

STATE OF MICHIGAN
MICHIGAN COMPENSATION APPELLATE COMMISSION

In the Matter of

BRIAN D. SAYLOR,

Appeal Docket No.: 16-029845-252338W

Claimant,

Social Security No.: XXX-XX-0498

C. L. RIECKHOFF COMPANY INC.,

Employer.

DECISION OF MICHIGAN COMPENSATION APPELLATE COMMISSION

This case is before the Michigan Compensation Appellate Commission (Commission) pursuant to the claimant's timely appeal from a February 2, 2017 Administrative Law Judge (ALJ) order denying the claimant's request for rehearing. The claimant requested rehearing of the ALJ's November 15, 2016 decision finding the claimant committed fraud and owed penalties under Sections 54(b) and 62(b) of the Michigan Employment Security Act¹ (Act) and that the claimant established good cause for late appeal of an August 23, 2016 Unemployment Insurance Agency (Agency) redetermination. Under Michigan Administrative Code (MAC), Rule 792.11414(5), the Commission will review both the February 2, 2017 denial of rehearing and the ALJ's previous decision issued on November 15, 2016.

Rehearings are granted or denied at the discretion of the ALJ.² After reviewing the record, the Commission finds that there has not been an abuse of discretion. Therefore, the ALJ's February 2, 2017 order denying rehearing is affirmed.

The Commission has reviewed the ALJ's November 15, 2016 decision in light of the evidence appearing in the record prior to the claimant's request for rehearing. We affirm that portion of the ALJ's decision finding the claimant established good cause for late appeal of the August 23, 2016 redetermination. We set aside that portion of the ALJ's decision finding that the claimant committed fraud and owed penalties under Sections 54(b) and 62(b) of the Act. Our reasons are as follows.

Section 32(a) of the Act provides, in part:

The unemployment agency shall designate representatives who shall promptly examine claims and make a determination on the facts. . . . The claimant and other

¹ MCL 421.1 *et seq.*

² MCL 421.33(1); MAC, Rule 792.11414(4).

interested parties shall be promptly notified of the determination and the reasons for the determination. [Emphasis added.]

Section 32(f) of the Act provides:

The issuance of each benefit check shall be considered a determination by the unemployment agency that the claimant receiving the check was covered during the compensable period, and eligible and qualified for benefits. A chargeable employer, upon receipt of a listing of the check as provided in section 21(a), may protest by requesting a redetermination of the claimant's eligibility or qualification as to that period and a determination as to later weeks and benefits still unpaid that are affected by the protest. Upon receipt of the protest or request, the unemployment agency shall investigate and redetermine whether the claimant is eligible and qualified as to that period. If, upon the redetermination, the claimant is found ineligible or not qualified, the unemployment agency shall proceed as described in section 62. In addition, the unemployment agency shall investigate and determine whether the claimant obtained benefits for 1 or more preceding weeks within the series of consecutive weeks that includes the week covered by the redetermination and, if so, shall proceed as described in section 62 as to those weeks.

On August 23, 2016, the Agency issued a redetermination that held the claimant committed fraud and owed penalties under Sections 54(b) and 62(b) of the Act because the claimant's "actions indicate [he] intentionally misled and/or concealed information to obtain benefits."³ The record reflects that the August 23, 2016 redetermination was the first adjudication issued in this case. In these cases, the Agency considers the benefit check to be the determination under Section 32(f).

As stated above, a benefit check is considered a determination that the claimant was eligible and qualified during the period covered by the check. **Upon a protest by an employer**, the Agency may only issue "a redetermination of the claimant's eligibility or qualification **as to that period and a determination as to later weeks...that are affected by the protest.**" (Emphasis added.) Only upon receiving the employer's protest may the Agency redetermine the claimant's eligibility or qualification during the time period covered by the check. Section 32(f) of the Act provides the Agency with authority to issue redeterminations **ONLY** upon the protest of an employer. Without an employer protest, the benefit check cannot serve as the basis for a valid redetermination. Even with an employer protest, the Agency may only issue a "redetermination of the claimant's eligibility or qualification as to that period" covered by the check.

³ The Agency also issued an accompanying August 23, 2016 redetermination holding the claimant ineligible for benefits under the employed provision of the Act, Section 48, starting May 15, 2016. That issue is disposed of via Commission Appeal No. 252337.

In this case, there is no evidence of any employer protest of the claimant's eligibility or qualification during the time period covered by the benefit check despite the language of Section 32(f) of the Act clearly requiring an employer protest before any Agency action under that provision. Rather, the Agency appears to have issued the redetermination on its own motion, which it has no authority to do. Thus, the Agency's ability to issue a redetermination under Section 32(f) of the Act was not properly triggered.

Additionally, the August 23, 2016 redetermination indicates that the claimant "intentionally misled and/or concealed information to obtain benefits you were not entitled to receive." Thus, the August 23, 2016 redetermination deals with intentional misrepresentation and does not relate to whether or not the claimant was eligible or qualified during any period of time. Therefore, as a matter of logic, it cannot be a redetermination of a previous benefit check determination.

Any redetermination of a benefit check determination under Section 32(f) of the Act may only cover the time period covered by the redetermined benefit check. Benefit checks only cover two weeks yet the August 23, 2016 redetermination held that the claimant committed fraud and owed restitution and fraud penalties on account of benefits received from May 15, 2016 through July 16, 2016.

The Agency's August 23, 2016 redetermination thus constitutes multiple violations of Section 32(f) of the Act. Without an employer protest of the benefit check determination, the Agency was without authority to issue a redetermination of the benefit check determination.⁴ Even with an employer protest, the Agency's August 23, 2016 redetermination was invalid because it covered a time period beyond that covered by the benefit check and failed to address the claimant's eligibility or qualification during that time period. Thus, the Agency's August 23, 2016 redetermination was issued in violation of the Act and the product of following unlawful procedures.

Even if the Agency had statutory authority under Section 32(f) of the Act to issue the August 23, 2016 redetermination, the Agency failed to issue the redetermination in a timely manner and include necessary information. At the latest, the benefit check covering the time period including May 15, 2016 would have been issued in late June 2016.

Section 32a of the Act provides, in pertinent part:

- (1) Upon application by an interested party for review of a determination, upon request for transfer to an administrative law judge for a hearing filed with the unemployment agency within 30 days after the mailing or personal service of a notice of determination, or upon the unemployment agency's own motion within that 30-day period, the unemployment agency shall review any determination. **After review, the unemployment agency shall issue a redetermination**

⁴ The Agency did, however, have authority to issue a determination covering the entire relevant time period under Section 32(a) of the Act.

affirming, modifying, or reversing the prior determination and stating the reasons for the redetermination, or may in its discretion transfer the matter to an administrative law judge for a hearing. If a redetermination is issued, the unemployment agency shall promptly notify the interested parties of the redetermination, the redetermination is final unless within 30 days after the mailing or personal service of a notice of the redetermination an appeal is filed with the unemployment agency for a hearing on the redetermination before an administrative law judge in accordance with section 33. [Emphasis added.]

- (2) The unemployment agency may, for good cause, including any administrative clerical error, reconsider a prior determination or redetermination after the 30-day period has expired and after reconsideration issue a redetermination affirming, modifying, or reversing the prior determination or redetermination, or transfer the matter to an administrative law judge for a hearing. A reconsideration shall not be made unless the request is filed with the unemployment agency, or reconsideration is initiated by the unemployment agency with notice to the interested parties, within 1 year from the date of mailing or personal service of the original determination on the disputed issue.

The Agency's August 23, 2016 redetermination was not issued by the Agency within 30 days of the benefit check determination, and the Agency did not present any indication of good cause for the reconsideration. Thus, the Agency's August 23, 2016 redetermination was issued in violation of Section 32a(2) of the Act.

Additionally, a redetermination must be a document "affirming, modifying, or reversing the prior determination" and "state the reasons for the redetermination."⁵ The August 23, 2016 redetermination does not include any reference whatsoever to any prior determination with the exception of a statement that "[t]his (re)determination is being issued as a result of the determination in case 0-007-512-462 involving Not Unemployed 48." The Act requires the redetermination to affirm, modify, or reverse a previous determination, which the August 23, 2016 redetermination clearly does not do. It merely refers to a somewhat related but distinct determination in a different case. Thus, in addition to being an invalid adjudication under Section 32(f) of the Act and an untimely redetermination under Section 32a(2) of the Act, the August 23, 2016 redetermination failed to include the basic information required by Section 32a(1) of the Act.

The Agency's August 23, 2016 redetermination was issued in violation of numerous provisions of law: (1) the Agency had no authority to act under Section 32(f) of the Act without an employer protest; (2) Section 32(f) provides no authority to make a misrepresentation finding; (3) the redetermination impermissibly covered a time period outside the time period covered by the benefit check; (4) the redetermination was untimely without good cause shown under Section

⁵ MCL 421.32a(2).

32a(2); and (5) the redetermination failed in nearly every respect to conform to the requirements of a redetermination under Section 32a(1) of the Act.

Thus, we find that the Agency issued the August 23, 2016 redetermination in violation of Sections 32(f), 32(a), 32a(2), and 32a(1) of the Act. The Agency's unlawful actions deprived the parties of the protections inherent in the Act's procedural requirements.

Section 306 of the Michigan Administrative Procedures Act⁶ (APA) provides, in part:

- (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
 - a. In violation of the constitution or a statute.
 - b. . . .
 - c. Made upon unlawful procedure resulting in material prejudice to a party.
 - d. . . .
 - e. . . .
 - f. Affected by other substantial and material error of law.

We are mindful that the APA speaks to the courts, not the Commission. However, the Commission will not knowingly issue a decision that we believe falls into the category of decisions that are mandated to be vacated by a court on appeal. The Agency's August 23, 2016 redetermination was issued in violation of the Act and made upon an unlawful procedure. The claimant was materially prejudiced by the inherent confusion created by the Agency's actions and the Agency's deprivations of the claimant's procedural rights under the Act. Thus, the proper action is to hold the redetermination unlawful and set it aside. As a result, there exists no valid Agency adjudication regarding misrepresentation under Sections 54(b) and 62(b) of the Act. Therefore, we set aside the ALJ's decision affirming the Agency's August 23, 2016 redetermination.

Therefore,

IT IS ORDERED that the ALJ's February 2, 2017 order denying the claimant's request for rehearing is affirmed.

⁶ MCL 24.201 *et seq.*

IT IS FURTHER ORDERED that the ALJ's finding that the claimant established good cause for late appeal of the Agency's August 23, 2016 redetermination is affirmed.

IT IS FURTHER ORDERED that the ALJ's November 15, 2016 decision is set aside.

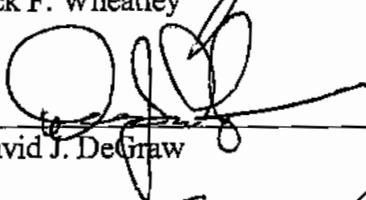
IT IS FURTHER ORDERED that the Agency's August 23, 2016 redetermination is set aside without prejudice.

IT IS FURTHER ORDERED that the August 23, 2016 redetermination shall not provide the basis for any action against the interest of any party in this matter.

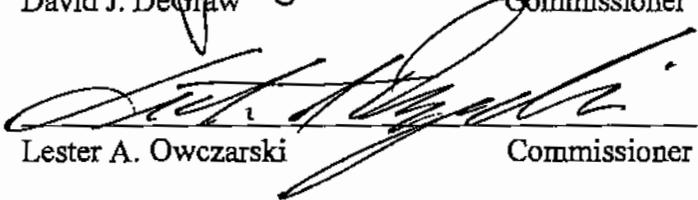
This matter is referred to the Agency for action consistent with this decision.



Jack F. Wheatley Commissioner



David J. DeGraw Commissioner



Lester A. Owczarski Commissioner

MAILED AT LANSING, MICHIGAN AUG 17 2017

This decision shall be final unless EITHER (1) the Michigan Compensation Appellate Commission RECEIVES a written request for rehearing on or before the deadline, OR (2) the appropriate circuit court RECEIVES an appeal on or before the deadline. The deadline is:

 SEP 18 2017

TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME.

STATE OF MICHIGAN
MICHIGAN COMPENSATION APPELLATE COMMISSION

In the Matter of

BRIAN D. SAYLOR,

Appeal Docket No.: 16-029832-252337W

Claimant,

Social Security No.: XXX-XX-0498

C. L. RIECKHOFF COMPANY INC.,

Employer.

DECISION OF MICHIGAN COMPENSATION APPELLATE COMMISSION

This case is before the Michigan Compensation Appellate Commission (Commission) pursuant to the claimant's timely appeal from a February 2, 2017 Administrative Law Judge (ALJ) order denying the claimant's request for rehearing. The claimant requested rehearing of the ALJ's November 15, 2016 decision finding him ineligible for benefits under the employed provision of the Michigan Employment Security Act¹ (Act), Section 48, starting May 15, 2016. Under Michigan Administrative Code (MAC) Rule 792.11414(5), the Commission will review both the February 2, 2017 denial of rehearing and the ALJ's previous decision issued on November 15, 2016.

Rehearings are granted or denied at the discretion of the ALJ.² After reviewing the record, the Commission finds that there has not been an abuse of discretion. Therefore, the ALJ's February 2, 2017 order denying rehearing is affirmed.

The Commission reviewed the ALJ's November 15, 2016 decision in light of the evidence appearing in the record made prior to the claimant's request for rehearing. We affirm that portion of the ALJ's decision finding the claimant established good cause for late appeal of the August 23, 2016 redetermination. We reverse that portion of the ALJ's decision finding the claimant ineligible for benefits under the employed provision of the Act, Section 48. Our reasons are as follows.

Section 32(a) of the Act provides, in part:

The unemployment agency shall designate representatives who shall promptly examine claims and make a determination on the facts. . . . The claimant and other

¹ MCL 421.1 *et seq.*

² MCL 421.33(1); MAC, Rule 792.11414(4).

interested parties shall be promptly notified of the determination and the reasons for the determination. [Emphasis added.]

Section 32(f) of the Act provides:

The issuance of each benefit check shall be considered a determination by the unemployment agency that the claimant receiving the check was covered during the compensable period, and eligible and qualified for benefits. A chargeable employer, upon receipt of a listing of the check as provided in section 21(a), may protest by requesting a redetermination of the claimant's eligibility or qualification as to that period and a determination as to later weeks and benefits still unpaid that are affected by the protest. Upon receipt of the protest or request, the unemployment agency shall investigate and redetermine whether the claimant is eligible and qualified as to that period. If, upon the redetermination, the claimant is found ineligible or not qualified, the unemployment agency shall proceed as described in section 62. In addition, the unemployment agency shall investigate and determine whether the claimant obtained benefits for 1 or more preceding weeks within the series of consecutive weeks that includes the week covered by the redetermination and, if so, shall proceed as described in section 62 as to those weeks.

On August 23, 2016, the Unemployment Insurance Agency (Agency) issued a redetermination that held the claimant ineligible for benefits under the employed provision of the Act, Section 48, starting May 15, 2016.³ The record reflects the August 23, 2016 redetermination was the first adjudication issued in this case. In these cases, the Agency considers the benefit check to be the determination.

As stated above, a benefit check is considered a determination that the claimant was eligible and qualified during the period covered by the check. **Upon a protest by an employer**, the Agency may only issue "a redetermination of the claimant's eligibility or qualification **as to that period and a determination as to later weeks . . . that are affected by the protest.**" (Emphasis added.) Thus, without an employer protest, the benefit check cannot serve as the basis for a valid redetermination. Even with an employer protest, the Agency may only issue a "redetermination . . . as to that period" covered by the check.

In this case, there is no evidence of any employer protest of the claimant's eligibility or qualification for the time period covered by the benefit check. Rather, the Agency appears to have

³ The Agency also issued an accompanying August 23, 2016 redetermination holding the claimant committed fraud and owed penalties under Sections 54(b) and 62(b) of the Act for misrepresenting his employment status to the Agency during that same time. That issue is disposed of via Commission Appeal No. 252338.

issued the redetermination on its own motion, which it has no authority to do. Thus, the Agency's ability to issue a redetermination under Section 32(f) of the Act was not triggered.

Even if there was an employer protest, the Agency's actions were still contrary to Section 32(f) of the Act. Benefit checks only cover two weeks. The August 23, 2016 redetermination indicates that the claimant is "ineligible for benefits under . . . Sec. 48 beginning May 15, 2016 and continuing until this condition no longer exists" and was accompanied by a demand for restitution covering nine weeks. As the Agency may only issue a redetermination as to the period covered by the benefit check, the August 23, 2016 redetermination must have been a redetermination of the benefit check covering May 15, 2016, as that was the only date mentioned in the redetermination. That benefit check included the two weeks from May 15, 2016 through May 28, 2016 yet the August 23, 2016 redetermination and its accompanying restitution demand cover at least nine weeks. Thus, the Agency's August 2, 2016 redetermination could not have been a redetermination of any single benefit check. As Section 32(f) of the Act requires, if the Agency would like to issue adjudications as to any time period not covered by the benefit check, the Agency must issue a determination as to those weeks, which it did not do.

Without an employer protest of the benefit check determination, the Agency was without authority to issue a redetermination of the benefit check determination.⁴ Even with an employer protest, the Agency's August 23, 2016 redetermination was invalid because it covered a time period beyond that covered by the benefit check. Thus, the Agency's August 23, 2016 redetermination was issued in violation of the Act and made upon unlawful procedure.

Even if the Agency had statutory authority under Section 32(f) of the Act to issue the August 23, 2016 redetermination, the Agency failed to issue the redetermination in a timely manner and include necessary information. The benefit check determination in this case is the benefit check covering the period from May 15, 2016 to May 28, 2016. The benefit check covering that period was issued in mid-June at the latest.

Section 32a of the Act provides, in pertinent part:

- (1) Upon application by an interested party for review of a determination, upon request for transfer to an administrative law judge for a hearing filed with the unemployment agency within 30 days after the mailing or personal service of a notice of determination, or upon the unemployment agency's own motion within that 30-day period, the unemployment agency shall review any determination. **After review, the unemployment agency shall issue a redetermination affirming, modifying, or reversing the prior determination and stating the reasons for the redetermination,** or may in its discretion transfer the matter to an

⁴ The Agency did, however, have authority to issue a determination covering the entire relevant time period under Section 32(a) of the Act.

administrative law judge for a hearing. If a redetermination is issued, the unemployment agency shall promptly notify the interested parties of the redetermination, the redetermination is final unless within 30 days after the mailing or personal service of a notice of the redetermination an appeal is filed with the unemployment agency for a hearing on the redetermination before an administrative law judge in accordance with section 33. [Emphasis added.]

- (2) The unemployment agency may, for good cause, including any administrative clerical error, reconsider a prior determination or redetermination after the 30-day period has expired and after reconsideration issue a redetermination affirming, modifying, or reversing the prior determination or redetermination, or transfer the matter to an administrative law judge for a hearing. A reconsideration shall not be made unless the request is filed with the unemployment agency, or reconsideration is initiated by the unemployment agency with notice to the interested parties, within 1 year from the date of mailing or personal service of the original determination on the disputed issue.

The Agency's August 23, 2016 redetermination was not issued by the Agency within 30 days of the benefit check determination, and the Agency did not present any indication of good cause for the reconsideration. Thus, the Agency's August 23, 2016 redetermination was issued in violation of Section 32a(2) of the Act.

Additionally, a redetermination must be a document "affirming, modifying, or reversing the prior determination" and "state the reasons for the redetermination."⁵ The August 23, 2016 redetermination does not even include any reference whatsoever to any prior determination. Thus, in addition to being an invalid adjudication under Section 32(f) of the Act and an untimely redetermination under Section 32a(2) of the Act, the August 23, 2016 redetermination failed to include the basic information required by Section 32a(1) of the Act.

The Agency's August 23, 2016 redetermination was issued in violation of numerous provisions of law: (1) the Agency had no authority to act under Section 32(f) of the Act without an employer protest; (2) it impermissibly covered a time period outside the time period covered by the benefit check; (3) it was untimely without good cause shown under Section 32a(2); and (4) it failed in nearly every respect to conform to the requirements of a redetermination under Section 32a(1) of the Act.

Thus, we find that the Agency issued the August 23, 2016 redetermination in violation of Sections 32(f), 32(a), 32a(2), and 32a(1) of the Act. The Agency's unlawful actions deprived the parties of the protections inherent in the Act's procedural requirements.

⁵ MCL 421.32a(2).

Section 306 of the Michigan Administrative Procedures Act⁶ (APA) provides, in part:

- (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
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 - b. . . .
 - c. Made upon unlawful procedure resulting in material prejudice to a party.
 - d. . . .
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 - f. Affected by other substantial and material error of law.

We are mindful that the APA speaks to the courts, not the Commission. However, the Commission will not knowingly issue a decision that we believe falls into the category of decisions that are mandated to be vacated by a court on appeal. The Agency's August 23, 2016 redetermination was issued in violation of the Act and made upon an unlawful procedure. The claimant was materially prejudiced by the inherent confusion created by the Agency's actions and the Agency's deprivation of the claimant's procedural rights under the Act. Thus, the proper action is to hold the redetermination unlawful and set it aside. As a result, there exists no valid Agency adjudication regarding the claimant's eligibility under Section 48 of the Act. Therefore, we set aside the ALJ's decision affirming the Agency's August 23, 2016 redetermination.

Therefore,

IT IS ORDERED that the ALJ's February 2, 2017 order denying the claimant's request for rehearing is affirmed.

IT IS FURTHER ORDERED that the ALJ's finding that the claimant established good cause for late appeal of the Agency's August 23, 2016 redetermination is affirmed.

IT IS FURTHER ORDERED that the ALJ's November 15, 2016 decision is set aside.

IT IS FURTHER ORDERED that the Agency's August 23, 2016 redetermination is set aside without prejudice.

⁶ MCL 24.201 *et seq.*

IT IS FURTHER ORDERED that the August 23, 2016 redetermination shall not provide the basis for any action against the interest of any party in this matter.

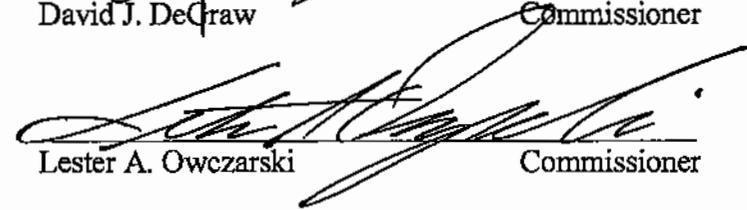
This matter is referred to the Agency for action consistent with this decision.



Jack F. Wheatley Commissioner



David J. DeCraw Commissioner



Lester A. Owczarski Commissioner

MAILED AT LANSING, MICHIGAN

AUG 17 2017

This decision shall be final unless EITHER (1) the Michigan Compensation Appellate Commission RECEIVES a written request for rehearing on or before the deadline, OR (2) the appropriate circuit court RECEIVES an appeal on or before the deadline. The deadline is:

SEP 18 2017

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