

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
P O Box 944275
SACRAMENTO CA 94244-2750

ARVIE J MORITZ
Claimant-Appellant

Precedent Benefit
Decision No. P-B-506

DHL EXPRESS
c/o UC EXPRESS
Employer

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

ROY ASHBURN

MICHAEL ALLEN

ROBERT DRESSER

Pursuant to section 409 of the California Unemployment Insurance Code, AO-314175 is hereby designated as Precedent Decision No. P-B-506.

Adopted as Precedent: January 14, 2014

Case Nos.: AO-314175, AO-314177, AO-314178, AO-314179
Claimant: ARVIE J MORITZ

OP

The claimant appealed from the portions of the decisions of the administrative law judge that held:

1. the claimant was disqualified for benefits under section 1256 of the Unemployment Insurance Code¹;
2. the claimant was overpaid benefits and liable for repayment of an overpayment in the amount of \$11,700 under code section 1375;
3. the claimant was overpaid benefits and liable for repayment of an overpayment in the amount of \$5,850 under code section 1375; and,
4. the claimant was overpaid benefits and liable for repayment of an overpayment in the amount of \$9,000 under code section 1375.

The administrative law judge inadvertently failed to mention in her decision that one of the issues in the matter was a department ruling that held the employer's reserve account subject to benefit charges; and failed to address the issue of whether the employer's reserve account should be subject to charges.

Pursuant to California Code of Regulations, title 22, section 5100(b), these partial appeals are consolidated for consideration and decision.

ISSUE STATEMENT

The issues to be decided in these cases are:

1. Does the Employment Development Department (hereinafter referred to as the department) have the authority to issue the employer a determination and ruling under sections 1030 and 1327 where:
 - a. the department's disqualification of the claimant under section 1256 is based on information provided by the claimant's employer beyond the time limits provided by sections 1030 and 1327;

¹ All section references are to the Unemployment Insurance Code unless otherwise noted.

- b. there is no evidence that the department made a finding of good cause to extend the time for the employer to respond to the notice that the claimant filed a claim for benefits (sections 1030 and 1327); and,
 - c. there is no evidence that the claimant engaged in fraud, misrepresentation, or willful nondisclosure when she filed her claim for unemployment benefits (sections 1257(a) and 1332.5)?
2. Does the department have the authority to reconsider a claimant's eligibility for benefits under section 1256 where:
- a. the department's disqualification of the claimant is based on information provided by the claimant's employer beyond the time limits provided by sections 1030 and 1327;
 - b. there is no evidence that the department made a finding of good cause to extend the time for the employer to respond to the notice that the claimant filed a claim for benefits (sections 1030 and 1327); and,
 - c. there is no evidence that the claimant engaged in fraud, misrepresentation, or willful nondisclosure when she filed her claim for unemployment benefits (sections 1257(a) and 1332.5)?
3. Is the claimant liable for an overpayment for those benefits paid to the claimant prior to the employer's untimely response to the notice issued to the employer pursuant to sections 1030 and 1327, when there has been no showing that the department had the authority to reconsider the claimant's eligibility for unemployment insurance benefits?

FINDINGS OF FACT

We set forth only those facts necessary for resolution of this matter.

The claimant filed a claim for unemployment insurance benefits on May 2, 2011, by completing the on-line application for benefits, known as "E-Apply for UI" on the department's website. The claimant selected "Laid Off" as the reason she was no longer working for her most recent employer, DHL Express. On May 5, 2011, the department mailed the claimant a Notice of Unemployment Insurance Award (DE429Z), advising the claimant that she established a claim for unemployment insurance benefits with a weekly benefit amount of \$450.

The claimant's employer, DHL Express, was both the claimant's last employer and a base period employer. The department sent this employer two notices advising the employer that the claimant filed a claim for benefits – a Notice of Unemployment Claim Filed (DE1101CZ)² and a Notice of Wages Used for Unemployment Insurance (UI) Claim (DE1545).³ Both of these notices provided the employer with an opportunity to explain the reason the claimant separated from her employment. Both of these notices set forth time limitations within which the employer was to respond.

The department mailed the employer the Notice of UI Claim Filed on May 5, 2011. This notice advised the employer that “the law requires an employer to submit any facts in his/her possession which may affect a claimant's eligibility for benefits,” and to respond as completely as possible because the facts in the response will be used in determining the claimant's eligibility for benefits. The Notice of UI Claim Filed further advised the employer that the time limit for replying is ten days from the mail date on the notice, and that if the employer is mailing his/her response late, the employer must explain the reasons for the delay as the time limit may be extended only for good cause.

The same notice also referenced to code section 1327 and informed the employer that the ten-day response period may be extended for good cause or, if the employer acquires knowledge of facts that may affect the claimant's eligibility after the ten-day period has expired and those facts could not reasonably have been known within the ten-day response period, the employer may provide those facts within ten days of acquiring them. This second ten-day period may also be extended for good cause. The employer had until May 16, 2011, to timely respond to the Notice of UI Claim Filed. According to the record, the employer did not respond to this notice.

Similarly, the Notice of Wages Used for UI Claim, mailed to the employer on May 25, 2011, advised the employer that the claimant had received unemployment insurance benefits and that if the employer wanted a ruling, the employer would need to supply the department with information regarding the separation. The employer had fifteen days from the date the notice was sent to timely respond to this notice. If the employer did not respond within fifteen days, the time limit could have been extended, provided the employer had shown good cause for the untimely response. The employer had until June 9, 2011, to timely respond to the Notice of Wages Used for UI Claim. According to the record, the employer did not respond.

² Hereinafter referred to as the Notice of UI Claim Filed.

³ Hereinafter referred to as the Notice of Wages Used for UI Claim.

On May 23, 2011, the department mailed the claimant her first benefit check in the amount of \$450 for the week ending May 14, 2011. (The week ending May 7, 2011 was the claimant's waiting period week.) After exhausting all regular unemployment insurance benefits, the claimant received federal extended benefits (including EUC and EUX) beginning on or about November 6, 2011. The claimant received regular unemployment benefits and extended unemployment benefits from May 8, 2011 through June 23, 2012, in the total amount of \$26,550.

In a department claim note dated July 2, 2012, fourteen months after the claimant filed her initial claim for unemployment insurance benefits and shortly before she would be paid benefits under another extended benefit program (EUY), the department recorded that DHL Express, her last and base period employer, through its agent TALX, informed the department that the claimant quit to retire. The record does not reflect why the employer waited fourteen months after receiving the first notices to respond with the requested information. The record does not show that any Notice of UI Claim Filed or Notice of Wages Used for UI Claim was sent to the employer, other than those issued in 2011.

If the employer was responding to either the Notice of UI Claim Filed or the Notice of Wages Used for UI Claim sent to the employer in 2011, the record does not reflect that the employer gave any reason to justify its almost fourteen-month delay.

On July 13, 2012, within two weeks of the department receiving the information from the employer's representative that the claimant quit to retire, the department conducted a telephone interview with the employer. According to the department's Record of Claim Status Interview, the employer's agent informed the department interviewer that the claimant sent the employer an email on March 21, 2011, wherein the claimant advised the employer that she was retiring and that her last day on the job would be April 22, 2011.

The department interviewer did not obtain any information from the employer regarding the employer's receipt of the Notice of UI Claim Filed and the Notice of Wages Used for UI Claim, sent to the employer shortly after the claim was filed in 2011, or why the employer did not timely respond to these notices, and waited fourteen months to provide this information.

Based on the information the department obtained during the July 13, 2012 interview, the department reconsidered the claimant's eligibility for benefits. The department issued a notice of determination and ruling on July 25, 2012, wherein the department found the claimant disqualified for benefits under code section 1256; relieved the employer's reserve account of benefit charges; and

disqualified the claimant under section 1257(a) because the department found she made a false statement or willfully withheld material information when claiming benefits. The department also issued three separate notices of overpayment on July 31, 2012, seeking reimbursement for fourteen months of benefits paid to the claimant on her regular unemployment claim as well as her two extended benefit claims. It is these department notices from which the claimant appealed.

The claimant and the employer were notified of the hearing on these issues before the administrative law judge. Only the claimant appeared at the hearing.

In related Case No. AO-314176 (FO Case No. 4559050), the claimant appealed from the decision of the administrative law judge that found the claimant did not make a willful false statement when she filed her claim. In that matter, the administrative law judge found that while the claimant was at fault for not providing the correct reason for her separation from her work, the claimant did not commit fraud, engage in misrepresentation, or willfully fail to disclose material information when she filed her claim for benefits, and was not disqualified for benefits under code section 1257(a). Neither the employer nor the department appealed this decision of the administrative law judge. Because the decision of the administrative law judge was favorable to the claimant, there was no disputed issue for the claimant to appeal. We dismissed the claimant's appeal in Case No. AO-314176 finding the claimant received a favorable decision from the administrative law judge and there is no further relief to be provided by the Appeals Board. The decision of the administrative law judge that held the claimant not disqualified for benefits under code section 1257(a) stands as issued.

REASONS FOR DECISION

A. THE EFFECT OF THE ADMINISTRATIVE LAW JUDGE DECISION FINDING NO FRAUD, MISREPRESENTATION OR WILLFUL NONDISCLOSURE, ON THE DEPARTMENT'S ABILITY TO RECONSIDER THE DETERMINATION AND RULING.

Any provision of the code which prescribes time limits within which the department may reconsider any determination, ruling or computation, or any provision that otherwise restricts or prevents such reconsideration, does not apply in any case of fraud, misrepresentation or willful nondisclosure. (Unemployment Insurance Code, section 1332.5.)

As discussed in the sections that follow, there are statutory provisions that prescribe time limits within which the department may reconsider a determination

and a ruling. Such time limits would not apply, however, in those cases where either the claimant or the employer has been found to have engaged in fraud, misrepresentation, or willful nondisclosure.

The decision of the administrative law judge found the claimant did not engage in fraud, misrepresentation, or willful nondisclosure when claiming benefits.⁴ Since neither the employer nor the department appealed from that decision, the administrative law judge's finding stands as issued.

Having found that the claimant did not engage in fraud, misrepresentation or willful nondisclosure, and is not disqualified for benefits under section 1257(a), the department was bound by the statutory time limits within which the department may reconsider the claimant's eligibility for benefits under section 1256 and the charges to the employer's reserve account under sections 1030 and 1032.

B. THE DEPARTMENT'S AUTHORITY TO ISSUE THE EMPLOYER A NOTICE OF DETERMINATION/RULING.

An individual is disqualified for benefits if the individual left the most recent work voluntarily without good cause or the individual was discharged for misconduct connected with the most recent work. (Unemployment Insurance Code, section 1256.)

An employer's reserve account may be relieved of benefit charges if the claimant left employment voluntarily without good cause or was discharged for misconduct. (Unemployment Insurance Code, sections 1030 and 1032.)

Section 1327 of the Unemployment Insurance Code requires the department to give notice of the filing of a new or additional claim to the employer by whom the claimant was last employed immediately preceding the filing of the claim unless:

- (1) the additional claim is the result of the filing of a partial claim;
- (2) no subsequent employer has been designated as the last employer;
- and,
- (3) there is no separation issue.

The claimant's most recent employer must submit, within ten days after the mailing of notice of a new or additional claim, any facts then known which may affect the claimant's eligibility for benefits, including the circumstances of the

⁴ See related AO Case No. 314176.

claimant's separation from employment. The ten-day period may be extended for good cause. (Unemployment Insurance Code, sections 1030(a) and 1327.)

The department is required to promptly notify each of the claimant's base period employers of its computation of the claimant's benefits after the payment of the first weekly benefit. (Unemployment Insurance Code, section 1329.)

A base period employer must submit within 15 days of a notice of computation any facts then known, and not previously required to be submitted as a most recent employer, regarding the claimant's loss of employment. The 15-day period may be extended for good cause. (Unemployment Insurance Code, sections 1030(b) and 1331.)

If after the time periods prescribed in sections 1327 and 1331, the employer acquires knowledge of facts that may affect the eligibility of the claimant and those facts could not reasonably have been known within those periods of time, the employer shall, within ten days of acquiring the knowledge, submit the facts to the department. That ten-day period may also be extended for good cause. (Unemployment Insurance Code sections 1327 and 1331.)

An employer is entitled to a ruling only if it timely responds to the notice of claim with information regarding the termination of the claimant's employment. The employer is entitled to a determination if it timely submits any information relevant to the claimant's eligibility for benefits. (Precedent Decision P-B-432.)

Where an employer, without good cause, fails to timely respond to the first notice of claim filed, the employer is not entitled to a ruling or a determination. (Precedent Ruling P-R-363; Precedent Decision P-B-499.)

An employer who, without good cause, fails to respond properly to the first notice of claim it was mailed is not entitled to a ruling or determination notwithstanding a timely response to later notices. (Precedent Decisions P-R-363, P-R-371, P-R-372 and P-B-499.)

In this matter, the employer was both the last employer and a base period employer. Consequently, the department was required to send, and did send, the employer two notices shortly after the claimant opened her claim for unemployment insurance benefits. The first notice sent to the employer was the Notice of UI Claim Filed on May 5, 2011. A subsequent notice, the Notice of Wages Used for UI Claim, was sent to the employer on May 25, 2011.

Pursuant to sections 1030(a) and 1327, the employer was to respond to the Notice of UI Claim Filed within ten days, or by May 15, 2011; and was to respond

to the Notice of Wages Used for UI Claim within the statutorily required 15-day days, or June 11, 2011. There is no evidence that the employer availed itself of these two opportunities in May and June of 2011 to timely provide the department with information pertaining to the claimant's separation. As a result, the department found the claimant eligible for unemployment insurance benefits, and charged the employer's reserve account accordingly.

Even though these notices provided the employer with two opportunities to timely provide the department with information regarding the claimant's separation – information which would impact both the department's determination of the claimant's eligibility and the department's ruling on the charging of the employer's reserve account – the employer did not provide the department with information regarding the claimant's separation until June or July of 2012, approximately fourteen months after benefits had commenced. While code section 1327 provides the employer with additional time to respond to the notices the department sent in 2011, the requirements are specific – the employer must show good cause for the untimely response or that the information provided was “newly acquired.”

The information the employer reported to the department in 2012 was contained in an email the claimant sent her employer one month prior to her separation in 2011. There is no evidence in the record establishing that the employer provided the department with any reason for this late response to the notices, and thus no showing the employer had “good cause” for the employer's late response. Nor is there any evidence that this email the claimant sent to the employer in 2011 was “newly acquired” information.

Moreover, there is no evidence that the department made a finding that the employer timely responded, that the employer had good cause for its untimely response, or that the employer provided newly acquired information. Consequently, the elements necessary to allow additional time for the employer to respond to the Notice of UI Claim Filed under code section 1327 have not been shown, and there is no basis for the department to extend the time for the employer to respond under code section 1327, and therefore no statutory support for the department's redetermination of the claimant's eligibility under section 1256 and the issuance of the determination and ruling in 2012.

Even assuming the department accepted the late filed information based on its belief that the claimant engaged in fraud, misrepresentation, or willful nondisclosure, once the administrative law judge decided otherwise, the untimely submitted information could only be relied upon if the employer had established good cause for its untimely response to the Notice of UI Claim Filed, or its receipt of newly acquired evidence. Thus, in the absence of any evidence that the

employer had good cause for its untimely response to the Notice of UI Claim Filed, the department does not have the authority to issue an unfavorable determination as to the claimant's eligibility and a favorable ruling that the employer's reserve account was not subject to charges, and the notice of determination and ruling must be set aside.

Accordingly, in Case No. AO-314175, we reverse the portion of the decision of the administrative law judge finding the claimant disqualified for benefits under code section 1256. The department's notice of determination and ruling is set aside.

In an appeal from a decision of an administrative law judge, the Board shall consider only those issues in a department action which were appealed, petitioned, or noticed by the Office of Appeals, related issues properly considered by the administrative law judge, related procedural issues, or appellate procedural issues. (California Code of Regulations, title 22, section 5101.) The Board may refer to the Employment Development Department or remand to an administrative law judge for appropriate action any issues raised for the first time in the appeal. The Board shall not consider any substantive issues which have not been appealed. (California Code of Regulations, title 22, section 5101.)

We set aside the decision of the administrative law judge and the underlying notice of determination and ruling because, as found above, once it was found that there was no fraud, misrepresentation or willful omission of material information by the claimant, there was no evidence in the record to support the conclusion that the department had authority to issue the notice of determination and ruling to the employer in this case. However, while the issues of fraud, misrepresentation and willful omission were fully litigated in Case No. AO 314176, the record does not reflect that the department specifically considered or addressed the issues of whether the employer timely responded to the Notice of Claim Filed, the employer had good cause for any delay in responding to such notice or the employer's correspondence to the department in June or July 2012 was newly acquired evidence. The notice of hearing did not list these issues for consideration at the hearing and the issues were not fully litigated by the parties. Rather, these issues have been considered by the Appeals Board for the first time. As such, we find it necessary to refer these issues to the department for its consideration.

The following issues are referred to the department for its consideration and issuance of any appealable notice(s) to the employer the department may deem appropriate: 1) whether the employer timely responded to the Notice of Unemployment Claim Filed pursuant to code sections 1030 and 1327; and 2) if the employer did not timely respond, a) whether the employer had good cause

for its untimely response; b) the reasons that support a finding of good cause for the employer's untimely response; and c) whether the employer's untimely response was based upon newly acquired information.

C. THE AUTHORITY OF THE DEPARTMENT TO RECONSIDER THE CLAIMANT'S ELIGIBILITY FOR BENEFITS.

An individual is disqualified for benefits if the individual left the most recent work voluntarily without good cause or the individual was discharged for misconduct connected with the most recent work. (Unemployment Insurance Code, section 1256.)

An individual is presumed not to have voluntarily left his or her work without good cause unless his or her employer has given written notice to the contrary to the department as provided in section 1327 of the code, setting forth facts sufficient to overcome the presumption. This presumption is rebuttable. (Unemployment Insurance Code, section 1256.)

If an employer fails to submit a timely protest under section 1327 of the code, or the protest fails to set forth sufficient facts, the burden is on the employer or the Employment Development Department to prove that the claimant is disqualified for benefits under section 1256 of the code. (*Rabago v. Unemployment Insurance Appeals Board* (1978) 84 Cal.App.3d 200; *O'Connell v. Unemployment Insurance Appeals Board* (1983) 149 Cal.App.3d 54.)

Section 1332(b) of the Unemployment Insurance Code provides in part:

“(b) The department may for good cause reconsider any determination within 15 days after an appeal to an administrative law judge is filed. If no appeal is filed, the department may for good cause reconsider any determination within 20 days after mailing or personal service of the notice of determination. The department may, if a claimant has not filed an appeal to an administrative law judge from any determination which finds that a claimant is ineligible or disqualified, or if an appeal has been filed but is either withdrawn or dismissed, for good cause also reconsider the determination during the benefit year or extended duration period or extended benefit period to which the determination relates. The department shall give notice of any reconsidered determination to the claimant and any employer or employing unit which received notice under sections 1328 and 1331 and the claimant or employer may appeal therefrom in the manner prescribed in section 1328”

The time limitations set forth in section 1332(b) of the code apply to a “silent” or “unwritten” determination by the department of a claimant’s eligibility for benefits under code section 1256. (Precedent Decision P-B-499.)

The department initially found the claimant separated from her work under qualifying reasons under code section 1256. The department did not send a written notice of determination to the claimant finding the claimant eligible for benefits. Rather, the department notified the claimant of its finding that she was eligible for unemployment benefits by virtue of the first benefit payment to the claimant on May 23, 2011. Thus, the department’s payment of benefits to the claimant is considered a “silent” determination finding the claimant eligible for unemployment benefits.

Having initially determined the claimant eligible for benefits, the department is bound by the time limitations as set forth in code sections 1332(b) within which the department may reconsider its initial finding that the claimant is eligible for benefits. Section 1332(b) allows the department, for good cause, to reconsider any determination within twenty days after mailing or personal service of the notice of determination in cases where no appeal was filed. As the claimant’s first benefit check was mailed on May 23, 2011, the department had until June 12, 2011 to reconsider the claimant’s eligibility for benefits. Since the department did not reconsider the claimant’s eligibility until fourteen months after the silent determination, the department was clearly beyond this twenty-day period.

The department may reconsider a favorable determination beyond the twenty-day period under limited circumstances.

The department may reconsider a favorable determination beyond that twenty-day period in those cases where there has been a change in the law affecting a claimant’s continuing eligibility for unemployment benefits. (See Precedent Decision P-B-499.) In this matter, there has been no change in the law affecting this claimant’s continuing eligibility for unemployment insurance benefits related to the issues under appeal.

The department may also reconsider a favorable determination beyond that twenty-day period in those cases involving fraud, misrepresentation or willful nondisclosure under section 1332.5. As discussed in section A above, the administrative law judge found the claimant did not engage in fraud, misrepresentation or willful nondisclosure when she filed her claim for unemployment benefits. Thus, the department did not have the authority under section 1332.5 to reconsider the favorable determination beyond the twenty-day time limitation set forth in section 1332(b).

The department is, therefore, limited to reconsidering the claimant's eligibility within twenty days from the mailing of the department determination. The record does not show the employer timely responded to the department notices, which timely response would have given the department the opportunity to reconsider the claimant's eligibility for benefits. It is important to note that had the employer timely responded to the Notice of Unemployment Claim Filed mailed to the employer on May 5, 2011, the department would have had sufficient time to evaluate the claimant's eligibility not only before the first benefit payment was issued, but also within twenty days of the issuance of the silent determination.⁵ Additionally, if the employer responded untimely with good cause, prior to the expiration of the twenty-day period after the silent determination was issued, the department may have had the ability to reconsider the silent determination.⁶

Accordingly, in Case No. AO-314175, the portion of the decision of the administrative law judge finding the claimant disqualified for benefits under section 1256 is set aside, and the department's notice of determination/ruling issued on July 25, 2012 is set aside. The "silent" determination issued on May 23, 2011 finding the claimant eligible for benefits under code section 1256 stands as issued.

D. THE NOTICES OF OVERPAYMENT

Any person who is overpaid unemployment insurance benefits is liable for repayment unless the overpayment was not due to fraud, misrepresentation or wilful nondisclosure, was received without fault, and its recovery would be against equity and good conscience. (Unemployment Insurance Code, section 1375(a).)

The notices of overpayment resulted from the department's notice of determination that found the claimant disqualified for benefits under 1256. Since we reverse the portion of the decision of the administrative law judge that found the claimant disqualified for benefits under code section 1256, and hold that the silent determination that found the claimant eligible for benefits under section 1256 stands as issued, the claimant remains eligible for the benefits that are the subject of the overpayments. Thus, the appealed portion of the decisions of the

⁵ The employer had ten days, or until May 16, 2011 to respond. The information the employer provided to the department in July 2012 was available to the employer on May 5, 2011. Had the employer timely responded within ten days as required, the department would have had the ability to consider the employer's information not only before the department issued the first benefit check on May 23, 2011, but also within the twenty-day period within which the department may reconsider the silent determination.

⁶ The twenty day period within which the department could reconsider the silent determination expired on June 13, 2011. The employer would have had at least an additional two weeks to provide this information to the department, along with a showing that the employer had good cause for its untimely response.

administrative law judge in Case Nos. AO-314177, AO-314178, and AO-314179 finding the claimant liable for the overpayment pursuant to code section 1375 are reversed, and the notices of overpayment are cancelled.

DECISION

In Case No. AO-314175, the portion of the decision of the administrative law judge pertaining to the determination finding the claimant disqualified for benefits under code section 1256 is reversed, and the portion of the decision of the administrative law judge pertaining to the employer's reserve account being relieved of benefit charges is set aside. The department's notice of determination/ruling issued on July 25, 2012 is set aside. The department's original "silent" determination issued on May 23, 2011 finding the claimant eligible for benefits under section 1256 remains in effect. The issue of whether the employer timely responded to the Notice of Unemployment Claim Filed, whether the employer had good cause for its untimely response, or whether the evidence the employer provided to the department was newly acquired, is referred to the department for further consideration and issuance of any notices to the employer it deems appropriate.

In Case Nos. AO-314177, AO-314178, and AO-314179, the appealed portions of the decisions of the administrative law judge are reversed, and the notices of overpayment are cancelled.