

STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

CATHY A ANTONIO, Employee

UNEMPLOYMENT INSURANCE
DECISION

Hearing No. 97000312BO

C K OF WISCONSIN DELLS
JT VENTURE, Employer

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 a decision in this matter. A timely petition for review was filed.

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 agrees with the decision of the ALJ, and it adopts the findings and conclusion in that decision as its own.

DECISION

The decision of the administrative law judge is affirmed. Accordingly, the employees are ineligible for benefits for those weeks set forth in the initial determinations as of week 49 of 1996. Thereafter, they are eligible for benefits, if otherwise qualified. Recovery of the overpaid benefits is waived. The employees are not required to repay the department, nor will the overpaid benefits be recovered by any other means. The appropriate employer accounts will be credited immediately with the overpaid amount.

Dated and mailed

MAR 31 1998

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/s/

~~David B. Falstad, Chairman~~

/s/

~~James A. Rutkowski, Commissioner~~

MEMORANDUM OPINION

The department petitions the administrative law judge's finding that recovery of benefits paid to the employees should be waived. The administrative law judge found that the employees reported all work and wage information required by the department in a timely manner, but that the department did not provide a format in the initial claim application, or in the weekly claim certification, which directly raise the 35 hour/80% issue. The administrative law judge concluded that the procedures which failed to elicit such relevant information amounted to an error of omission on the part of the department justifying waiver of the recovery of overpaid benefits.

The department agrees that there is no claimant fault, false statement, or misrepresentation in this case. The department maintains that no department error has occurred because it did not fail to ask a question that would determine the employees' eligibility, but made an administrative decision not to ask the question. The department argues that although a claimant can certify whether he or she worked, received pay for, or could have received pay for at least 35 hours, he or she cannot certify whether the employer paid at least 80% of the wages in the employee's base period. The department maintains that if it initiated an investigation based only on what the claimant could provide, it would unnecessarily hold benefit payments for many claimants while it verified the employer's base period liability.¹ However, the goal of prompt payment should not be achieved at the sacrifice of accurate payment. While payment of claims should not be unnecessarily delayed, it should first be determined, by an adequate investigation of eligibility issues, that payment is due.²

¹ The department does not indicate exactly or even approximately how "many" claimants would be affected by this issue. The commission has dealt with the 35/80 issue before. See, e.g., *Gloria Ford v. All American Enterprises of Wisconsin Inc.*, UC Hearing No. 96201053 (LIRC Oct. 7, 1996); *Carol Baurichter v. Admanco Inc.*, UC Hearing No. 95000048 (LIRC Apr. 26, 1995). Of course, the commission's experience is not necessarily indicative of how often the issue arises at the initial or weekly claim stage.

² In *California Department of Human Resources Development v. Java et al.*, 402 U.S. 121 (1971), the Supreme Court held that California's procedure of automatically suspending benefit payments once an employer appealed an initial decision granting benefits did not conform with the federal requirement that a state's method of administration be "reasonably calculated to insure full payment of unemployment compensation when due." In doing so, however, the Court set out the investigation that took place prior to determining a claimant's eligibility and issuance of an initial determination. The Court noted that it was the "critical point in the California procedure" or, as the Department termed it, "the point at which any issue affecting the claimant's eligibility is decided and fulfills the Department's legal obligation to insure that . . . benefits are paid promptly if claimant is eligible." *Java* at 127-128. The Supreme Court was in no way critical of the investigation, and attendant delay in issuing an initial determination, caused by multiple interviews with the claimant and employer in order to adduce necessary

The commission agrees with the department that a claimant would be able to certify whether he or she worked, received pay for, or could have received pay for at least 35 hours. Second, even were the claimant unsure of the appropriate response, the telephone claim system utilized by the department permits, for some questions, three possible responses "no," "yes," or "not sure." Either of the latter two responses could alert the department of the potential issue.³ The department does not explain why asking a claimant whether he or she worked or could have worked 35 hours would unduly delay a claim. If the response is no, benefits will be paid. If the answer is yes (or unsure), an investigation will ensue as to whether the employer paid 80% of the claimant's wages. Base period wage information is known to the department based on wages reported by the claimant's employer(s). Further, if an investigation is necessary because of a claimant's response to a potentially disqualifying question, then an investigation, whether it may delay payment or not, is appropriate.⁴

The department's practice is to wait for the employer to indicate that the claimant worked 35 hours, yet the employer certainly does not know whether it paid 80% of the claimant's base period wages. Relatively speaking, one would think the claimant would have more knowledge of the origin of her wages than a particular employer. Further, in the cases of the five claimants at issue, Ms. Antonio, Ms. Jorgenson, Ms. Templin, and Ms. Herriot had only one base period employer. If these claimants are representative of claimants in general, then 80% would be able to answer the hours and wages questions. The commission is unconvinced that a purposeful decision to fail to investigate an eligibility issue, or delay investigating an eligibility issue, prevents a finding of department error. Certainly the department may decide that it does not wish to use its resources in making the 35/80 inquiry. The question here is not whether the department can make such a choice, but whether a claimant should be required to repay benefits if it is subsequently determined that benefits should not have been paid.

information to substantiate a decision. Indeed, part of the rationale for finding the later automatic suspension unacceptable was that based on the initial investigation employers were successful in less than 50% of their appeals. Thus, more often than not, benefits that were paid a claimant were due a claimant.

³ Further, if a claimant is uncertain regarding how to respond to the question the claimant can look for guidance in the *Handbook for Claimants* provided by the department which explains various questions and eligibility issues, including the 35/80 provision. See *Handbook for Claimants*, UCB-10-P, Rev. 10/96, p. 30.

⁴ The commission does not agree that a claimant's inability to answer in a way that will definitively resolve the eligibility issue on an initial or weekly claim certification justifies not making the inquiry at all.

The department further argues that its decision not to investigate the 35/80 provision is reasonable on the grounds that it "potentially affects only one week" and therefore is "in the best interests of claimants as a whole." Whether or not the potential weeks/amount of overpayment involved justifies failure to investigate an eligibility issue, the argument seems misplaced in these cases. For instance, Ms. Herriot was overpaid in three weeks.⁵

For the above reasons, and for the reasons set forth in the appeal tribunal decision, the commission affirms that decision.

⁵ Ms. Antonio was overpaid benefits in weeks 49 and 50 but the overpayments were not set forth on the initial determinations.

PAMELA I. ANDERSON, COMMISSIONER (dissenting):

I am unable to agree with the result reached by the majority herein and I dissent. It is not department error every time a person is paid benefits at one level and then benefits are denied at a higher level.

The department is under time constraints to pay benefits in a timely fashion because of the *Java* decision. The department made a policy decision that it would not ask the questions necessary to find and resolve the issue in this case by way of the phone survey.

Adding a question about whether the employer paid at least 80% of the wages in the base period would not resolve all the cases. There would be some confusion about what the base period was. The employee could say yes or no to the question but would often be wrong.

The majority claims the department could have asked the employee whether she worked, received pay for or could have received pay for at least 35 hours in a week. This is not a straightforward question. There can be three answers to the question. No, I did not work 35 hours. No, I did not receive pay for 35 hours. I do not know if I could have received pay for at least 35 hours. The employee will have a question about when they must receive the pay- if they are paid next week for this weeks work, does that count?

The department must make some decisions about how to use its limited resources. Adding the necessary questions would result in many phone calls to the adjudicators, often from people not involved in this issue at all. The department followed its procedure for investigating this issue. This issue does not occur frequently. I do not recall another case like this in over 15 years on the Commission. For these reasons, I would reverse the finding of department error and require the employee to repay the benefits she was not entitled to receive.

/s/

Pamela I. Anderson, Commissioner

cc: GREGORY FRIGO
DIRECTOR
BUREAU OF LEGAL AFFAIRS