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**APPEAL TRIBUNAL
DECISION**

State of Wisconsin
Department of Workforce Development
Unemployment Insurance

Mailed to:

ATTORNEY VICTOR FORBERGER
2509 VAN HISE AVE
MADISON WI 53705

Hearing No. [REDACTED]
In the matter of: [REDACTED]
Employee: APPELLANT [REDACTED]
B.C. & S.S. No.: 12/****-** [REDACTED]
vs. [REDACTED]
Employer: RESPONDENT [REDACTED]
UI Account No. [REDACTED]

APPEAL RIGHTS

THIS DECISION WILL BECOME FINAL UNLESS A WRITTEN PETITION FOR REVIEW BY THE LABOR AND INDUSTRY REVIEW COMMISSION IS FILED WITHIN 21 DAYS FROM THE DATE OF THIS DECISION. (SEE DATE BELOW.) THE REQUIRED PROCEDURES TO FILE A PETITION FOR COMMISSION REVIEW ARE DESCRIBED ON THE BACK OF THIS PAGE. THE COMMISSION WILL REVIEW THE EVIDENCE ALREADY PRESENTED AT THE HEARING TO MAKE A DECISION. NO FURTHER HEARING WILL BE HELD UNLESS THE COMMISSION SO ORDERS.

A CLAIMANT WHO IS STILL UNEMPLOYED SHOULD CONTINUE TO FILE CLAIMS WHILE THE REVIEW IS PENDING. IF THIS DECISION ALLOWS BENEFIT PAYMENT, PAYMENTS WILL BE MADE AND WILL CONTINUE UNLESS A LATER DECISION DENIES BENEFIT PAYMENT. IF THIS DECISION OR ANY HIGHER LEVEL DECISION REVERSES AND RESULTS IN A DENIAL OF BENEFIT PAYMENT, THE CLAIMANT WILL BE REQUIRED TO REPAY PREVIOUSLY PAID BENEFITS.

ANOTHER HEARING WILL NOT BE SCHEDULED UNLESS A PARTY WHO FAILED TO APPEAR SHOWS GOOD CAUSE FOR NOT APPEARING AT THE HEARING ORIGINALLY SCHEDULED. THE REQUEST FOR RESCHEDULING MUST BE IN WRITING, MUST EXPLAIN THE REASON FOR FAILING TO APPEAR, AND SHOULD BE MAILED IMMEDIATELY TO THE UI HEARING OFFICE ABOVE. IF YOU DO NOT UNDERSTAND THE PROCEDURE, CALL THE UI HEARING OFFICE FOR ASSISTANCE.

DECISION: SEE ATTACHED DECISION WHICH REVERSES IN PART AND AFFIRMS IN PART THE INITIAL DETERMINATION.

Employee appeared by: Employer appeared by:
VICTOR FORBERGER DID NOT APPEAR
ATTORNEY

Administrative Law Judge SIGNE L. DENNY	Dated and Mailed FEBRUARY 8, 2016	Petition Must Be Received or Postmarked By: FEBRUARY 29, 2016
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(SEE REVERSE FOR ADDITIONAL INFORMATION)

Decision mailed to:

ATTORNEY VICTOR FORBERGER, 2509 VAN HISE AVE, MADISON, WI 53705
[REDACTED]

THE DEPARTMENT'S DETERMINATION HELD: that in weeks 1 of 2015 through week 22 of 2015, the claimant was not able to work and available for suitable work. As a result, benefits were denied for those weeks and until the claimant is able and available for suitable work. The determination further found that in filing his weekly claim certifications for weeks 1 through 22 of 2015, that the employee reported that he was able and available for suitable work during those weeks and that such action amounted to concealment.

The determination further found that the claimant was overpaid unemployment insurance benefits in the amount of \$8,140, which must be repaid by the claimant. The determination further found that, as a result of concealing information from the department, the claimant shall be assessed a penalty of 40% of the aforesaid overpayment, in the amount of \$3,256.

Based on the applicable records and evidence in this case, the appeal tribunal makes the following

FINDINGS OF FACT

The claimant worked seasonally for the named employer for the last nine seasons. On November 24, 2014, he initiated a claim for benefits reporting that he was laid off. Thereafter, the claimant filed weekly certifications, including for weeks 1 through 22 of 2015. On the weekly certifications for weeks 1 through 22 of 2015, he answered "yes" in response to the first question, "Were you able to work fulltime and available for fulltime work?"

On Saturday, January 3, 2015 (week 1), the claimant traveled to Germany to be with his girlfriend. Prior to his travel on January 3, he was able and available to work at least 32 hours in week 1. He returned to the United States on June 15, 2015 (week 25). During his travel, he also visited Spain and the United Arab Emirates. While traveling, he filed his weekly claim certifications for weeks 1 through 22 of 2015 and was paid benefits. He did not have authorization to work while traveling abroad. There is no evidence that he was aware that there were geographical restrictions with respect to the availability question for unemployment purposes.

CONCLUSIONS OF LAW

The first issue to be decided is whether the claimant was able to work and available for work in the claimant's labor market in weeks 1 through 22 of 2015.

The Wisconsin Statutes provide that to be eligible for benefit payments in a given week a claimant must be "able to work and available for work" during that week. Wis. Stat. § 108.04(2)(a)1. The phrase "available for work" is defined in law to mean that the claimant maintains and attachment to the labor market and is ready and willing to perform full time suitable work. Sec. DWD 128.01(4)(a), Wis. Admin. Code. However, by enactment of Wisconsin's state legislature in 2012, Wis. Stat. § 108.04(2)(ae) further specifies as follows:

A claimant is not available for work under par. (a)1. in any week in which he or she is located in a country other than the United States, as defined in s. 108.02 (15) (do) 2., or Canada for more than 48 hours unless the claimant has authorization to work in that other country and there is a reciprocal agreement concerning the payment of unemployment insurance benefits between that other country and the United States.

The language of the above statute is clear and unambiguous. During weeks 2 through 22 of 2015 the claimant traveled abroad for more than 48 hours, and during those weeks he did not have authorization to work in the countries he visited or that there existed a reciprocal agreement between the United States and those countries concerning the payment of unemployment insurance benefits. Consequently, as a matter of law, pursuant to Wisconsin unemployment insurance law, the claimant must be deemed to have been unavailable for work and therefore ineligible for benefits during those weeks. While this result is adverse to the claimant, the appeal tribunal is required to follow the law as it is written. Accordingly, the claimant was unavailable for full-time suitable work in weeks 2 through 25 of 2015 due to his travel abroad.

Section DWD 128.01(2) of the Wisconsin Administrative Code creates a presumption that an otherwise eligible claimant is able to work and available for work unless there is evidence that he or she is not. As of week 1 of 2015, throughout that week the claimant was staying at his residence in Wisconsin. There is no evidence to suggest that he was not fully able to work and available for work in his labor market during week 1 of 2015. He is therefore presumed to be able to work, available for work and eligible to receive benefits for that week, if otherwise qualified.

Having determined that the claimant was not able to work and available for work during weeks 2 through 22 of 2015, the next issue to be decided is whether he has received benefits to which he was not entitled.

Departmental records indicate that the claimant received weekly benefits of \$370 per week for weeks 2 through 22 of 2015, totaling \$7,400. Upon the above findings, the claimant was not eligible to receive those benefits, and the issuance of those benefits constitutes an overpayment that the employee must repay unless recovery is waived by the Department.

A final issue to be decided is whether recovery of all or part of the overpayment received by the claimant must be waived by the Department.

Generally, a claimant who receives unemployment compensation benefits in error is required to repay those benefits to the department. However, current law provides that recovery of the overpaid benefits shall be waived if the overpayment occurred as the result of departmental error, regardless of whether employer fault was a contributing factor, and if the overpayment was not caused by the claimant's fault or by a false statement or misrepresentation by the claimant.

The claimant argues that the overpayment should be waived pursuant to federal law that requires state law to include provisions that reasonably affords those entitled to unemployment compensation benefits an opportunity to know, establish, and protect their rights under its unemployment compensation law. As such the department's failure to include the geographical restriction in the Claimant Handbook or any other notice delivered to the claimant supports a waiver of the overpayment. However, the state law is in compliance with federal law because the unemployment insurance law is accessible publicly. The entirety of the unemployment insurance law simply cannot be reduced to the Claimant Handbook. Moreover, the department has provided its contact information in the Claimant Handbook with instructions to contact the department if there is a question concerning one's eligibility for benefits. Accordingly, it was the claimant's responsibility to report to the department that he would be traveling abroad and to ask whether his travel had any impact on his eligibility.

The claimant in this case has received unemployment insurance benefits totaling \$7,400, to which he is not entitled, given the findings and conclusions above. Those benefits were paid by the department without full information as to the underlying facts and eligibility issue. The overpayment was not caused by any departmental error and repayment of the benefits cannot be waived.

The final issue to be decided is whether the claimant concealed from the department the fact that he was not available for work in weeks 1 through 22 of 2015, as would require the imposition of a 40% overpayment penalty.

Wisconsin Stat. §108.04(1)(b) requires that, where an a benefit overpayment is caused by an act of "concealment" by claimant, then in addition to repayment of that overpayment a penalty shall be assessed against the claimant in the amount of 40% of the erroneously paid benefits.

The term "concealment," as used by the provisions of Wis. Stat. §108.04(1)(b), implies a deceitful purpose and design. *Kamuchey v. Trzemesniewski*, 8 Wis. 2d 94, 99 (1959) (citing 23 Am Jur. *Fraud and Deceit* § 77, para. 851). "A forfeiture of benefits may not be imposed against a claimant who makes an honest mistake, but only as a willful act of concealment, not due to ignorance or lack of knowledge. There must be an intent to receive benefits to which the individual knows he or she is not entitled." *Brenda R. Mortensen*, UI Dec. Hearing No. 05002751JV (LIRC Dec. 14, 2005).

Here, the claimant did not intentionally conceal from the department that he was unavailable for work while claiming benefits in weeks 1 through 22 of 2015. The question of whether for unemployment insurance purposes he was "available for work" in those weeks represents a mixed question of both fact and law, and the claim certification question asked the claimant in that regard is therefore inherently open to misinterpretation. Moreover, the mere fact that as a matter of law the claimant in this case is necessarily treated as having been "unavailable" for work while staying outside the United States does not obviate the literal truth that he was at all times ready, willing and able to accept fulltime suitable work during weeks 1 through 22 of 2015. In filing his weekly claim certifications he responded that he was available for work in those weeks because he honestly believed that he was, not because he had any plan or desire to mislead the department.

Accordingly, because the claimant did not intentionally conceal material information from the department when claiming benefits for in weeks 1 through 22 of 2015, no 40% overpayment penalty shall be imposed.

The appeal tribunal therefore finds that, in week 1 of 2015, the claimant was able to work and available for suitable work, within the meaning of Wis. Stat. § 108.04(2)(a) and Chapter DWD 128, Wis. Admin. Code.

The appeal tribunal further finds that, in weeks 2 through 22 of 2015, the claimant was not able to work and/or not available for suitable work, within the meaning of Wis. Stat. §§ 108.04(2)(a) and (2)(ae) and Chapter DWD 128, Wis. Admin. Code.

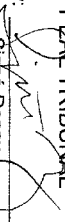
The appeal tribunal further finds that, in week 1 of 2015 and in weeks 2 through 22 of 2015, the claimant did not conceal from the department material information relating to his benefit eligibility, within the meaning of Wis. Stat. § 108.04 (11)(a).

The appeal tribunal further finds that for weeks 2 through 22 of 2015, the claimant was paid benefits in the amount of \$7,400, for which he was not eligible and to which he was not entitled, within the meaning of Wis. Stat. § 108.03(1), and that the entire amount must be repaid to the department because the overpayment was not because of any error by the department and/or was caused partially or wholly by the employee, within the meaning of Wis. Stat. § 108.22(8)(a) and (c).

The appeal tribunal further finds that, because the aforesaid benefit overpayment was not the result of an act of concealment by the claimant, within the meaning of section 108.04(11) of the statutes, the department shall not assess a 40% overpayment penalty against the employee, within the meaning of Wis. Stat. § 108.04(11)(bh).

DECISION

The department's determination is modified to conform to the above findings and, as modified, is affirmed in part and reversed in part. Accordingly, the claimant is eligible for benefits in week 1 of 2015 if otherwise qualified. The claimant is ineligible for benefits in weeks 2 through 22 of 2015. The claimant may be eligible for benefits thereafter, if otherwise qualified. The claimant is required to repay the sum of \$7,400 to the Unemployment Reserve Fund. The department shall not assess against the claimant or attempt to collect from the claimant a 40% overpayment penalty.

APPEAL TRIBUNAL
By: 
Signe Denny
Administrative Law Judge

NOTE:

Repayment instructions for the amount that must be repaid will be mailed after this decision becomes final. The department will withhold benefits due for future weeks of unemployment in order to offset overpayments of unemployment and other special benefit programs that are due to the state, another state or to the federal government.

Contact the Unemployment Compensation Division, Collections Unit, P.O. Box 7888, Madison, WI 53707, to establish an agreement to repay the overpayment.