State of Wisconsin

Labor and Industry Review Commission

Athena L Salinas Employee **Acro Metal Stamping Co** Employer Hearing No. 24604558MW	**Unemployment Insurance Decision**[1] **Dated and Mailed:** October 25, 2024 salinat_usd.doc:111

The commission **modifies** and **affirms** in part and **reverses** in part the appeal tribunal decision. Accordingly, the employee is ineligible for benefits beginning in the week of the discharge and until seven weeks have elapsed since the end of the week of discharge and the employee has earned wages in covered employment performed after the week of discharge equaling at least 14 times the weekly benefit rate that would have been paid had the discharge not occurred. Recovery of overpaid benefits is waived.

By the Commission:

/s/
_____
Michael H. Gillick, Chairperson

/s/
_____
Georgia E. Maxwell, Commissioner

/s/
_____
Marilyn Townsend, Commissioner

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[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) of the Unemployment Insurance Division of the Department of Workforce Development held a hearing and issued a decision. The commission received a timely petition for review. The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing.

Findings of Fact and Conclusions of Law

The commission makes the same findings of fact and conclusions of law as stated in the appeal tribunal decision and incorporates them by reference into the commission's decision, subject to the following modifications:

Delete the third sentence in the fourth full paragraph on the third page of the appeal tribunal decision.

Delete the sixth full paragraph on the third page of the appeal tribunal decision and replace it with: "The appeal tribunal further finds that the employee was paid benefits in the amount of $1,460, to which the employee was not entitled, within the meaning of Wis. Stat. § 108.03(1) and that recovery of the overpaid benefits is waived because the overpayment was caused by departmental error."

Delete the third sentence in the DECISION paragraph of the appeal tribunal decision and replace it with: "Recovery of the overpaid benefits is waived."

Delete the second and third paragraph of the NOTES section of the appeal tribunal decision.

Memorandum Opinion

The employer discharged the employee pursuant to its attendance policy, of which the employee had acknowledged receipt with her signature. The employee was therefore discharged for misconduct within the meaning of Wis. Stat. § 108.04(5)(e). *See Martin v. Hormel Foods Corp.*, UI Dec. Hearing No. 24004045MD (Oct. 11, 2024).

The employee made a number of assertions in her petition that she did not make at the hearing including assertions related to how the employer treated staff differently and pay that was withheld. The commission's rules provide that its review is based on the record of the case, including the evidence previously submitted at the hearing before an appeal tribunal. Wis. Admin. Code § LIRC 1.071(intro.). None of the employee's assertions constitute newly discovered evidence that would warrant a new hearing. Therefore, further hearing will not be granted and the commission has not considered the employee's assertions that are outside the record in this decision.

Athena L Salinas
24604558MW

The employee also argues that the appeal tribunal decision is unfair. However, the commission is required to apply the statute as written by the legislature and interpreted by the courts and has no authority to deviate from binding precedent. The commission, therefore, affirms the appeal tribunal's finding that the employee was discharged for misconduct.

The employee received benefits in the amount of $1,460 to which she was not entitled and for which she was not eligible. Recovery of erroneously paid benefits shall be waived if the overpayment was the result of a departmental error and the overpayment did not result from the fault of the employee. Wis. Stat. § 108.22(8)(c). There is no evidence that the employee provided incomplete or inaccurate information to the department regarding her separation nor any other evidence of employee fault. Departmental error includes errors made by the department in paying benefits resulting from a "misapplication or misinterpretation of the law." Wis. Stat. § 108.02(10e)(am)1. In light of the recent court of appeals decision in *Bevco Precision Mfg. Co. v. LIRC*, 2024 WI App 54, ___ Wis. 2d ___, ___ N.W.3d ___ (petition for supreme court review pending), it is clear that the department misinterpreted Wis. Stat. § 108.04(5)(e) when it issued its determination finding the employee eligible for benefits. That misinterpretation is what caused the overpayment of benefits in this case. This constitutes a misinterpretation of law, and therefore departmental error, even though the department's action was reasonable at the time due to commission precedent that was overruled by the *Bevco* court. See *DWD v. LIRC*, 2017 WI App 68, 378 Wis. 2d 226, 903 N.W.2d 303. Therefore, recovery of the overpaid benefits is waived.

The appeal tribunal decision's finding that the employee was discharged for misconduct is affirmed. The appeal tribunal decision's finding that the employee must repay erroneously received benefits is reversed.

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24604558MW