weekly claim certifications. The employee was told that whatever wages he reported would be verified with his employer and "any problems or discrepancies" with the amounts reported would be reconciled by the department. If his employer reported a higher amount than him, any overpayment would be offset by future benefits. When offsets occurred, the department would send the employee letters of explanation. Thereafter, the employee reported his base pay wages on his weekly claim certifications.

In March 2009, the department determined that the employee had been overpaid $22.00 for week 9 of 2009 and sent him an overpayment notice. The employee called the department in response to the notice. A claims specialist explained to him that UI benefits were being withheld because the wages he and his employer reported for week 9 of 2009 were different. The Sheraton's amount included the employee's service charge commissions, while the amount reported by the employee did not.

The employee again asked how he should report his wages, given his unique situation—never knowing for any given week how much the Sheraton would pay him in service charge commissions. The employee was told, just as he had been told the previous year, that, if there were a difference between the wage amounts reported by him and his employer, the department would recalculate his benefits. Any overpayment would be recovered by offsetting benefits payable in a later week.

The department recouped the $22.00 the employee was overpaid for week 9 of 2009 by offsetting benefits payable to him for week 13 of 2009. Thereafter, the employee received a number of the overpayment notices and offset letters from the department.

The employee received a *Handbook for Claimants* after reopening his claim in June 2008. A copy of the actual handbook he would have received at that time is not in the record. The earliest copy in the record is dated August 2008. The employee looked at the handbook after he received it. The handbook instructed claimants who were paid a commission as all or part of their wage to contact the department. The handbook notified claimants that any income reported on a weekly claim certification is verified with employers. If an employer provides the department with a different amount than that reported by a claimant, the department uses the amount reported by the employer to recalculate benefits due.

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[1] The department identified and resolved wage discrepancies between the Sheraton and the employee for weeks 35 and 36 of 2007. (Ex. 2, p. M9).

The employee filed his weekly claim certifications in the same manner in 2008, 2009, 2010, 2011, 2012, 2013, and 2014. He reported his hourly wages, because those he could ascertain (number of hours worked multiplied by his base pay rate) and he understood from speaking with department representatives that that was what he was supposed report. The employee further understood that the department would obtain from the employer the amount of service charge commissions he earned each week and, as necessary, recalculate his benefits. Offset letters would be sent when overpayments were recovered from benefits payable for a later week. The employee believed that this was how the system worked for claimants in his situation. He was unaware that there were any problems with the manner in which he reported his wages on his weekly claims, and he was unaware that the Sheraton was not reporting his full wages, including his service charge commissions, to the department as required.

The department did not formally address the issue until after the employee began working for a second employer, the Edgewater Hotel (Edgewater), in 2014. The employee was hired by the Edgewater on July 30, 2014 (week 31), to work part-time as a banquet server. The employee had trouble reporting wages from both the Sheraton and the Edgewater on his weekly claim certifications. On August 15, 2014, the department sent a weekly earnings audit to the Sheraton, asking it to supply the employee's weekly wage information for five weeks, from UI week 29 of 2014 through UI week 33 of 2014.

The employee did not work for or earn wages from the Edgewater in weeks 29 through 32 of 2014. The Edgewater paid the employee $7.25 per hour to attend 9.5 hours of training in week 33 of 2014 (total wages $68.88). The employee did not file a claim for benefits for week 33 of 2014, and he did not work for the Edgewater in weeks 34 and 36 of 2014.

The Edgewater completed and returned Wage Verification/Eligibility Reports (Form UCB-23s) for weeks 35 and 37 through 40 of 2014. It reported that the employee worked for 13 hours in week 35 of 2014, for which he was paid $94.25; for 6.5 hours in week 37 of 2014, for which he was paid $47.13; for 8 hours in week 38 of 2014, for which he was paid $45.00; 16 hours in week 39 of 2014, for which he was paid $116.00; and 14 hours in week 40 of 2014, for which he was paid $68.00. The Edgewater's witness testified that the employee's last day of work was September 27, 2014 (week 39), so it is not clear why the Edgewater reported hours and wages for the employee in week 40 of 2014.

The employee reported working for both the Sheraton and the Edgewater in week 35 of 2014. The employee did not report working for either employer in week 36 of 2014. For week 37 of 2014, he reported working more hours and earning greater wages than either of his employers reported. For week 38 of 2014, the employee reported the same number of hours and gross wages as did the Edgewater. He did not work for the Sheraton in that week. For week 39 of 2014, the employee reported different amounts than either employer. For week 40 of 2014, the

employee reported the same number of hours and gross wages as did the Edgewater.

The employee did not work for the Edgewater after September 27, 2014, due to scheduling conflicts. The Edgewater reported on November 4, 2014 (week 45), that the employee had quit.[2]

On November 5, 2014, the department sent the employee a quit questionnaire, which he completed and returned. On that questionnaire, the employee reported that, in addition to working for the Edgewater, he works for the Sheraton as a food server. He reported that he is paid $5 plus tips and that the gross wages he earns varies. The employee did not hide on this form, or on any other questionnaire that he was asked by the department to complete, that he earns "tips" in addition to an hourly wage.

On November 21, 2014, the department sent a weekly earnings audit to the Sheraton, asking it to supply the employee's weekly wage information for seven calendar years, from UI week 45 of 2008 through UI week 44 of 2014. The audit form was completed by a third party, and on December 9, 2014, the Sheraton's director of human resources, who had begun working for the employer eight days earlier, certified that the information provided on the audit form was accurate and complete.

No actual payroll records or copies of wage statements issued by the Sheraton to the employee for the weeks at issue were offered as evidence. There is no evidence in the record establishing the beginning and end dates of the Sheraton's pay periods, the dates on which the employee was paid, his rate of pay, or the hours and days of the week he worked. The Sheraton's witness did not know the employee's base rate of pay, and she had no idea why, in some weeks, the Sheraton reported that the employee worked but the employee reported that he had not. Likewise, she could not explain why there were instances where the employee reported that he had worked but the audit form indicated that he had not. She was not sure why vacation time was labeled differently in 2009 and 2010 and had no personal knowledge as to why negative amounts were listed for vacation pay in some weeks.

An "Adjudicator's Preliminary Claimant Report" dated March 11, 2015, shows that, from 2008 through 2014, the department mailed Wage Verification/Eligibility Reports (Form UCB-23s) to the Sheraton for each week that the employee filed a claim and reported wages. The Form UCB-23s advised the Sheraton that it "must report wages earned and equivalent hours/minutes for each pay type from Sunday through Saturday" and that it must return the form to the department if correcting

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[2] It was determined that the employee did not quit his employment with the Edgewater. The employee was discharged in week 40 of 2014, because, due to his job at the Sheraton, he was not available to work the shifts for which the Edgewater needed him. *See* LIRC companion decision in UI Dec. Hearing No. 15000634MD.

or adding information to that reported by the employee. Although the employee only reported his base pay wages every week, the Sheraton corrected and returned very few Form UCB-23s to the department.

The department relies on employers to complete and return Form UCB-23s, because it does not have another mechanism in place by which it can identify wage discrepancies or errors in calculation. The department, for example, does not compare wages reported by an employee on his or her weekly claims with the wages reported quarterly by the employee's employer(s).

On the basis of the wage information reported in 2014 by his employers, the department recalculated the employee's benefit entitlements, going back to 2008, including weeks for which the Sheraton had previously returned Form UCB-23s. The department determined that, based on the size of the discrepancies between what the employee reported and what his employers reported, the employee had filed fraudulent weekly claims from 2008 through 2014. The ALJ who held the employee's appeal hearings agreed.

Issues

The issues to be decided are (1) whether the employee worked and earned wages in weeks 45 of 2008 through 43 of 2014; (2) whether he concealed work performed and/or wages earned from the department when filing claims for unemployment insurance benefits for weeks 45 of 2008 through 43 of 2014; (3) whether he received benefits for which he was not eligible and which he must repay; and (4) whether concealment penalties must be assessed.

Concealment

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."[3] The standards and burden of proof for concealment were explicitly set forth in *Hollett v. Shaffer,* UI Dec. Hearing Nos. 13003690MW and 13003691MW (LIRC Apr. 30, 2014), *aff'd, Wis. Dept. of Workforce Dev. v. Wis. Labor & Indus. Rev. Comm'n and Hollett,* Case No. 14 CV 331 (Wis. Cir. Ct. Sauk Cnty. Jan. 22, 2015).

> 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. ...

[3] Wis. Stat. § 108.04(11)(g).

> A claimant is presumed eligible for unemployment insurance benefits, and the party resisting payment must prove disqualification. The burden to establish that a claimant concealed information is on the department. As a form of fraud, concealment must be proven by clear, satisfactory, and convincing evidence.
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> ... (footnotes omitted).

Concealment may be established through direct evidence, such as an admission by the claimant that incorrect information was provided to the department with the intent to receive benefits to which the claimant was not entitled, or indirect evidence from which such intent can be inferred. An inference of concealment may not always be drawn from the simple fact that a claimant provided incorrect or inaccurate information to the department when filing a weekly benefit claim. Concealment will not be found, for example, where a claimant makes an honest mistake, misinterprets information received by the department, or misunderstands his or her obligations and benefit rights under the unemployment insurance law.[4]

Analysis

The employee does not dispute that he worked and earned wages from the Sheraton in most of the weeks at issue and that he also worked for the Edgewater for several weeks in 2014. He does not dispute that he did not include in the wage amounts he reported to the department the service charge commissions paid to him by the Sheraton, and he admits that he had trouble reporting wages from both employers in a single week. He accepts that, as a result, he may have received more benefits than he would otherwise have been eligible to receive.

The employee, however, disputes that he concealed, as that term is defined in the unemployment insurance law, his service charge commissions or any other wages from the department. He contends that he tried to submit accurate information to the department and "did what [he] was instructed to do by the department."

There is no direct evidence in the record of concealment. While he admits that he did not report his service charge commissions from the Sheraton on any of his weekly claim certifications and may have erred in failing to report wages from the Edgewater, the employee denies that he intended in any way to mislead or defraud the department.

The commission does not infer from the indirect evidence in the record that the employee's failure to report his service charge commissions or wages from his second job was done to mislead or defraud the department. The employee wanted to avoid providing the department with inaccurate information. He was unable to report his service charge commissions to the department with any degree of accuracy, because

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[4] *See, e.g., Hollett v. Shaffer, supra; In re Scott Lynch,* UI Dec. Hearing No. 10404409AP (LIRC Mar. 11, 2011); *In re Joseph Hein, Jr.*, UI Dec. Hearing No. 00605374MW (LIRC Dec. 13, 2001).

he did not know how much he would be paid, or even after the fact was paid, by the Sheraton by event, by day, or by UI week. Only the Sheraton had the necessary information to determine on a weekly basis the employee's gross wages for UI reporting purposes.

The employee explained his circumstances to department personnel on at least two occasions and thereafter followed the department's instructions. He reported the wages he could ascertain and relied on the department's assurances that it would verify his wages with the Sheraton and recalculate his benefits to reflect the wages, inclusive of service charge commissions, reported by the employer. The employee was never told to estimate his service charge commissions, which would have been difficult to do given how much they varied from week to week. The employee openly disclosed to the department that he earns hourly base pay plus service charge commissions or, as he referred to them, "tips." The employee believed that he was filing his weekly claims correctly and that the system was operating as explained.

Unfortunately for the employee, the department's mechanism for verifying the wages he reported with the Sheraton, and obtaining the missing piece of wage information, did not work as expected. Consequently, the employee was paid more in unemployment insurance benefits each week than he should have received. Yet, the erroneous payments were not due to the wrongful or fraudulent actions of the employee. The fact that the department did not anticipate there being discrepancies larger than a few dollars between the amounts reported by the employee and the amounts reported by the Sheraton does not transmute the actions taken by the employee in good faith into acts of concealment. The mistakes the employee made when reporting his work for and wages from the Edgewater were honest mistakes.

In her appeal tribunal decisions, the ALJ faulted the employee for failing to take "proactive steps to report the additional wages himself," as he received notice from his employer about his wage earnings on his bi-weekly paychecks. In its brief, the department argued that the employee, when he received his bi-weekly check, knew the amount payable to him as service charge commissions and, had he delayed filing his claim by "a matter of days," he could have reported the proper amount of service charge commissions paid to him for the preceding two-week period. This is not borne out by the evidence in the record.

The employee could not report to the department the proper amount of service charge commissions he earned in any given week, because he never knew what those amounts were. He received his service charge commissions as a lump sum on his bi-weekly payroll checks, but they were not itemized by event, by day, or by week. Moreover, even if they were itemized by week, the Sheraton's pay periods (Thursday through Friday) do not correspond with UI benefit weeks (Sunday through Saturday). The employee simply did not have the information necessary to apportion accurately his lump sum bi-weekly service charge commissions, which is why he relied on the department to obtain that information from the Sheraton and calculate his benefits accordingly, just as the department explained to him it would do. The employee did not intentionally mislead or defraud the department.

The next issue to be determined is whether the employee received benefits for which he was not eligible. Although the employee concedes that his wages may have been underreported in many weeks because his service charge commissions were not included, he may still be entitled to partial benefits for some of those weeks. Wisconsin Stat. § 108.05(3) provides, in material part, that, if an eligible employee earns wages in a given week, the first $30.00 of the wages shall be disregarded and the employee's applicable weekly benefit payment shall be reduced by 67% of the remaining amount, except that no such employee is eligible for benefits if the employee's benefit payment would be less than $5.00 for any week.

The department and the employee stipulated during the combined *de novo* hearing to the accuracy of the wage amounts reported by the employers for the weeks in which the employee reported to the department that he worked and earned wages. The wage amounts reported by the Sheraton are set forth on a weekly earnings audit.[5] The wage amounts reported by the Edgewater are set forth on a weekly earnings audit and several Form UCB-23s.[6]

The stipulation of the parties notwithstanding, the commission finds that the evidence in the record is insufficient to determine whether the employee was entitled to receive partial benefits for the weeks at issue. The Sheraton's audit form is hearsay, and its reliability is questionable. Thus, the audit form does not constitute substantial evidence.[7]

The individual who completed the Sheraton's audit form did not testify at the hearing, and the audit form was offered at hearing as evidence to prove the truth of the matter asserted. The individual who testified at the hearing signed the audit form on December 9, 2014, certifying that the wage information reflected on the audit form was accurate and complete, although at that point she had only worked for the Sheraton for eight days. At the hearing, she did not know how much the employee earned as base pay in any given week or year and could not explain why, in some weeks, the employee reported working and the Sheraton reported he had not, and vice versa. She also could not adequately explain why negative amounts were sometimes included on the audit form as monies paid to the employee. No non-hearsay evidence was presented to corroborate the information on the Sheraton's audit form, such as payroll records, wage statements, or other business records.

In addition, the wage information the Sheraton provided to the department in 2009, 2010, and 2012 was different than the wage information the Sheraton provided to the department in 2014 on the audit form for the same weeks.[8] It is unknown

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[5] *See* Ex. 1, pp. F1-F19.

[6] *See* Ex. 1, pp. F20, F22-F30.

[7] *See Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, 278 Wis. 2d 111, 692 N.W.2d 572.

[8] *Compare, e.g.,* Ex. 2, p. M8 with Ex. 1, pp. F4, F7, and F11. In 2009, the employer reported that the employee earned wages of $205.50 in week 34 of 2009. In 2014, the employer reported that he earned wages of $271.48 in that week. Similarly, in 2010, the employer reported that the employee earned wages of $263.12 in week 31 of 2010. In 2014, the employer reported that he earned wages of $213.34 in that week. In 2012, the employer reported that the employee

whether the wage amounts reported by the Sheraton were inaccurate when first reported, were inaccurate when reported in 2014, or both. There is no explanation in the record for the inconsistencies. It is also unknown whether, in completing the audit form, the Sheraton's payroll records were adjusted to reflect wages earned by the employee each Sunday through Saturday. The Sheraton's weeks for payroll purposes run Friday through Thursday.

The Sheraton was required by law to complete and return the Form UCB-23 Wage Verification/Eligibility Reports it was sent while the employee's benefit claims were in progress if any information on the reports, including wage amounts, was missing or incorrect.[9] It routinely failed to do so. This failure raises the issue of employer fault. Yet, it appears that neither the department nor the ALJ considered whether employer fault was responsible, at least in part, for the erroneous payment of benefits to the employee. It can be the case that, if the employer is at fault for benefits erroneously paid to the employee, no overpayment is established, even if departmental error is not present.[10]

Departmental error is defined to be an error made by the department in paying benefits which results exclusively from misinformation provided to a claimant by the department, on which the claimant relied.[11] Here, after twice asking how the service charge commissions paid to him by the employer would be handled, the employee was told that the department would verify the wages he reported on his weekly claims with his employer and that any discrepancies or problems would be resolved by the department through the offset of future benefits. The process did not work as the department assured the employee it would. The employee relied to his detriment on the department's representations. Given this, the department should consider whether departmental error was responsible, at least in part, for the erroneous payment of benefits to the employee.

The commission therefore finds that, while the employee may have worked and earned wages in weeks 45 of 2008 through 43 of 2014, he did not conceal, as that term is defined in Wis. Stat. § 108.04(11), work performed or wages earned from the department when filing weekly claims for benefits.

The commission further finds that the employee's entitlement to partial benefits, if any, cannot be calculated based on the wage information in the record. This matter is remanded to the department for an investigation and findings as to the actual amount of wages earned by the employee in the weeks at issue and for the calculation of partial benefits under Wis. Stat. § 108.05(3).

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earned wages of $193.96 in week 7 of 2012. In 2014, the employer reported that the employee earned wages of $212.31 in that week.

[9] Wis. Admin. Code § DWD 123.03(2).

[10] *See* Wis. Stat. § 108.04(13).

[11] Wis. Stat. § 108.02(10e)(am)2.

The commission further finds that, if for any week the employee was entitled to an unemployment benefit payment and received federal additional compensation (FAC), he is entitled to retain the FAC.

The commission further finds that, since 2008, the Sheraton routinely failed to return UCB-23s sent to it. This matter is remanded to the department for an investigation and determination as to whether employer fault was responsible, at least in part, for the erroneous payment of benefits to the employee and whether benefits erroneously paid should remain charged to the Sheraton.

The commission lastly finds that the employee relied to his detriment on the assurances made to him by department representatives. This matter is remanded to the department for an investigation and determination as to whether departmental error was responsible, at least in part, for the erroneous payment of benefits to the employee.

DECISION

The decisions of the administrative law judge are reversed in part and remanded to the department. Accordingly, the employee is entitled to partial unemployment insurance benefits for weeks 45 of 2008 through 43 of 2014, if otherwise eligible. The employee is entitled to retain federal additional compensation (FAC) received for any weeks in which he was entitled to an unemployment insurance benefit payment. As a result of this decision, there are no concealment overpayment penalties.

This matter is **remanded** to the department to determine whether accurate and reliable wage information was provided by the employers and, if not, to obtain the same; to investigate and determine whether employer fault was responsible, at least in part, for any erroneously paid benefits; to investigate and determine whether departmental error was responsible, at least in part, for any erroneously paid benefits; and to investigate and determine whether overpayments should be established or waived.

BY THE COMMISSION:

Laurie R. McCallum, Chairperson

C. William Jordahl, Commissioner

David B. Falstad, Commissioner

The employee underreported his wages on his weekly claim certifications while working for the employer since at least 2007. The underreporting occurred because the employee, a banquet server, did not know, and had no way of ascertaining, the amounts paid to him by his employer in "service charge commissions." The employee understood, based on assurances from department personnel, that, if he reported his weekly base pay, the department would obtain from his employer the total amount of wages, including service charge commissions, he earned each week and adjust his benefits accordingly. The employee understood that the unemployment insurance system was designed to work this way and never had reason to question it. The employee was not attempting to mislead or defraud the department when reporting his weekly wages; he could only report those wages he could ascertain. Any other reporting would have been inaccurate, and the employee was never advised to estimate his service charge commissions in the event his employer failed to report them.

Before reversing the ALJ's appeal tribunal decisions, the commission requested the ALJ's personal impressions, including the manner of testifying and demeanor, of the material witnesses in these and multiple companion cases. The ALJ indicated that any credibility and demeanor impressions she had were included in her written decisions. She did not have any additional impressions to impart. With respect to the issue of concealment, the ALJ rejected the employee's testimony that "he was given erroneous information by the department in the early part of his claim and that he continued to file claims in error." The ALJ found that such testimony was not credible "due to the evidence and testimony received at the hearing."

The commission disagrees with the ALJ's credibility assessment. The employee testified credibly that he spoke with department personnel in 2008 and 2009. After explaining that, as a banquet server, he did not know, and had no way of ascertaining, how much he would receive from his employer in service charge commissions in any given week, the employee was assured by the department that it would verify the wages he reported with his employer and, if the wages reported by the employer were greater, his benefit eligibility would be recalculated and any overpayment would be offset in a future week. The employee's testimony concerning what he was told was verified as correct by the department's witness.[12] The employee's testimony concerning what he was told was also corroborated by the 2008 printed version of the department's *Handbook for Claimants*.

The employee filed his claims as he understood he was instructed to do by the department. The notices he subsequently received regarding overpayments and offsets were exactly what the department advised the employee he would receive. Copies of the actual notices sent to the employee by the department about his wage reporting are not in the record. Instead, blank form notices were marked as exhibits. The commission disagrees with the ALJ's characterization of the blank form notices

[12] The department's witness stated, "That statement, just that verbiage alone, is not incorrect."

as "extremely clear" and sufficient to warn the employee of potential concealment penalties.

The department argued at the hearing, and reiterated the same in its brief, that the employee concealed wages from the department consisting of service charge commissions received as part of his compensation from the employer, because the employee, when he received his bi-weekly check, knew the amount payable to him as service charge commissions. If he had delayed filing his claim by "a matter of days," he could have then reported the proper amount of service charge commissions paid to him for the preceding two-week period and avoided any overpayments. The department's argument is not supported by the evidence in the record.

As explained more fully in the body of the commission decision, the Sheraton makes a single entry for service charge commissions on the employee's wage statements. The amount is not broken down by event or by day, and the Sheraton's weeks for payroll purposes do not correspond with UI benefit weeks. The employee never had in his possession the wage information he needed to file accurate claims for unemployment insurance benefits. Only his employer had that information, and the Sheraton failed to supply that information to the department on required reports.

The department further argued in its brief that "it had to have been obvious" to the employee that "the department's detection of a one-week wage discrepancy a few times a year was inadequate to reasonably account for the amount of his unreported weekly commission fees." It is not clear why this should have been obvious to the employee. He was assured by the department, both verbally and in writing, that it verified the wages he reported on a weekly basis with the employer. The employee reasonably relied on the department's representations as to the manner in which it handled discrepancies in wage amounts reported by employees and employers. He went to work as scheduled, filed his claims as instructed, and had no reason to believe that the system was not working as described.

It stands to reason that, if the discrepancies were so obvious, the employer would have complained to the department that it was being overcharged for unemployment insurance benefits paid to the employee. There is no evidence in the record that the employer ever contested benefits paid to the employee from its UI account. Similarly, one could argue that it should have been obvious to the department that the employee was routinely reporting wages less than minimum wage, even for "tipped" employees.

During the hearing, the ALJ referenced department records stored online, informing hearing participants that she was reviewing documents on UIBNet. The ALJ did not print any of these documents from UIBNet, and, consequently, any documents reviewed by the ALJ are not part of the record. The commission finds this troubling, because ALJs are responsible for developing a record sufficient for appellate review. The commission and the courts cannot review the documents that the ALJ viewed on her computer.

The employee's attorney expressed concerns about whether his client was afforded all of his due process rights, and the commission shares some of his concerns.[13] The commission is particularly troubled by the ALJ's conduct at the hearing.

The "fair hearing" provision in sec. 303(a)(3) of the federal Social Security Act requires a reasonable opportunity for workers whose claims are denied to be heard by an impartial tribunal in an adjudicatory proceeding which assures them of elementary fairness. Here, the ALJ's questioning of the employee did not appear unbiased or objective. In fact, the ALJ expressly acted as a representative of the department, as she frequently used the term "we" when referring to the department. For example, the ALJ stated that "we get calls all the time from people," "we never got a proactive stamp from you," "we expected a truthful reporting," and "we have to walk a tight line as a department." The ALJ clearly aligned herself with the department throughout the hearing and placed the burden on the employee to prove that he did not intentionally mislead or defraud the department rather than on the department to prove that he did.

Finally, in addition to her lack of specific findings of fact as to the weeks of issue and the wages earned by the employee in those weeks, the commission is troubled by the ALJ's use of a clearly inapplicable standard paragraph to fulfill the requirements of Wis. Stat. § 108.22(8). In her appeal tribunal decisions, the ALJ used a standard paragraph that only applies to cases in which an ALJ reverses an initial determination allowing benefits, thereby establishing an overpayment. Here, overpayments had already been established and set forth in the initial determinations.

cc: EDGEWATER MGT COMPANY LLC
[redacted]

SHERATON MADISON HOTEL
[redacted]

[13] The employee's attorney referenced several times the Rita Wales case, UI Dec. Hearing No. 12002276MD (LIRC Jan. 15, 2013), asserting that it stands for the proposition that the premature recovery of unemployment insurance benefits legally due a claimant is a violation of the claimant's due process rights. However, the Rita Wales case involved federal law and the collection of erroneously paid federal emergency unemployment compensation (EUC). Federal law does not permit the collection of an EUC overpayment until the claimant has notice, an opportunity for a fair hearing, and the decision establishing the overpayment becomes final. State law provides that benefits shall be paid or denied in accordance with the most recently issued determination or decision, notwithstanding the pendency of an appeal period. *See* Wis. Stat. § 108.09(9). There is no requirement that the department wait to recover regular UI benefits that were erroneously paid.

VICTOR FORBERGER
ATTORNEY AT LAW
2509 VAN HISE AVE
MADISON WI 53705

ROBERT C JUNCEAU
ATTORNEY AT LAW
DWD - UI DIV - BOLA
P O BOX 8942
MADISON WI 53708-8942