-DECISION-

Claimant:
NANCY S MCKEOWN

Employer:
LOCUST INDUSTRIES LIMITED

Decision No.: 5277-BH-12

Date: November 09, 2012

Appeal No.: 1107059

S.S. No.:

L.O. No.: 65

Appellant: Claimant

Issue: Whether the claimant has made a false statement or representation knowing it to be false or has knowingly failed to disclose a material fact in order to obtain or increase any benefit or other payment within the meaning of the Maryland Code, Labor and Employment Article, Title 8, Section 809.

- 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: December 09, 2012

- APPEARANCES -

FOR THE CLAIMANT:

NANCY S. MCKEOWN

FOR THE EMPLOYER:

FAILED TO APPEAR

FOR THE AGENCY

SARAH HARLEN, Assistant Attorney General

JUDY SMYLIE, Chief Hearing Examiner
Director – Lower Appeals Division

EVALUATION OF THE EVIDENCE

This is a case of first impression for the Board on the issue of whether the claimant's due process rights were violated when the Lower Appeals Division hearing examiner deliberately and intentionally sought out the Agency – a party before the Lower Appeals Division – to attend and present evidence at a contested hearing. The Agency initially failed to appear within the customary ten-minute grace period after the noticed hearing time and prior to any testimony or evidence being taken at the hearing. The Board finds on the facts of this case that the claimant's due process rights were violated.

The Notice of Hearing was mailed to all parties at their addresses of record on March 8, 2011. The Notice advised each party that the hearing would be held at 9:00 a.m. on March 21, 2011, by telephone conference. Information was included describing the process the parties were to follow to utilize the telephone conference service in order to participate.

In the instant case, the claimant appeared for the telephonic hearing at the proper time per the hearing notice. The hearing examiner called into the teleconference six minutes past the 9:00 o'clock noticed hearing time. The Agency and the employers were not present at that time. No testimony was taken or solicited until eighteen minutes past the hour.

In the meantime, as the ten-minute past the hour mark approached, the hearing examiner appeared concerned that the Agency would fail to appear. The hearing examiner understood that it was not necessary for the Agency to appear at the hearing and that he "…know[s] [he] can go forward" and "move forward regardless one way or the other....".

Concomitantly, when the hearing examiner stated, "We don't have any employers and that is fine", the hearing examiner evinced no concern that the other parties to the case - the employers - were not present. The hearing examiner did not "try" to get the employers to appear for the hearing and present evidence.

On the other hand, the hearing examiner gave the Agency "the benefit of doubt" and only intended to "try" and obtain the Agency for its testimony and evidence ("I was trying to get an Agency to find out if an Agency representative was going to show up."). No such benefit was conferred upon the employers.

The hearing examiner incorrectly explained to the claimant, "It is an Agency case and they are supposed to be here to present." If the hearing examiner's statement was intended to assert that the Agency was a necessary party to the case, the hearing examiner was wrong. The claimant, as the appellant, had the burden of production and the burden of going forward. The Agency, the party who rendered the initial adverse determination, had the burden of proof on the noticed issues in this case. If the Agency was "supposed to be [at the hearing] to present" it had no more or less duty to appear and "present" evidence than the employers did. The Board finds that the weight of the evidence supports a finding that the hearing examiner's actions in this regard demonstrate an improper deference to and prejudicial bias towards the Agency.

The hearing examiner should have proceeded with the hearing at ten minutes past the hour with the claimant's evidence. If, and only if, at the end of the claimant's testimony and evidence, there was insufficient evidence upon which to base a decision, could the hearing examiner continue and re-notice the hearing in order to subpoena the witnesses he deemed necessary to gather sufficient facts. Otherwise, if sufficient evidence was presented upon which to base a decision, the hearing examiner must end the hearing and render a decision based upon the credible evidence in the record, even if the decision is based solely upon the claimant's testimony.

Because no Agency representative appeared by the tenth minute past the hour, the Board is persuaded that, but for the hearing examiner's actions, the Agency would not have appeared. Because the Agency is an adverse party in this case, and because the Board finds that the hearing examiner's Herculean efforts to procure the Agency as an adverse party for the hearing in contravention of the stated policy on the notice, the Board finds that the claimant was unduly prejudiced and her procedural due process rights were violated.

In support of the hearing examiner's actions, the Lower Appeal Division's Chief Hearing Examiner testified at the hearing as an Agency witness before the Board and stated

> We have a case right now that was continued by a hearing examiner because in the middle of the hearing, it was a severance pay case, and they decided that there was an employer witness they needed and so they just stopped the hearing and said we'll come back and we'll bring that witness in. Not because the claimant or the employer wanted the witness, but because the hearing examiner wanted the witness. And in COMAR[1] it specifically states that the hearing examiners are permitted to call witnesses, not just to question them. They can call witnesses, they can cross-examine witnesses and they can question witnesses. So when – if there is – we've done it before in cases and not just in cases that involve fraud or overpayments; cases that involved other issues.
>
> 09.32.11.02 – let me just see – for procedure hearing would be (K). So 09.32.11.02(K) procedure, the hearing examiner may call, examine and cross-examine witnesses and may introduce into the record documentary or other evidence. And then (indiscernible) after that continuance – the hearing examiner may continue any hearing and make any direction or instruction for the disposition of the matter at the hearing examiner's discretion.

The Chief Hearing Examiner also testified that the Agency representative in the instant case was merely a fact witness called by the hearing examiner and that the Agency was not necessarily a party before him. The Chief Hearing Examiner further stated

> At this point he's calling them [the Agency] because he believes he needs their testimony. He can't be sure if they are or are not a party because the way the statute is written the Agency is not automatically a party to every proceeding; they can be a party to every

[1] Acronym for the "Code of Maryland Regulations".

> proceeding. So, until they show up and say we're a party, they're not a party. They're not on the record, but he believes that he needs their testimony in order to make a full and fair decision. So, he contacts them to say I see that you submitted documents, are you going to, you know, are you going to come because he believes that he needs them as the witness, the witness to give them testimony, the background for how this case came about. And then from that he'll determine the legal correctness of what they did or didn't do when they made their decision.
>
> I'm not sure that we officially designate them as a party. They do come and participate, they're sworn in, their testimony is taken under oath, but at the point that they don't call in I'm not sure that they're a party yet. For all we know they're not – I mean, if they're not on the record yet then they're not exercising their right to be a party. But he did – he called and said I see your documents are here. It appears that you're going to participate. I wouldn't say that we call every party who's not there, but there have been times when parties have been called.

Notwithstanding the Chief Hearing Examiner's affectations to the contrary, the hearing examiner's actions run afoul of the stated Lower Appeals Division procedural policy clearly stated on the hearing notice. The hearing notice provides, in pertinent part, "…**the Hearing Examiner will not conduct an investigation, contact witnesses not brought to the hearing or obtain documents which are not brought into the hearing by the parties**" [emphasis added]… and that "The Hearing Examiner **WILL NOT CALL YOU** for your hearing" [emphasis in original]. The Board finds that fundamental fairness dictates that the *pro se* claimant had the right to rely on this stated policy and the assurance that the policy applied equally to all parties noticed for the hearing.

Although the Chief Hearing Examiner testified that COMAR permits the hearing examiner to call witnesses, this statement must be squared with the stated policy on the hearing notice and with the governing law of fundamental fairness.

In her testimony, the Chief Hearing Examiner referenced an un-cited recent case where the hearing examiner needed an additional witness in a severance pay hearing. The Chief Hearing Examiner's anecdotal evidence is distinguished from this case because in that instance the hearing examiner made a determination that the additional witness was needed "in the middle of the hearing" and after testimony and evidence was presented. In this case, the hearing examiner sought out the Agency prior to taking *any* testimony or evidence.

The Chief Hearing Examiner's argument that the hearing examiner "needs" the Agency as a witness at first blush seems reasonable. However, none of the Agency's evidence would have been first-hand. The Agency would have testified from documents and hearsay statements supplied to it by and originating from the employers. The Agency could not have had first hand evidence regarding the preparation and compilation of the employer's wage reports. The Agency is not the custodian of the employers' records. All of the germane relevant first-hand evidence was in the control and custody of the employers; the

parties whose absence was just "fine" with the hearing examiner. If any party was *needed* as a fact witness at the hearing it was the employers' witnesses and not the Agency representative.

To conclude that the Agency was not a party to the proceedings (as the Agency argued) but merely a helpful witness called at the hearing examiner's discretion requires the Board to put form over substance. The Lower Appeals Division noticed the Agency as a named party the same way the Lower Appeals Division noticed the claimant and the employers. The hearing examiner sought a "representative from the Agency" and recognized that the Agency had a "case" to present. Most importantly, the Agency had the burden of proof on all noticed issues in this case. Notwithstanding the Chief Hearing Examiner's asseverations, there is no requirement or provision that the Agency "show up and say [it's] a party" at the hearing in order for the Agency to morph from a witness to a party to the proceedings.

The Board notes that the Agency could have subpoenaed the employers as first-hand fact witnesses if the employers did not intend to appear. The Board wholly rejects the Agency's argument that the Agency or the Lower Appeals Division did not know or recognize that the Agency was a party in this case. The Board is not persuaded by the Agency's argument.

The Agency correctly argued that the "Board's job is to make a determination as to whether benefits were properly paid or not paid". However, the Agency also averred (referring to the Board), "You're protecting the Unemployment Insurance Trust Fund." The Board finds that it is not its role to "protect" the Unemployment Insurance Trust Fund in contravention of its statutory mission. The Board is charged with hearing and deciding appeals from the Lower Appeals Division and claims for benefits referred to it by the Secretary under *Section 8-5A-09*, and to ascertain the substantial rights of the parties in accord with the Legislative policy enunciated in *Section 8-102*. The Board's role is not to "protect" the fund but to insure that unemployment benefits are paid and unemployment taxes are levied in accordance with the law and due process.

FINDINGS OF FACT

The claimant filed a timely appeal of the Agency's initial determination to the Lower Appeals Division. On March 8, 2011, notices were sent to the claimant, the employers and the Agency for a telephone hearing to be held on March 21, 2011 at 9:00 a.m. No notices were returned for a failure to deliver or for an improper address. The parties received proper notice. The parties were to appear telephonically by dialing the noticed telephone number and "participant pass code". None of the parties were required to appear in person before the hearing examiner.

The parties to the hearing were appellant Nancy McKeown (the "claimant"), appellee the DLLR Secretary / Office of Unemployment Insurance (the "Agency"), and collectively, appellees Merrick/Sparrow Advertising and Locust Industries, Ltd. (the "employers").

The hearing notice provided, in pertinent part

HEARING, ISSUES, AGENT AND ATTORNEYS

The Hearing Examiner will try to develop all of the facts of this case in order to give a fair hearing to all parties, but the Hearing Examiner will not conduct an investigation, contact witnesses not brought to the hearing or obtain documents which are not brought into the hearing by the parties. The only exception is for the Department of Labor, Licensing and Regulation records, which you have the right to see. [italics in original].

* * * * *

INSTRUCTIONS FOR TELEPHONE HEARINGS

If a telephone hearing has been scheduled, the out of state party and his/her witnesses will give testimony from a place convenient to them, but each party must arrange for his/her own witnesses to be available for the hearing at the proper time.

* * * * *

Upon receipt of this notice, you should be aware of the following:

*A. The Hearing Examiner **WILL NOT CALL YOU** for your hearing. Instead, at the time scheduled, you must dial the toll free number provided on the front of this hearing notice and enter the participant passcode which is listed followed by the pound sign.* [italics and emphasis in original].

The Lower Appeals Division has a longstanding policy and customary procedure that provides that a hearing will not begin in the absence of any of the noticed parties until ten minutes past the noticed hearing time. This established praxis comports with due process. There is no proper procedure or recognized established practice where a hearing examiner is permitted to unilaterally seek out an adverse party that fails to initially appear at the noticed date, time and place of the hearing.

On March 21, 2011 at 9:06 a.m., Hearing Examiner Greer dialed into the conference call. The claimant was present. The Agency and the employers failed to appear by 9:10 a.m., the end of the ten-minute grace period. Notwithstanding, after an additional minute of silence, the hearing examiner stated to the claimant, "Give me one second I need to run downstairs and get my other phone." Beginning approximately two minutes later, the following statements were made on the record prior to the opening of the hearing[2]:

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[2] The hearing examiner's telephone conversation was conducted on a separate telephone from the telephone utilized for the hearing. Only Hearing Examiner Greer's portion of the conversation can be heard. The person on the other end of the telephone conversation cannot be heard on the record.

Hearing Examiner ("HE"): Who is this Sapp or Doug?[3] Sapp this is Greer. My nine just out of curiosity…I have a huge fraud case set at nine o'clock this morning. I don't have an Agency representative for it. They sent in documentation for it. I don't know who it is supposed to be. I don't think it is postponed at least. I am at home and it is on the phone. I know I can go forward. I was just curious to know is there any way someone could call down to Maria Noble's and just see who it is supposed to be. I don't have her number and I have the claimant holding on the line. 2404 alright.

HE (calling another number): Hello. Yes good morning my name is Wesley Greer. I have a case this morning. A fraud case is being conducted by telephone but I don't have an Agency representative. I am trying to figure out who should I talk to about that. No, I am a hearing examiner. The hearing already started at 9. I don't have a representative from the Agency. Okay.

[about a minute of silence]

Claimant ("CL"): Hello?

HE: I am sorry Ms. McKeown, thank you for your patience. We are going to…

CL: I wasn't sure if I was still connected or not.

HE: No you're fine just hold on one second ok?

CL: Sure.

HE (speaking on the second phone line to an Agency employee): Ms. Becker this is Wesley Greer, hearing examiner. I have a fraud case this morning with a Nancy McKeown. Somebody from the Agency sent me documentation in support of this case but I don't have a representative on the phone for it. It is kind of large so I would give the benefit of the doubt and call and find out who was supposed to be here this morning. Sure. Yea, yeah I just have the claimant. Alright. Bye. Ok.

HE: I apologize for that. I was trying to get an Agency to find out if an Agency representative was going to show up. We don't have any employers and that is fine. It is an Agency case and they are supposed to be here to present. It is your appeal so we get to move forward regardless one way or the other so.

CL: Who is that other person you said should show up?

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[3] "Sapp or Doug" refers to Hearing Examiners Brian Sapp and Doug Sandhaus, who act as the Lower Appeals Division's designated Administrative Officer from time to time.

HE: It is the Agency representative. They are the people the Agency who are supposed to be presenting the case. The employers are not here – so be it- they are not here. We are going to go ahead and get started. If they are going to show up they will show. If they are not…

CL: I doubt if my employer will show. One is out of the country so...
HE: Well, no. If they were they would have them here by 9. They got the documentation just like you did.

[At which time an Agency representative appeared at the hearing].[9:18 a.m.].

CONCLUSIONS OF LAW

The findings of fact and evaluation of the evidence are incorporated herein by reference.

I.

In Maryland, a modified *Accardi* doctrine applies to substantive procedures where a demonstration of prejudice to a party is shown. The Court of Appeals set forth the modified doctrine in *Pollock v. Patuxent Inst. Bd. Of Review, 374 Md. 463 (2003)*:

> Consistent with our own APA in respect to the agencies to which it applies, we adopt for other administrative agencies, the *Accardi* doctrine as we modify it and hold that an agency of the government generally must observe rules, regulations or procedures which it has established and under certain circumstances when it fails to do so, its actions will be vacated and the matter remanded. This adoption is consistent with Maryland's body of administrative law, which generally holds that an agency should not violate its own rules and regulations.
>
> In so holding we nonetheless note that not every violation of internal procedural policy adopted by an agency will invoke the *Accardi* doctrine. Whether the *Accardi* doctrine applies in a given case is a question of law that, as the Court of Special Appeals has opined, requires the courts to scrutinize the agency rule or regulation at issue to determine if it implicates *Accardi* because it "affects individual rights and obligations" or whether it confers "important procedural benefits" or, conversely, whether *Accardi* is not implicated because the rule or regulation falls within the ambit of the exception which does not require strict agency compliance with internal "procedural rules adopted for the orderly transaction of agency business," *i.e.*, not triggering the *Accardi* doctrine.
>
> Additionally, we adopt the exception to the *Accardi* doctrine which provides that the doctrine does not apply to an agency's departure from purely procedural rules that do not invade fundamental constitutional rights or are not mandated by statute, but are adopted primarily for the orderly transaction of agency business.

* * * * *

To this extent we adopt the application and rationale of the Court of Special Appeals in its previous applications of the *Accardi.* We reject, however, the Court of Special Appeals' holdings where that court has indicated that there can be a *per se* violation of the doctrine in situations where it may be applicable, regardless of whether the complainant involved was prejudiced by the failure of the agency to follow its procedures or regulations.

Where the *Accardi* doctrine is applicable, we are in accord with the line of cases arising from the Supreme Court and other jurisdictions which have held that prejudice to the complainant is necessary before the courts vacate agency action. In the instances where an agency violates a rule or regulation subject to the *Accardi* doctrine, *i.e.*, even a rule or regulation that "affects individual rights and obligations" or affords "important procedural benefits upon individuals," the complainant nevertheless must still show that prejudice to him or her (or it) resulted from the violation in order for the agency decision to be struck down. In other instances where an exception to *Accardi* applies and where an agency fails to follow its "internal administrative procedures," if the complainant can nonetheless show prejudice to a substantial right due to the violation of the rule or regulation by the agency, then the agency decision may be invalidated pursuant to the Maryland Administrative Procedure Act. In either case, prejudice must be shown.

Pollack v. Patuxent Inst. Bd. Of Review, 374 Md. at 503-504.

II.

Md. Code Ann, Lab. & Empl. art., Section 8-506 provides, in pertinent part

Conduct of hearings

(a) In general. –

(1) A hearing examiner shall conduct a hearing or appeal in a manner that ascertains the substantial rights of the parties.

(2) (i) A hearing examiner is not bound by statutory or common law rules of evidence or technical rules of procedure.

(ii) A hearing examiner shall consider evidence offered in accordance with § 10-213 of the State Government Article.

* * * * *

(b) Conflicts of interest. –

(1) (i) A hearing examiner may not participate in any proceeding in which the hearing examiner has a direct or indirect interest.

(ii) The status of the Secretary as a party to a case may not constitute a direct or indirect interest as to a hearing examiner.

Md. Code Ann., Lab. & Empl. art., Section 8-508 provides, in pertinent part

Review by hearing examiner of determination of claims

* * * * *

(b) Secretary party to appeal. -- The Secretary, at the Secretary's discretion, may be a party to an appeal filed by a claimant or employing unit with the Lower Appeals Division.

(c) Duties of hearing examiner. -- Unless an appeal filed under subsection (a) of this section is withdrawn or removed to the Board of Appeals, a hearing examiner shall:

(1) give the parties a reasonable opportunity for a fair hearing in accordance with the notice provisions in §§ 10-207 and 10-208 of the State Government Article, except that the notice is not subject to § 10-208(b)(4) and (7) of the State Government Article;

III.

COMAR 09.32.11.02 provides, in pertinent part

* * * * *

K. Procedure at Hearing. The Hearing Examiner may call, examine, and cross-examine witnesses and may introduce into the record documentary or other evidence. The parties to the hearing shall be given an opportunity to call witnesses on their own behalf, cross-examine witnesses, inspect documents, and offer evidence in explanation or rebuttal. The Hearing Examiner may order the taking of additional testimony as the Hearing Examiner considers necessary. Upon the request of any party at the hearing, the Hearing Examiner shall grant a reasonable time for oral argument by the interested parties.

L. Continuance of Hearing. The Hearing Examiner may continue any hearing and make any direction or instruction necessary for the efficient disposition of the matter at the Hearing Examiner's discretion.

* * * * *

(R) * * (4) In the case of a telephone hearing, the failure to answer the telephone, the failure to have a telephone available for the hearing, or the failure to be ready to proceed with the hearing shall be considered as a failure to appear at the hearing if these conditions exist for more than 10 minutes after the scheduled time for the hearing.

IV.

The Lower Appeals Division's policy regarding "Hearing, Issues, Agents and Attorneys" (as noted on the hearing notice mailed to the parties on March 8, 2011) provides, in pertinent part

> *The Hearing Examiner will try to develop all of the facts of this case in order to give a fair hearing to all parties, but the Hearing Examiner will not conduct an investigation, contact witnesses not brought to the hearing or obtain documents which are not brought into the hearing by the parties. The only exception is for the Department of Labor, Licensing and Regulation records, which you have the right to see.* [italics in original].

The Lower Appeals Division's policy regarding "Telephone Hearings" provides, in pertinent part

> *The Hearing Examiner **WILL NOT CALL YOU** for your hearing. Instead, at the time scheduled, you must dial the toll free number provided on the front of this hearing notice and enter the participant passcode which is listed followed by the pound sign.* [italics and emphasis in original].

V.

Administrative bodies are not ordinarily bound by the strict rules of evidence of a law court. *Hyson v. Montgomery County Council*, 242 Md. 55, 70, 217 A.2d 578, 587 (1966). In that connection, the Court of Appeals stated in *American Radio-Telephone Service, Inc. v. Public Service Commission*, 33 Md. App. 423, 434-35, 365 A.2d 314, 320 (1976), "although administrative agencies are not bound by the technical common law rules of evidence, they must observe the basic rules of fairness as to the parties appearing before them." *See Dickinson-Tidewater, Inc. v. Supervisor of Assessments*, 273 Md. 245, 253, 329 A.2d 18, 24 (1974); *Montgomery County v. National Capital Realty*, 267 Md. 364, 376, 297 A.2d 675, 681 (1972); *Dal Maso v. Board of County Commissioners*, 238 Md. 333, 337, 209 A.2d 62, 64 (1965).

Procedural due process in administrative law is recognized to be a matter of greater flexibility than that of strictly judicial proceedings. *NLRB v. Prettyman, 117 F.2d 786, 790 (6th Cir. 1941); Lacomastic Corp. v. Parker, 54 F. Supp. 138, 141 (D. Md., 1944).* The concept of due process requires that the adjudicative body examine "the totality of the procedures afforded rather than the absence or presence of particularized factors." *Boulware v. Battaglia, 344 F. Supp. 889, 904 (1972)*; *Widomski v. Chief of Police of Baltimore County, 41 Md. App. 361, 378-79 (1979).* The concept that an administrative proceeding must be fundamentally fair to the parties pervades Maryland's administrative law. *Cecil County Dep't of Social Servs. v. Russell, 159 Md. App. 594, 612 (2004).* The tenants of fundamental fairness apply to the hearing

in the instant case even though the *Maryland Administrative Procedures Act* does not wholly apply to unemployment insurance cases. *See DLLR v. Woodie, 128 Md. App. 398, 409-412 (1999).*

The hearings conducted by the Lower Appeals Division are *de novo*. A *de novo* proceeding is one that starts fresh, on a clean slate, without regard to prior proceedings and determinations. *Mayer v. Montgomery County, Maryland, 143 Md. App. 261, 281 (2002).*

It is a well-established principle of Maryland law that *pro se* parties must adhere to procedural rules in the same manner as those represented by counsel. *DLLR v. Woodie, 128 Md. App. 398, 411 (1999).* The Court of Appeals has stated that "the principle of applying rules equally to *pro se* litigants is so accepted that it is almost self-evident." *Woodie, 128 Md. App. at 411, citing Tretick v. Layman, 95 Md. App. 62, 68 (1993).* The Board finds, therefore, self-evident that the Agency must adhere to procedural rules in the same manner as *pro se* claimants.

The hearing notice provided, "Each party should arrange for all necessary witnesses to attend the hearing, and for all necessary documents to be presented at the hearing." The parties in the instant case "had clear notice of [an] obligation to present [a] case before the DLLR Hearing Examiner." *Quoting Woodie, 128 Md. App. at 411.* In the instant case, the Agency had proper notice of the issues and the hearing in this case. The Agency was noticed as to the date, time and place of the hearing, the toll-free hearing telephone number and the participant passcode. The Agency did not call into the hearing at the noticed time or within the ten-minute grace period.

The hearing examiner admittedly "[knew]" he could have "move[d] forward regardless" of the Agency's appearance. Notwithstanding, the hearing examiner embarked upon a twelve minute quest to assemble a contested hearing in contravention of the stated policy that he "***WILL NOT CALL***" any of the parties. The hearing examiner unilaterally sought out and procured, *sua sponte*, an Agency representative.

The Agency is an adverse party to the claimant. The Agency was awarded, without a showing of good cause for its initial non-appearance, an opportunity to proceed with an opposing case - an opportunity it would not have had but for the hearing examiner's unsolicited and unilateral efforts. The Board has no reason to doubt that if – on the other hand - the claimant failed to appear within the ten minute grace period, the hearing examiner would not have sought out the claimant's presence and the case would have been dismissed in the usual course of business.

The Agency cited no case, and the Board is not aware of any case upon which it may take official or judicial notice, where a hearing examiner sought out and procured a claimant's appearance prior to or after the ten minute grace period and prior to commencement of the evidentiary portion of the hearing. This one-sided action and violation of the stated Lower Appeals Division policies violates fundamental fairness and the claimant's due process rights. It additionally taints the proceedings with the color of bias towards the Agency and vitiates the appearance of the hearing examiner's neutrality.

The issue before the Board is how to reconcile the Lower Appeals Division's policies stated on the back of the hearing notice with the provisions of *COMAR 09.32.11.02. COMAR 09.32.11.02(L)* permits a

hearing examiner to continue a hearing "for the efficient disposition of the matter at the Hearing Examiner's discretion". *COMAR 09.32.11.02(K)* provides, in pertinent part, "The Hearing Examiner may call, examine, and cross-examine witnesses and may introduce into the record documentary or other evidence." However, per the stated longstanding Lower Appeals Division policy, "the Hearing Examiner will not conduct an investigation, contact witnesses not brought to the hearing or obtain documents which are not brought into the hearing by the parties" and "[t]he Hearing Examiner **WILL NOT CALL [A PARTY]** for [the] hearing". The parties are permitted a ten-minute grace period to appear for a hearing prior to the hearing going forward. *See COMAR 09.32.11.02(R)(4).*

The Board holds that the hearing examiner may only seek to have an non-appearing party or its witness appear for the hearing when (after notice of the continuance of the hearing) after the course of a hearing, the hearing examiner determines there is no evidentiary basis upon which to render a decision within the meaning of *Md. Code Ann., Lab. & Empl. art., Section 8-508(c)(2)* and *(c)(3)*. The Board holds that, under the *COMAR* regulations and the Lower Appeals Division's stated procedural policies, an appearing parties' due process rights are violated, and an appearance of bias by the hearing examiner is evinced, when a hearing examiner unilaterally seeks out an adverse party prior to hearing the testimony and evidence of the appearing party and prior to a determination that there is an insufficient evidentiary basis upon which to render a decision.[4]

Therefore, the Board finds in the instant case, that the claimant's due process rights were violated and that the hearing examiner's violation of the Lower Appeals Division's policy prohibiting the hearing examiner from contacting non-appearing parties unduly prejudiced the claimant.

The conundrum in this case is for the Board to determine the appropriate remedy. The Board finds it evident that it is impossible for the claimant to have the hearing for which she was otherwise entitled to receive had the Lower Appeals Division policies been observed. That bell can't be un-rung. A remand of this case would be the "doing of a useless thing" because the Board finds it does not have the power to remand this case and exclude the Agency and the employers from participating. The Board finds that justice requires that the evidentiary record of the proceedings before it must "be struck down". *Pollock v. Patuxent Inst. Bd. Of Review, 374 Md. 463, 503-504 (2003)* and that a decision in favor of the prejudiced party (the claimant) must be rendered.

The evidence in the record is tainted. There being insufficient evidence, Agency did not meet its burden of proof on the issues in this case. Therefore, pursuant to *Md. Code Ann., Lab. & Empl. art., Section 8-5A-10(d)*, the Board reverses the hearing examiner's decision and finds in favor of the claimant. No disqualification or overpayment shall be assessed against the claimant.

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[4] The Board notes that the above-described absent adverse party situation is distinguished from a hearing where a party appears for the hearing, and the hearing examiner finds he or she needs an additional fact witness from the appearing party to clarify or properly develop the record.

DECISION

There is insufficient evidence to show that the claimant knowingly and intentionally misreported her earnings, the Board finds that the claimant did not violate *§ 8-1301* and *§ 8-1305.*

The Board further finds that any benefits paid to the claimant from weeks beginning January 24, 2010 through week ending January 29, 2011, cannot be recovered because the Board finds that the claimant was not overpaid pursuant to *Md. Code Ann., Lab. & Empl. Art., § 8-809(a)* and *§8-809(b)* and *Maryland Code Ann., Lab. & Empl. Art., § 8-1305.*

The Board finds, based upon a preponderance of the credible evidence, that the Agency failed to meet its burden of establishing that the claimant was overpaid benefits within the meaning of *§ 8-809(a).*

The Board finds, based upon a preponderance of the credible evidence, that the Agency failed to meet its burden of establishing that the claimant knowingly made a false statement and/or failed to disclose a material fact in order to obtain or increase benefits within the meaning of *§ 8-809(b)* and *§ 8-1305.*

The decisions shall be reversed for the reasons stated herein.

Clayton A. Mitchell, Sr., Associate Member

Eileen M. Rehrmann, Associate Member

Donna Watts-Lamont, Chairperson

RD
Date of hearing: January 31, 2012
Copies mailed to:
NANCY S. MCKEOWN
LOCUST INDUSTRIES LIMITED
MARIA NOBLE
BRENDA HALEY BPCU
LOCUST INDUSTRIES LIMITED
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

NANCY S MCKEOWN

SSN #

Claimant

vs.

LOCUST INDUSTRIES LIMITED

Employer/Agency

Before the:
Maryland Department of Labor, Licensing and Regulation
Division of Appeals
1100 North Eutaw Street
Room 511
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Appeal Numbers: 1107059,
1106867-1106868
Appellant: Claimant
Local Office : 65 / SALISBURY CLAIM CENTER

April 28, 2011

For the Claimant: PRESENT

For the Employer:

For the Agency: PRESENT, BRENDA HALEY

ISSUE(S)

Whether the claimant failed to disclose a material fact or made false statements to obtain or increase benefits to which the claimant was not entitled, within the meaning of MD. Code Annotated, Labor and Employment Article, Title 8, Sections 809(b), 1301 and 1305. Whether the claimant is overpaid within the meaning of Section 8-809(a).

PREAMBLE

Appeal Numbers 1107059, 1106867, and 1106868 were consolidated for purposes of hearing and decision. Only this one consolidated decision which addresses the issues in each of the appeals is being issued.

FINDINGS OF FACT

The claimant filed a claim for unemployment insurance benefits, establishing a benefit year effective January 24, 2010, and a weekly benefit amount of $410.00.

Thereafter, claimant established a second benefit year effective January 24, 2011, with a weekly benefit amount of $363.00.

On February 15, 2011, the Claims Specialist determined the claimant committed a fraudulent act because the claimant knowingly failed to disclose a material fact(s) in order to obtain and/or increase benefits to which the claimant would not otherwise be entitled, and consequently disqualified the claimant for a period of one year from receipt of unemployment benefits. The Claims Specialist further determined that the claimant received wages totaling either less than or more than the claimant's weekly benefit amount, for the individual weeks in question, while the claimant concurrently received unemployment insurance benefits to which the claimant was not entitled. The claimant was therefore overpaid for the full amount of the benefits received for the affected weeks, as provided for in Sections 8-809 (b), and 1301 of the Maryland Unemployment Insurance Law.

The Agency sent and the claimant received the Agency publication "What You Should Know About Unemployment Insurance In Maryland," (See Agency Exhibit 1), wherein the Agency informed the claimant to report all wages earned during the week in which she earned the wages.

During the weeks in the question, the claimant worked for the above-captioned employer and for another employer, namely Merrick/Sparrow Advertising Inc. The information regarding the weeks claimed by the Claimant are as follows:

Appeal Number	Week Ending Date	Claimant Earnings Merrick ($)	Claimant Earnings Locust ($)	Total Claimant Earnings	Wages Reported by Claimant ($)	U.I. Paid ($)
1106867 1106868	06/26/10	27.00	400.00	427.00	85.00	410.00
1106867 1106868	07/03/10	252.00	280.00	532.00	115.00	395.00
1106867 1106868	07/10/2010	172.00	410.00	582.00	165.00	345.00
1106867 1106868	07/17/10	0.00	410.00	410.00	280.00	230.00
1106867 1106868	07/24/10	26.00	490.00	516.00	326.00	184.00
1106867 1106868	07/31/10	212.00	555.00	767.00	350.00	160.00
1106867 1106868	08/07/10	120.00	555.00	675.00	300.00	210.00
1106867 1106868	08/14/10	0.00	580.00	580.00	302.00	208.00
1106867 1106868	08/21/10	40.00	580.00	620.00	363.00	147.00

The claimant contended that the claimant initially under-reported the above wages for Locust Industries because she feared that the employer would not be able to pay her. However, the claimant also failed to report those wages when she was paid for those nine weeks. During this same time period, the claimant also worked for another employer, Merrick/Sparrow Advertising Inc., and earned wages from it. Based upon the combined wages from both employers, the claimant clearly under-reported her wages for the time period in question. The claimant's underreporting of wages resulted from a deliberate and willful attempt to obtain or increase benefits to which the claimant might not otherwise be entitled.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1301, provides an individual, for that person or for another, may not knowingly make a false statement or false representation, or knowingly fail to disclose a material fact, to receive or increase a benefit or other payment under this title or an unemployment insurance law of another state, the federal government, or a foreign government.

Md. Code Ann., Labor & Emp. Article, Section 8-1305 (b) (2), provides an individual who violates Section 8-1301 is disqualified from receiving benefits for one year from the date on which a determination is made the claimant filed a claim involving a false statement or representation, or failed to disclose a material fact.

Md. Code Ann., Labor & Emp. Article, Section 8-809 (b) (Supp 1996), provides "if the Secretary finds a claimant knowingly made a false statement or representation, or knowingly failed to disclose a material fact, to obtain or increase a benefit or other payment under this title, in addition to disqualification of the claimant, the Secretary may recover from the claimant:

(1) all benefits paid to the claimant for each week for which the false statement or representation was made or for which the claimant failed to disclose a material fact; and

(2) interest of 1.5% per month on the amount accruing from the date the claimant is notified by the Secretary the claimant was not entitled to benefits received."

EVALUATION OF EVIDENCE

The Agency had the burden to show, by a preponderance of the credible evidence, the claimant knowingly made a false statement or false representation, or knowingly failed to disclose a material fact in order to receive or increase benefits. [See Bogan v. OCS Home Remodelers, 1555-BH-82, "Whether the claimant deliberately failed to disclose a material fact in order to obtain benefits, within the meaning of Section 8-809 (b), is a question of intent."]. In the case at bar, the Agency met this burden.

The Agency's documentation supports the conclusion the claimant regularly failed to report all of her weekly earned wages. The claimant candidly admitted that for the nine weeks between June 20, 2010 to August 21, 2010, she simply did not report her wages from Locust Industries for fear that the employer would not pay her. Yet, she failed to report her wages once the employer actually paid her. Upon consideration of the totality of the evidence presented in the case, the Hearing Examiner is compelled to determine that the claimant's frequent false representations were motivated by a deliberate fraudulent intent

to obtain benefits to which she would not otherwise be entitled. That is to say, in the case at bar the Agency met the burden of proving that the claimant did underreport wages, and also met its burden of proving that the claimant possessed fraudulent intent when doing so. Further, I hold that the Agency did adequately prove that the claimant received benefits to which the claimant was not properly entitled, and therefore those benefits are recoverable pursuant to the sections of law set forth above.

DECISION

IT IS HELD THAT the claimant knowingly made a false statement and/or failed to disclose a material fact in order to obtain or increase benefits within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-809(b). Any benefits paid to the claimant from June 20, 2010, to August 21, 2010, may be recovered along with the statutory rate of interest. Further, in accordance with Sections 8-1301 and 8-1305(b)(2), the claimant shall be disqualified from receiving benefits from February 15, 2011, and for a period of one year thereafter.

The determinations of the Claims Specialist in Appeal Numbers 1107059, 1106867, and 1106868 are affirmed.

W E Greer, Esq.
Hearing Examiner

Note: This decision does not preclude the Department of Labor, Licensing and Regulation from instituting civil or criminal action against the claimant under the provisions of the Code of Maryland, Labor and Employment Article, Title 8, Section 809.

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 May 13, 2011. 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 21, 2011
BLP/Specialist ID: USB57
Seq No: 002
Copies mailed on April 28, 2011 to:

NANCY S. MCKEOWN
LOCUST INDUSTRIES LIMITED
LOCAL OFFICE #65
MARIA NOBLE