

- DECISION -

Claimant:
HERMAN BROWN

Decision No.: 3106-BR-09

Date: October 23, 2009

Appeal No.: 0910234

S.S. No.:

Employer:
MANPOWER INTERNATIONAL INC

L.O. No.: 63

Appellant: Claimant

Issue: Whether the claimant received wages in excess of his/her weekly benefit amount and failed to disclose wages in order to obtain benefits as defined within Section 8-1301 of the unemployment insurance law; whether the claimant is entitled to benefits within the meaning of Section 8-803 of the law, whether the claimant is overpaid benefits within the meaning of Section 8-809.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the Maryland Rules of Procedure, Title 7, Chapter 200.

The period for filing an appeal expires: November 23, 2009

REVIEW ON THE RECORD

After a review on the record, the Board adopts the following findings of fact and reverses the hearing examiner's decision.

Although the claimant's appeal letter references appeal 0910227, there were six other cases heard at the same hearing with involved the same issues and nucleus of operating facts. The Board finds that case 0910228, and cases 0910230 through 0910234 are a part of this appeal.

The Agency and the employer, duly notified of the date, time and place of the July 27, 2009 hearing failed

to appear. Neither the Agency nor the employer offered any testimony and evidence in this case.

There is insufficient evidence in the record to support the hearing examiner's decision. The hearing examiner even admitted that all he had was "sketchy stuff" from the Agency and the employer in the file and that he had "little information to go on". These documents, even if they were admitted into evidence, are hearsay and should have been given little if any weight. Notwithstanding, the Agency documents to which the hearing examiner referred in his decision are not in evidence and therefore were not considered by the Board in its review.

The claimant did not fail to disclose a material fact and did not make a false statement to obtain or increase benefits to which the claimant was not entitled. There is no credible evidence in the record that the claimant is overpaid any benefits to which he was not entitled.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., § 8-102(c)*. Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training, 309 Md. 28 (1987)*.

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner, or evidence that the Board may direct to be taken, or may remand any case to a hearing examiner for purposes it may direct. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d); COMAR 09.32.06.04(H)(1)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E)*.

The Agency has the burden of proof in cases involving overpayment under *Md. Code Ann., Lab. & Empl. Art., § 8-809(a)* and fraud under §§ *8-809(b), 1301 and 1305*. In the July 27, 2009 hearing, the appellant / claimant had the burden of moving forward; however, the burden of proof remained with the Agency. The Agency must produce all evidence it has to support the required findings under *Md. Code Ann., Lab. & Empl. Art., §8-809(c)* at the hearing before the hearing examiner. The parties in the instant case had clear notice of the obligation to present a case before the hearing examiner. *DLLR v. Woodie, 128 Md. App. 398, 411 (1999)*. The hearing notice provided,

This hearing is the last step at which either the claimant or the employer has an absolute right to present evidence. The decision will be made on the evidence presented. The decision will affect the claimant's claim for benefits, and it may affect the employer's contribution tax rate or reimbursement account.

The Board finds that as a party before the Lower Appeals Division, the above-cited paragraph also applies to the Agency.¹ In addition, the notice stated, in bold print, that additional "important information" could be found on the reverse side of the notice. Because the Agency was on notice that the only absolute opportunity to present evidence was before the DLLR Hearing Examiner, the employer and the Agency had no legitimate justification for their failure to present the evidence in the first hearing. *See DLLR v. Woodie, 128 Md. App. 398, 401 (1999).*

There are no cognizable defects in the record. Absent some extreme circumstance, the employer and the Agency will not be further heard in this case. The only end served by the Board remanding this case or having an additional hearing before the Board would be to allow the employer or the Agency a second opportunity to present evidence: evidence they were free to present at the first hearing. *See DLLR v. Woodie, 128 Md. App. 398, 408 (1999).*

Without Agency documentation raising the issue of whether the claimant has or has not reported wages, the Agency failed its burden in putting on a *prima facie* case. The Secretary is required to notify the claimant (when the Agency decides to recover benefits because of an overpayment or because of fraud) of the amount to be recovered, the weeks for which benefits were paid, and the provision of the unemployment insurance law which the Secretary determined that the claimant was ineligible for benefits. *See Md. Code Ann., Lab. & Empl. Art., §8-809(c)*. There is no evidence in the record that the Agency complied with this mandatory provision.

It is not the claimant's burden, duty or obligation to prove the Agency's case. The Agency has the initial burden to provide enough evidence for a *prima facie* case that the claimant is either overpaid or has committed a fraud in order to obtain benefits. The claimant's statements do not support a finding that the claimant was overpaid or committed a fraud in order to obtain an increase in benefits to which he was otherwise not entitled.

Therefore, the Board finds that the Agency failed to demonstrate that the claimant is not in compliance with any of the noticed issues. The hearing examiner's decision shall be reversed.

DECISION

The Board holds that the claimant did not knowingly make false statements or knowingly fail to disclose material facts to obtain or increase benefits within the meaning of *Md. Code Ann., Lab. & Empl. Art., Section 8-809(b), 1301, and 1305*. There is no disqualification under these provisions of the law.

¹ "The Secretary, at the Secretary's discretion, may be a party to an appeal filed by a claimant or employing unit with the Lower Appeals Division". *Md. Code Ann., Lab. & Empl. Art., § 8-508(b)*. In the instant case, the Secretary elected not to participate as a party in the Lower Appeals Division proceedings. By electing not to participate, it assumed the risk of an adverse decision. The Board and the Lower Appeals Division must treat the Agency consistent with its treatment of employers and claimants and cannot afford it any more or any less substantive or procedural due process rights. There is no postponement request in the record from either the employer or the Agency.

The Board holds that the claimant is not overpaid within the meaning of *Md. Code Ann., Lab. & Empl. Art., § 8-809(a)*. There is no disqualification or recovery of benefits paid by the Agency to the claimant in this case.

The hearing examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

HERMAN BROWN

MANPOWER INTERNATIONAL INC

MANPOWER TEMPORARY SERVICES

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

HERMAN BROWN

SSN #

Claimant

Vs.

MANPOWER INTERNATIONAL INC

Employer/Agency

Before the:

**Maryland Department of Labor,
Licensing and Regulation**

Division of Appeals

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

Appeal Number: 0910234

Appellant: Claimant

Local Office : 63 / CUMBERLAND
CLAIM CENTER

August 21, 2009

For the Claimant: PRESENT

For the Employer:

For the Agency:

ISSUE(S)

Whether the claimant received wages in excess of his/her weekly benefit amount and failed to disclose wages in order to obtain benefits as defined within Section 8-1301 and 8-809(b) of the unemployment insurance law; whether the claimant is entitled to benefits within the meaning of Section 8-803 of the law, whether the claimant is overpaid benefits within the meaning of Section 8-809(a).

FINDINGS OF FACT

The claimant established a benefit year beginning July 13, 2008 and a weekly benefit amount of \$63.00. The claimant was working part-time for Safeway and then Manpower International between July 2008 and January 2009. The employer and Agency were not present at the hearing to offer evidence or testimony regarding the claimant's earnings. However, this information was presented in a file which the claimant did not totally dispute although he indicates his recollection of specific pay during these weeks for these two employers maybe sketchy.

At all times during his employment with Manpower the claimant declared zero wages while earning a weekly benefit amount of \$63.00. As far as the employment with Safeway, the claimant also reported zero wages and was paid \$63.00 in benefits.

With respect to Manpower, the claimant earned \$345.00 for the week ending September 27. For the week ending November 8 he earned \$187.50; \$292.50 for the week ending November 15, 2008; \$382.50 for the week ending November 22, 2008; \$327.50 for the week ending November 29, 2008; \$325.00 for the week ending December 6, 2008; \$342.50 for the week ending December 15, 2008; and \$77.50 for the week ending December 20, 2008. The claimant earned \$67.75 for the week ending January 10, 2009. (Agency Exhibit No. 1, Agency Fact Finding Report).

For the week ending July 19, 2008, the claimant earned \$84.00 from Safeway followed by \$112.00 for the week ending August 9, 2008. The claimant was working as a meat cutter part-time at Safeway during this period.

The claimant does not recall why he declared no wages and he was disputing some of the employment records although he agrees he did work for Safeway and Manpower, but, as previously stated, he could not recall the specificity exact wages earned although he believes that he may not have declared wages for the weeks that he earned income.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1301 provides that an individual, for that person or another, may not knowingly make a false statement or false representation or knowingly fail to disclose a material fact to receive or increase a benefit or other payment under this title or an unemployment insurance law of another state, the federal government, or a foreign government.

Md. Code Ann., Labor & Emp. Article, Section 8-1305(b)(2) provides that an individual who violates Section 8-1301 is disqualified from receiving benefits for one year from the date on which a determination is made that the claimant filed a claim involving a false statement or representation, or failed to disclose a material fact.

Md. Code Ann., Labor & Emp. Article, Section 8-809(b) provides that "if the Secretary finds that a claimant knowingly made a false statement or representation or knowingly failed to disclose a material fact to obtain or increase a benefit or other payment under this title, in addition to disqualification of the claimant, the Secretary may recover from the claimant:

- (1) all benefits paid to the claimant for each week for which the false statement or representation was made or for which the claimant failed to disclose a material fact; and
- (2) interest of 1.5% per month on the amount accruing from the date that the claimant is notified by the Secretary that the claimant was not entitled to benefits received."

EVALUATION OF EVIDENCE

The Agency obtained wage information from the two employers, Safeway and Manpower, which documented earned wages for specific weeks, detailed above. The claimant admits that he did not declare wages during these weeks but could not specifically recall what weeks he worked or how much he earned. Absent any documentation or testimony from the employer or Agency, the claimant was effectively able to rebut the presumption that he committed a fraud. However, it is apparent that the claimant is guilty of an

overpayment for these weeks and the decision in all of these cases will be that he is overpaid but that there was no indication of what specific fraudulent act.

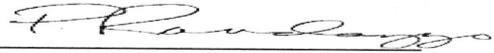
DECISION

IT IS HELD THAT the claimant did not knowingly make false statements or knowingly fail to disclose material facts to obtain or increase benefits within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-809(b). Therefore, the claimant shall not be subject to the one year eligibility proscription of Section 8-1305(b) (2). However, the claimant is in receipt of benefits to which the claimant is not entitled and which must be repaid under the Maryland Unemployment Insurance Law.

The amount of overpayment shall be determined by the Unemployment Insurance Claim Center. The claimant should contact the claim center to determine the amount of overpayment and to inquire about the other eligibility requirements of the law.

The claimant is held overpaid for the week of January 4, 2009 to the week ending January 10, 2009.

The determination of the Claims Specialist is affirmed.



P G Randazzo, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-767-2404. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.

Notice of Right to Petition for Review

Any party may request a review either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A (1) appeals may not be filed by e-mail. Your appeal must be filed by September 8, 2009. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787
Phone 410-767-2781

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing: July 27, 2009

AEH/Specialist ID: WCU28

Seq No: 010

Copies mailed on August 21, 2009 to:

HERMAN BROWN
MANPOWER INTERNATIONAL INC
LOCAL OFFICE #63
MANPOWER TEMPORARY SERVICES