

DECISION

Claimant:
RICHARD W SMITH

Decision No.: 5212-SE-13

Date: December 23, 2013

Appeal No.: 1306665

Employer:
BELTWAY INTERNATIONAL LLC

S.S. No.:

L.O. No.: 65

Appellant: Board Assumed Jurisdiction

Issue: Whether the claimant is monetarily eligible for benefits under Section 8-802 of the Labor and Employment Article.

- 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: January 22, 2014

- APPEARANCES -

FOR THE CLAIMANT:
Richard Smith
Alecia Frisby, Esquire

FOR THE EMPLOYER:
Fail to appear

AGENCY: Failed to appear

PROCEDURAL HISTORY

On February 27, 2013, the claimant, Richard W Smith, filed a timely appeal of the Benefit Determination dated February 27, 2013 which stated that the claimant was monetarily ineligible to receive unemployment benefits based on the standard base period pursuant to *Md. Code Ann., Lab. & Empl. Art., § 8-802 and § 8-803*. The claimant was held to not meet the monetary eligibility based on wages reported by the employer in the alternate base period under *§ 8-801*.

The Lower Appeals Division heard the claimant's appeal on March 20, 2013. The Board of Appeals ("Board") assumed jurisdiction of the claimant's case. The Board set a Special Examiner hearing for October 31, 2013 at 1:00 p.m., notice of which was sent to all parties.

After a review of the record and in consideration of new argument established at the Special Examiner's hearing, the Board adopts the hearing examiner's findings of facts and conclusions of law and makes additional conclusions of law. The decision of the hearing examiner is affirmed.

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. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

The issue in the case is whether the claimant is monetarily eligible for benefits pursuant to Section 8-802 of the Labor and Employment Article. This section states as follows:

§ 8-802. Wages for covered employment.

An individual is eligible for benefits if, during the base period:

- (1) the individual was paid wages of at least the lower quarterly wage amount in line 1 of the schedule of benefits in § 8-803 of this subtitle for covered employment during the calendar quarter in which the individual's wages were highest; and
- (2) the individual was paid wages for covered employment that, during at least 2 calendar quarters combined, are at least 1.5 times the upper limit of the wages for the line in the schedule of benefits for which the individual qualifies.

Section 8-802 provides that a claimant must have been paid wages for covered employment during at least two calendar quarters of his base period. To qualify for benefits, the claimant must have sufficient earnings during the applicable base period.

The Board has consistently ruled based on guidance and precedent from the 1963 Court of Appeals case of *Maryland Department of Employment Security v. Werner*, 231 Md. 474, 190 A.2d 786 (1963) that a claimant is eligible for those benefits for wages which are actually paid within the base period, not for wages earned during the qualifying base period. The Court held that determining whether a claimant has sufficient wages credited during his statutory base period to qualify him for unemployment compensation benefits, the clear, unambiguous legislative intent, as buttressed by the legislative history of the unemployment insurance law, is that eligibility is controlled by wages actually paid, and not by the wages earned, within the statutory base period.

However, the facts in the instant case can be distinguished from this precedent. In the instant case, the claim specialist found that the claimant was \$369 short to be eligible for benefits based on the wages reported by the employer. However, the claimant disputed these reported wages stating that the employer failed to pay him wages earned for the period in question. During this period, the claimant filed a claim with the Department of Labor, Licensing and Regulation's Division of Labor and Industry stating that the employer failed to pay him his wages. The investigation found that the claimant's wages were fraudulently withheld from him and the claimant was reimbursed those wages on January 15, 2013, in the amount of \$584.64. (*See Special Examiner Claimant Exhibit #1*) Thus, wages that should have been paid to the claimant, timely, would qualify him for benefits.

In *Werner*, *supra*, the facts are different than those in the present case. The claimant in *Werner* earned wages within one qualifying period, but those wages, while paid timely and without dispute, were not paid until the following qualifying period. At that time, the Court, agreed with the Department's argument, as follows:

As a matter of administrative feasibility, if the Department were to credit wages when earned, it would be necessary in every instance where the claimant qualified for less than the maximum amount of benefits to contact his employer to determine from his payroll records when each dollar of wages was actually earned. Needless to say, this would not only delay the payment of benefits, but it would also impose a great, if not impossible burden on the Department and on every employer.

Thus, the Court held, based on practical purposes, that eligibility for benefits are for wages paid to claimants not wages earned by claimants. Otherwise, if eligibility for benefits was based on wages earned there would be an unreasonable burden placed on the Agency to investigate every claim based on earned wages spanning two eligibility periods. The task would be onerous.

The instant decision by the Hearing Examiner is not adverse to the Court's well established precedent. The Board's ruling is merely distinguishing the facts from that of *Werner*. In *Werner*, the claimant was paid his wages timely; those wages straddled two separate qualifying periods. In the instant case, the claimant's wages were fraudulently withheld by the employer. It was not until the claimant brought a claim against the employer that his wages were paid. If not for the employer fraudulently withholding the claimant's wages, he would have qualified for benefits. It was the bad faith actions of the employer that

caused the claimant to be found ineligible because the employer failed to pay the claimant his earned wages.

The claimant's attorney provided the Board with the following analogy which the Board finds persuasive in distinguishing the outcome of the present case from that of *Werner*.

The Board has held that if an employer withholds a claimant's pay and the claimant voluntarily quits his employment, the claimant may be eligible to receive benefits because the claimant had good cause to quit employment. The obligations of the employment contract are reciprocal. While the employee has the obligation to work diligently and in good faith for the employer, the employer has an obligation to pay the remuneration agreed upon in a timely manner. *Quina v. Marlo Furniture Company, Inc., 1121-BR-92; Kimmell v. Dennis J. Smith, et.al., 2065-BR-92*. The failure to pay wages correctly and on time may constitute good cause for quitting one's employment. *Quina v. Marlo Furniture Company, Inc., 1121-BR-92; Kimmell v. Dennis J. Smith, et.al., 2065-BR-92*. Changes in the method or amount of payment may constitute good cause. *See Butka v. John Ferguson Company, 225-BR-89; Smith v. James Hondroulis, 1687-BR-92*. If wages are not paid correctly and on time, the damage to the claimant has already been done. *Kimmell v. Dennis J. Smith, et.al., 2065-BR-92*.

Counsel in the instant case argues, and the Board agrees, that the same unlawful act of withholding wages allowing a claimant to have good cause to quit, would prevent the claimant from being ineligible to receive benefits based on inadequate wages. Thus, creating an unjust result because of the fraudulent activity of the employer.

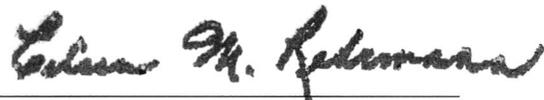
In conclusion, the Board finds, based on the facts in the instant case, that the claimant is eligible to receive benefits pursuant to *Md. Code Ann., Lab. & Empl. Art., § 8-802*. The decision of the hearing examiner is affirmed.

DECISION

The Board holds that the claimant has established monetary eligibility within the meaning and intent of *Md. Code Ann., Lab. & Empl. Art., § 8-802*. Benefits are allowed from the week beginning January 6, 2013, provided that the claimant meets the other eligibility requirement of the law.



Donna Watts-Lamont, Chairperson



Eileen M. Rehrmann, Associate Member

VD

Date of hearing: October 31, 2013

Copies mailed to:

RICHARD W. SMITH

BELTWAY INTERNATIONAL LLC

DENNIS MORTON

SUSAN BASS DLLR

BETTY MULL

JIM MCVICKER

ALECIA FRISBY STAFF ATTY.

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

RICHARD W SMITH

SSN #

Claimant

vs.

BELTWAY INTERNATIONAL LLC

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: 1306665

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

April 2, 2013

For the Claimant: PRESENT

For the Employer:

For the Agency:

ISSUE(S)

Whether the claimant is in receipt of vacation or holiday pay pursuant to Sec. 1007 of the Labor and Employment Article, Title 8; whether the claimant is monetarily ineligible because the claimant has not earned sufficient wages during the Base Period pursuant to Section 101 & 802 of the Labor and Employment Article, Title 8; whether the claimant is entitled to partial unemployment benefits within the meaning of Section 803; whether the claimant is overpaid within the meaning of Section 8-809a.

FINDINGS OF FACT

The claimant, Richard Smith, first filed for benefits during the week beginning January 6, 2013. The claimant had worked for Beltway International from August 6, 2011, through October 25, 2012, earning \$38,000 per year.

The Agency determined that the claimant did not earn sufficient wages during the base period to be eligible for benefits. As such, the Agency looked at the claimant's high quarter wages and total wages. The claimant's calculation required that the claimant earn \$7452 in total wages. The Agency, based upon information provided by the employer, believed that the claimant only earned \$7083 in total wages. At the conclusion of the claimant's employment, the employer improperly withheld salary from the claimant in the amount of \$584.64. This was not reimbursed to the claimant until January 15, 2013. As such, it was not included in the total wages calculation conducted by the Agency.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-802 provides that "(a)n individual is eligible for benefits if, during the base period:

(1) the individual was paid wages of at least the lower quarterly wage amount in line 1 of the schedule of benefits in Section 8-803 of this subtitle for covered employment during the calendar quarter in which the individual's wages were highest; and

(2) the individual was paid wages for covered employment that, during at least 2 calendar quarters combined, are at least 1.5 times the upper limit of the wages for the line in the schedule of benefits for which the individual qualifies.

EVALUATION OF EVIDENCE

The claimant has the burden of producing sufficient facts to show that the original Agency determination in this case was incorrect. The claimant presented credible evidence that his total wages were improperly reported to the Agency. Neither the Agency nor the employer appeared at the hearing to dispute the evidence presented. As such, a new calculation is required by the Agency to determine the actual amount of the claimant's weekly benefit amount. This calculation is to include an additional \$584.64.

DECISION

IT IS HELD THAT the claimant has established monetary eligibility within the meaning and intent of Md. Code Ann., Labor & Emp. Article, Section 8-802. Benefits are allowed from the week beginning January 6, 2013, provided that the claimant meets the other eligibility requirements of the Maryland Unemployment Insurance Law. The claimant may contact the Claimant Information Service concerning the other eligibility requirements of the law at ui@dllr.state.md.us or call 410-949-0022 from the Baltimore region, or 1-800-827-4839 from outside of the Baltimore area. Deaf claimants with TTY may contact Client Information Service at 410-767-2727, or outside the Baltimore area at 1-800-827-4400.

The determination of the Claims Specialist is affirmed.



M Franceschini, 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 April 17, 2013. 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 : March 20,2013
TH/Specialist ID: RBA3E
Seq No: 002
Copies mailed on April 2, 2013 to:

RICHARD W. SMITH
BELTWAY INTERNATIONAL LLC
LOCAL OFFICE #65
DENNIS MORTON
SUSAN BASS DLLR
BETTY MULL
JIM MCVICKER