

14-0315

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

LARRY MYERS,

Petitioner,

v.

**OUTDOOR EXPRESS, INC. and
WORKFORCE WEST VIRGINIA,**

Respondents.

2014 FEB 25 PM 1:37
CARRY...
KANAWHA COUNTY CIRCUIT COURT
CIVIL ACTION NO. 13-AA-71
Judge Paul Zakaib, Jr.

FINAL ORDER AFFIRMING DECISIONS OF BOARD OF REVIEW

Pending before the Court is the Petitioner's Petition for Appeal filed on June 11, 2013, from a series of decisions entered by the Unemployment Compensation Board of Review on May 13, 2013, finding that the Petitioner, Larry Myers, was neither totally nor partially unemployed during the relevant time periods at issue, and was therefore, ineligible for unemployment compensation benefits. This decision by the Board of Review resulted in the Petitioner owing the Respondent WorkForce West Virginia \$39,713.00 in overpayments pursuant to W.Va. Code § 21A-10-8.

A briefing schedule was established by this Court, and the case was submitted to the Court for decision on briefs. After carefully reviewing the Court file, petition for appeal, submissions of the parties, and pertinent legal authority, for the reasons explained in the following Opinion, this Court concludes the Board's final orders must be affirmed.

Findings of Fact

1. The Petitioner was employed as a salesman for a recreation vehicle sales company, Outdoor Express, Inc., in Falling Waters, West Virginia.

2. The Petitioner was paid on a commission basis only between three (3) and four (4) percent of the sales price. The Petitioner is not entitled to "draw" upon anticipated commissions.

3. The Petitioner is paid by the company on a bi-weekly basis based upon sales closed by the company within the preceding two-week period.

4. The employer issued Low Earning Reports (LER's) to the Petitioner for any period when the Petitioner was not issued a commission check beginning on November 28, 2008 to March 17, 2012.

5. The Petitioner was paid a full weekly unemployment compensation benefit for all periods for amounts between \$339.00 a week to \$424.00 a week, depending upon the benefits year.

6. For all relevant time periods, the employer reported the Petitioner worked forty (40) hours per week for the employer and was paid no compensation.

7. The Petitioner's sales commissions are and have been adversely affected by both the seasonal nature of sales and the recent extended downturn in the economy.

8. For all relevant periods of time for which LER's were issued by the employer to the Petitioner, said Petitioner was performing some services for the company for which the Petitioner was eventually compensated by commissions.

9. During primarily winter months, the Petitioner and a co-worker would come to the office on a split-time type coverage, rotation basis, and/or work from home for the benefit of the company for which the Petitioner was paid his commissions for sales made.

10. Between the third quarter of 2009, and the third quarter of 2012, the Petitioner was paid approximately \$164,000.00 in commissions by the employer.

11. During said time period, the employer reported all compensation paid to the

Petitioner on a quarterly basis to the Unemployment Compensation Office.

12. During said time period, the Petitioner reported no compensation in the form of commissions received to the Unemployment Compensation Office on his continued claim forms.

13. During the time period for which the Petitioner worked for the employer and filed for unemployment compensation benefits, the Petitioner was never partially unemployed due to the fact that the Petitioner had full-time work wages of forty (40) hours per week.

14. According to the Initial Claim/Low Earnings Report, the Petitioner was responsible for reporting all wages earned and hours worked for any weeks he claimed unemployment compensation benefits even if he had not received payment.

Conclusions of Law and Discussion

1. *W.Va. Code* § 21A-1A-27 defines total and partial unemployment as follows:
 - (1) An individual is totally unemployed in any week in which such individual is separated from employment for an employing unit and during which he or she performs no services and with respect to which no wages are payable to him or her.
 - (2) An individual who has not been separated from employment is partially unemployed in any week in which due to lack of full-time work wages payable to him or her are less than his or her weekly benefit amount plus sixty dollars: Provided, That said individual must have earnings of at least sixty-one dollars.
2. Pursuant to *W.Va. Code* § 21A-1A-28(a):
 - (a) "Wages" means all remuneration for personal service, including commissions, gratuities customarily received by an individual in the course of employment from persons other than the employing unit, as long as such gratuities equal or exceed an amount of not less than \$20 each month and which are required to be reported to the employer by the employee, bonuses and the cash value of all remuneration in any medium other than cash..."
3. Pursuant to *W.Va. Code* § 21A-6-1(4), an unemployed individual shall be eligible to receive benefits only if the Commissioner finds that the individual has been totally or partially

unemployed during his or her benefit year for a waiting period of one week prior to the week for which he or she claims benefits for total or partial unemployment.

4. *W.Va. Code* § 21A-10-8 provides as follows regarding recovery of benefits paid based upon a misrepresentation:

A person who, by reason of nondisclosure or misrepresentation, either by himself or another (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent), has received a sum as a benefit under this chapter, shall either have such sum deducted from a future benefit payable to him or shall repay to the commissioner the amount which he has received. Collection shall be made in the same manner as collection of past-due payments against employers as set forth in section sixteen of article five of this chapter, which specifically includes the institution of civil action and collection procedures thereon enumerated in said section: Provided, That such collection or deduction of benefits shall be barred after the expiration of five years, except for known or fraudulent nondisclosure or misrepresentation which shall be barred after the expiration of ten years, from the date of the filing of the claim in connection with which such nondisclosure or misrepresentation occurred.

5. The Petitioner's case was discovered in a cross-match audit comparing the inconsistencies between what the employer reported as the compensation received by the Petitioner as well as the fact that the Petitioner worked forty (40) hours a week, and the failure of the Petitioner to report any compensation on his claim form.

6. In the instant case, the Petitioner was not totally or partially unemployed. Accordingly, the Petitioner is not eligible for unemployment compensation benefits.

Court's Orders

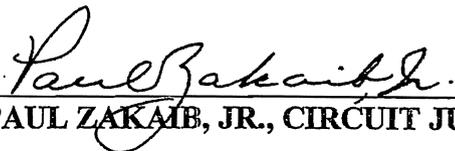
Therefore, after reviewing the entire record in this case, the relevant legal authority, and the briefs submitted by the parties, the Court hereby **AFFIRMS** the final decisions of the Board of Review as the evidence in the record supports the same. The Petitioner is ineligible for unemployment compensation benefits due to the fact that he worked forty (40) hours a week, and therefore, is not partially unemployed.

Accordingly, it is hereby **ORDERED** that the Petitioner, Larry Myers, is ineligible for unemployment compensation benefits and thus has an overpayment of \$39,713.00, said overpayment recoverable in accordance with the applicable statute. The Court notes the objection and exception of all parties aggrieved by this Final Order.

It is **FURTHER ORDERED** that this case is **DISMISSED AND STRICKEN** from the docket of the Court. The Clerk of the Court shall provide certified copies of this Final Order to all counsel of record as follows:

- (1) Brett Offutt, Esq.
Law Office of Brett Offutt
P.O. Box 1244
Harpers Ferry, WV 25425
- (2) Mary Blaine McLaughlin, Esq.
WorkForce West Virginia/Legal Section
112 California Ave.
Charleston, WV 25305
- (3) Legal Representative
Outdoor Express, Inc.
P.O. Box 100
Falling Waters, WV 25419

Enter this 25th day of February, 2014.



PAUL ZAKAB, JR., CIRCUIT JUDGE

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 25
DAY OF February 2014
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA