

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM**

Form 1850

DECISION

MARGARET M WICKHAM
05759 COUNTY ROAD 689
SOUTH HAVEN, MI 49090

ADECCO CS INC
PO BOX 182366
COLUMBUS, OH 43218

ADMINISTRATIVE LAW JUDGE: STEPHEN B. GOLDSTEIN

SSN: XXX-XX-9482

Appeal No.: 16-021211

Case No.: 3185802

ORDER


The Agency's July 6, 2016 denial is set aside, vacated and dismissed with prejudice.

The November 21, 2014 Adjudication is set aside, vacated and dismissed with prejudice.

The claimant is not disqualified for benefits and is not liable for restitution and penalties under Sections 62(a), 62(b) and 54(b) of the Act.

The claimant is entitled to benefits for each claimed week following the date of filing, if otherwise eligible and qualified.

Decision Date: September 28, 2016



**STEPHEN B. GOLDSTEIN
ADMINISTRATIVE LAW JUDGE**

PARTICIPANTS

		09-21-16					
		Sworn		Sworn		Sworn	
Claimant	Margaret M. Wickham	X	X				
Representative	Samir Hanna, Supervising Attorney	X					
Witness	Andrew Eberle, Student Attorney	X					
Witness							
Witness							
Witness							
Employer	Opted not to participate						
Representative							
Witness							
Witness							
Witness							
Witness							
Witness							
Witness							
Witness							
	Mark Weishar, Unemployment Insurance Agency Examiner	X	X				

EXHIBITS

NO	SUBMITTED BY			DOCUMENT DATED	FORM NO	DOCUMENT DESCRIPTION
	UIA	E	C			
						None

JURISDICTION

On July 29, 2016, the claimant timely appealed a July 6, 2016 Unemployment Insurance Agency (Agency) Denial of Request for Re-Consideration or Re-Determination (denial) under Section 32a(2) of the Michigan Employment Security Act (Act). The July 6, 2016 denial concerns a November 21, 2014 Agency Notice of Determination (Adjudication) holding the claimant disqualified for benefits and liable for restitution and penalties under the fraud provisions of Sections 62(a), 62(b) and 54(b) of the Act.

APPLICABLE LAW

Sections 62(a), 62(b) and 54(b)

MCL 421.62(a) provides:

- (a) If the unemployment agency determines that a person has obtained benefits to which that person is not entitled, or a subsequent determination by the agency or a decision of an appellate authority reverses a prior qualification for benefits, the agency may recover a sum equal to the amount received plus interest by 1 or more of the following methods: deduction from benefits or wages payable to the individual, payment by the individual in cash, or deduction from a tax refund payable to the individual as provided under section 30a of 1941 PA 122, MCL 205.30a. Deduction from benefits or wages payable to the individual is limited to not more than 50% of each payment due the claimant. The unemployment agency shall issue a determination requiring restitution within 3 years after the date of finality of a determination, redetermination, or decision reversing a previous finding of benefit entitlement. The unemployment agency shall not initiate administrative or court action to recover improperly paid benefits from an individual more than 3 years after the date that the last determination, redetermination, or decision establishing restitution is final. The unemployment agency shall issue a determination on an issue within 3 years from the date the claimant first received benefits in the benefit year in which the issue arose, or in the case of an issue of intentional false statement, misrepresentation, or concealment of material information in violation of section 54(a) or (b) or sections 54a to 54c, within 6 years after the receipt of the improperly paid benefits unless the unemployment agency filed a civil action in a court within the 3-year or 6-year period; the individual made an intentional false statement, misrepresentation, or concealment of material information to obtain the benefits; or the unemployment agency issued a determination requiring restitution within the 3-year or 6-year period.

Except in a case of an intentional false statement, misrepresentation, or concealment of material information, the unemployment agency shall waive recovery of an improperly paid benefit if the payment was not the fault of the individual and if repayment would be contrary to equity and good conscience and shall waive any interest. If the agency or an appellate authority waives collection of restitution and interest, except as provided in subdivision (ii), the waiver is prospective and does not apply to restitution and interest payments already made by the individual.

As used in this subsection, "contrary to equity and good conscience" means any of the following:

(i) The claimant provided incorrect wage information without the intent to misrepresent, and the employer provided either no wage information upon request or provided inaccurate wage information that resulted in the overpayment.

(ii) The claimant's disposable household income, exclusive of social welfare benefits, is at or below the annual update of the poverty guidelines most recently published in the federal register by the United States department of health and human services under the authority of 42 USC 9902(2), and the claimant has applied for a waiver under this subsection. A waiver granted under the conditions described in this subdivision applies from the date the application is filed.

(iii) The improper payments resulted from an administrative or clerical error by the unemployment agency. A requirement to repay benefits as the result of a change in judgment at any level of administrative adjudication or court decision concerning the facts or application of law to a claim adjudication is not an administrative or clerical error for purposes of this subdivision.

MCL 421.62(b) provides:

(b) For benefit years beginning on or after October 1, 2000, if the unemployment agency determines that a person has intentionally made a false statement or misrepresentation or has concealed material information to obtain benefits, whether or not the person obtains benefits by or because of the intentional false statement, misrepresentation, or concealment of material information, the person shall, in addition to any other applicable interest and penalties, have his or her rights to benefits for the benefit year in which the act occurred canceled as of the date the claimant made the false statement or misrepresentation or concealed material information, and wages used to establish that benefit year shall not be

used to establish another benefit year. A chargeable employer may protest a claim filed after October 1, 2014 to establish a successive benefit year under section 46(c), if there was a determination by the unemployment agency or decision of a court or administrative tribunal finding that the claimant made a false statement, made a misrepresentation, or concealed material information related to his or her report of earnings for a preceding benefit year claim. If a protest is made, any unreported earnings from the preceding benefit year that were falsely stated, misrepresented, or concealed shall not be used to establish a benefit year for a successive claim. Before receiving benefits in a benefit year established within 4 years after cancellation of rights to benefits under this subsection, the individual, in addition to making the restitution of benefits established under subsection (a), may be liable for an additional amount as otherwise determined by the unemployment agency under this act, which may be paid by cash, deduction from benefits, or deduction from a tax refund. The individual is liable for any fee the federal government imposes with respect to instituting a deduction from a federal tax refund. Restitution resulting from the intentional false statement, misrepresentation, or concealment of material information is not subject to the 50% limitation provided in subsection (a).

MCL 421.54(b) provides:

(b) Any employing unit or an owner, director, officer, or agent of an employing unit, a claimant, an employee of the unemployment agency, or any other person who makes a false statement or representation knowing it to be false, or knowingly and willfully with intent to defraud fails to disclose a material fact, to obtain or increase a benefit or other payment under this act or under the unemployment compensation law of any state or of the federal government, either for himself or herself or any other person, to prevent or reduce the payment of benefits to an individual entitled thereto or to avoid becoming or remaining a subject employer, or to avoid or reduce a contribution or other payment required from an employing unit under this act or under the unemployment compensation law of any state or of the federal government, as applicable, is subject to administrative fines and is punishable as follows, notwithstanding any other penalties imposed under any other statute of this state or of the United States:

(i) If the amount obtained as a result of the knowing false statement or representation or the knowing and willful failure to disclose a material fact is less than \$500.00, the unemployment agency may recover the amount obtained as a result of the knowing false statement or representation or the knowing and willful failure to disclose a material fact and may also recover damages equal to 2 times that amount. For a second or subsequent violation described in this subdivision, the unemployment agency may recover damages equal to 4 times the amount obtained.

(ii) If the amount obtained as a result of the knowing false statement or representation or the knowing and willful failure to disclose a material fact is \$500.00 or more, the unemployment agency shall attempt to recover the amount obtained as a result of the knowing false statement or representation or the knowing and willful failure to disclose a material fact and may also recover damages equal to 4 times that amount. The unemployment agency may refer the matter to the prosecuting attorney of the county in which the alleged violation occurred for prosecution. If the unemployment agency has not made its own determination under this subdivision, the recovery sought by the prosecutor shall include the amount described in this subdivision and shall also include 1 or more of the following penalties if the amount obtained is \$1,000.00 or more:

(A) Subject to redesignation under subsection (l), if the amount obtained or withheld from payment as a result of the knowing false statement or representation or the knowing and willful failure to disclose a material fact is \$1,000.00 or more but less than \$25,000.00, then 1 of the following:

(I) Imprisonment for not more than 1 year.

(II) The performance of community service of not more than 1 year but not to exceed 2,080 hours.

(III) A combination of (I) and (II) that does not exceed 1 year.

(B) If the amount obtained or withheld from payment as a result of the knowing false statement or representation or the knowing and willful failure to disclose a material fact is \$25,000.00 or more, then 1 of the following:

(I) Imprisonment for not more than 2 years.

(II) The performance of community service of not more than 2 years but not to exceed 4,160 hours.

(III) A combination of (I) and (II) that does not exceed 2 years.

(C) If the knowing false statement or representation or the knowing and willful failure to disclose a material fact made to obtain or withhold an amount from payment does not result in a loss to the commission, then a recovery shall be sought equal to 3 times the amount that would have been obtained by the knowing false statement or representation or the knowing and willful failure to disclose a material fact, but not less than \$1,000.00, and 1 of the following:

(I) Imprisonment for not more than 2 years.

(II) The performance of community service of not more than 2 years but not to exceed 4,160 hours.

(III) A combination of (I) and (II) that does not exceed 2 years.

FINDINGS OF FACT

On November 21, 2014, the Agency issued an Adjudication which states, in pertinent part, as follows:

“...Issues and Section(s) of Michigan Employment Security Act involved: misrepresentation and 62(b)

Your actions indicate you intentionally misled and/or concealed information to obtain benefits you were not entitled to receive.

Benefits will be terminated on any claims active on April 5, 2014.

You are disqualified for benefits under MES Act, Sec. 62(b). Restitution is due under MES Act, Sec. 62(a). The wages used to establish your claim are cancelled and no further benefits will be paid based on those wages. In addition, you are required to pay the penalty assessed based on this determination under MES Act, Sec. 54(b).”

“...”

DECISION

In *Brooks Williamson & Associates, Inc. v. Mayflower Const. Co.*, 308 Mich. App. 18, 35, 863 N.W.2d 333, 343 (2014), the Michigan Court of Appeals held that, "...an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, [70 S.Ct. 652, 94 L.Ed. 865] (1950). The Court further held that the failure to give notice violates "the most rudimentary demands of due process of law." *Armstrong v. Manzo*, 380 U.S. 545, 550, [85 S.Ct. 1187, 14 L.Ed.2d 62] (1965). [*Id.* at 84, 108 S.Ct. 896.]

Michigan law requires that, when pleading a cause of action involving fraud, the circumstances alleged to constitute fraud must be stated with particularity. *MCR 2.112(B)(1)*; *Kassab v Michigan Basic Property Insurance Association*, 441 Mich 433 (1992). "Facts showing the time, place, contents of the misrepresentation or nature of the misleading acts, facts misrepresented, and identification of what was obtained thereby, should be sufficient." *Robert Dean & Ronald S. Longhofer, Michigan Court Rules Practice, §2112.3, at 291 (4th Ed 1998)*

Here, the November 21, 2014 Adjudication concludes that the claimant's "actions" indicate she intentionally misled and/or concealed information to obtain benefits to which she was not otherwise entitled. The Adjudication includes no factual assertion(s) in support of that vague generalized legal conclusion.

I conclude that the Agency's omission of particularized factual assertions in support of its legal conclusions violates Michigan law concerning the pleading of causes of action involving fraud. This practice also violates the most rudimentary demands of due process of law by failing to apprise the claimant of specifically when, why and how her "actions" constitute intentional misrepresentation of material fact.

The United States Department of Labor has issued instructions to State Agencies concerning the requirements of Federal Law. This guidance includes the following:

for all determinations, including overpayments and fraud, the individual must be provided with a written determination which provides **sufficient information to understand the basis for the determination** and how/when an appeal must be filed **and must also include the facts on which the determination is based, the reason for allowing or denying benefits, the legal basis for the determination, and potential penalties or consequences.** (**Emphasis added**)

***Advisory System, US Department of Labor, Unemployment Insurance Program
Letter No. 1-16 (October 1, 2015), Federal Law Requirement Overview, Section 4 a.***

Not only does the November 21, 2014 Adjudication fail to provide the claimant with factual information sufficient to assist her in understanding the basis for the Agency's conclusions, it also fails to include the potential penalties or consequences arising from her alleged actions. Thus, the Adjudication fails to comply with the aforementioned Federal guidance on the issue.

The November 21, 2014 Adjudication additionally fails to comport with Section 32(a) of the Act. Section 32(a) requires that the Agency examine claims and render determinations on the facts. The Agency lacks jurisdiction to render adjudications containing summary legal conclusions un-supported by factual assertions. (Emphasis supplied by Administrative Law Judge).

For the above reasons, I conclude that the Agency's November 21, 2014 Adjudication is facially defective as a matter of law. It is therefore void, set aside, vacated and dismissed. Additionally, because the Agency's denial of re-consideration concerns a facially defective and therefore invalid underlying Adjudication, it is of no legal force or effect. Therefore, it must also be set aside, vacated and dismissed as a matter of law.

IMPORTANT: TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME

This Order will become final unless an interested party takes ONE of the following actions: (1) files a written, signed, request for rehearing/reopening to the Administrative Law Judge, or by an office or agent office of the agency OR (2) files a written, signed, appeal to the Michigan Compensation Appellate Commission at P.O. Box 30475, Lansing, MI 48909-7975 (Facsimile: 517-241-7326); OR (3) files a direct appeal, upon stipulation, to the Circuit Court on or before:

OCTOBER 28, 2016

I, S. Duncan, certify a copy of this order has been sent on the day it was signed, to each of the parties at their respective addresses on record.

(SEE ATTACHED SHEET)

REQUEST FOR REHEARING OR REOPENING BEFORE AN ADMINISTRATIVE LAW JUDGE

When the appeal to the Administrative Law Judge (ALJ) has been dismissed for lack of prosecution or a party is in possession of newly discovered material information not available when the case was heard by the ALJ, the party may request rehearing in writing before the ALJ instead of appealing to the Michigan Compensation Appellate Commission (Commission). A request for rehearing must be signed by the requesting party or their agent, and RECEIVED by the Michigan Administrative Hearing System (MAHS) at **611 West Ottawa, 2nd Floor, Lansing, MI 48933** or by an office or agent office of the agency, within 30 calendar days after the date of this decision. The party requesting rehearing must also serve the request on the opposing party. A rehearing request received (as described above) more than 30 days after the decision is mailed, shall be treated as a request for reopening.

The ALJ may, for good cause, reopen and review this decision and issue a new decision or issue a denial of rehearing/reopening.

If a request for rehearing or reopening is not received by MAHS, and an appeal to the Commission is not submitted, the hearing decision becomes final.

If the Agency fails to comply with an ALJ decision or order more than 30 days, but within 1 year, after the date of mailing of the decision, you may request, in writing, that the ALJ reopen the matter. You must serve a copy of the request to reopen on the other party.

APPEAL TO THE MICHIGAN COMPENSATION APPELLATE COMMISSION

The Michigan Compensation Appellate Commission (Commission) consists of up to nine members appointed by the governor and is not part of the Unemployment Insurance Agency (UIA).

An appeal to the Commission shall be in writing and signed by the party or his/her agent and RECEIVED directly by the COMMISSION within 30 days after the mailing of the ALJ's hearing decision or order denying rehearing or reopening. A timely appeal or request for rehearing/reopening may be made by personal service, postal delivery (**P.O. Box 30475, Lansing, MI 48909-7975**), facsimile transmission (**517.241.7326**), or other electronic means as prescribed by the Commission.

The timely appeal/request may also seek to present additional evidence in connection with the appeal or request an oral argument before the Commission. The Commission may consider written argument only if all parties are represented; by agreement of the parties; the Commission orders oral argument; or the Commission orders evidence be produced before it. For additional information, please review the Mich Admin Code, Rules 792.11416 through 792.11429 or visit <http://www.michigan.gov/lara/0,4601,7-154-35738---,00.html>.

An appeal cannot be requested by telephone, but information about the appeal process can be obtained by calling (800) 738-6372 or visiting http://www.michigan.gov/documents/uia_UC1800_76144_7.pdf.

BY-PASS OF COMMISSION/DIRECT APPEAL TO THE CIRCUIT COURT

A party may by-pass appealing to the Commission and appeal a decision or final order of an ALJ directly to a circuit court in the county in which the Claimant resides or in the county in which the Claimant's place of employment is (or was) located, or if the Claimant is not a party to the case, the circuit court in the county in which the employer's principal place of business in this state is located, if the parties (Claimant and Employer), or their respective authorized agents/attorneys, sign a timely written stipulation agreeing to the direct appeal to the circuit court. **The stipulation must be mailed to the Michigan Administrative Hearing System, 3026 W. Grand Blvd, 2nd Floor Annex, Suite 2-700, Detroit, Michigan 48202.** Application for review to a circuit court must be made within 30 days after the mailing date decision or final order by any method permissible under the rules and practices of the circuit court.

The responsibility for properly and timely filing an appeal with the clerk of the circuit court rests with the party filing the appeal.