IN THE SUPREME COURT OF MISSOURI

SC93361

MELISSA CODAY
Claimant/Appellant
vs.
DIVISION OF EMPLOYMENT SECURITY
Respondent

Appeal from the Decisions of
The Labor and Industrial Relations Commission
Commission Nos. LC-11-03935, LC-11-03936, LC-12-00535,
LC-12-00536 and LC-12-00537

Missouri Court of Appeals
APPEAL NO. ED98030
(Consolidated with Appeals ED98031, ED98667, ED98678 and ED98679)

APPELLANT'S SUBSTITUTE BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

JURISDICTIONAL STATEMENT

This is a consolidated appeal from five Decisions of the Labor and Industrial Relations Commission, which affirmed or modified Decisions of the Appeals Tribunal of the Division of Employment Security. Section 288.210 R.S. Mo. provides that claimants may appeal decisions of the Commission to the Missouri appellate court having jurisdiction in the area where the claimant resides. Ms. Coday resides in St. Louis County, Missouri. Therefore, she filed her appeals with the Court of Appeals for the Eastern District of Missouri. After that Court issued its Order and Memorandum pursuant to Rule 84.16(b) and Appellant's Application for Transfer under Rule 83.02 was denied, Appellant filed an Application for Transfer pursuant to Rule 83.09 which this Court granted May 28, 2013.

INTRODUCTION

Claimant/Appellant Melissa Coday has five appeals now pending before this Court with the Division of Employment Security as the Respondent in each. All five Appeals were consolidated in the Curt of Appeals.

The Appeal from Commission No. LC-11-03935 involves an overpayment determination of $5,739.00 in benefits during the seven months from May 3, 2009

through October 3, 2009. It is discussed in Points I and II. Appeal from Decision No. LC-11-03936 is from a 25% penalty assessment under Section 288.380.9. It is discussed in Point III. Appeal from No, LC-12-00535 is from a Decision that Melissa Coday had been overpaid $6,844.00 in benefits during the five months from October 4, 2009 through March 6, 2010; and there is an issue of the timeliness of Claimant's Appeal. Appeals relation to that Decision are covered in Points IV, V, and VI. Appeal from No. LC-12-00536 is from a decision that there was an overpayment of $295.00 for the week of March 7 through March 13, 2010, the "waiting week" and timeliness of that appeal also is an issue. It is the subject of Points VII and VIII. Ms. Coday's Appeal from Decision No. LC-12-00537 involves an assessment of a penalty of $6,419.00, 100% of the Missouri (as opposed to Federal stimulus) benefits paid, under Section 288.030.9. Claimant's appeal from that determination was timely. That Decision is discussed in Point IX

There are transcripts from two hearings. One hearing was on July 15, 2011 and the Transcript of that hearing, along with the associated Legal File is included in the Record.. There were two packages of Division Records marked as Division Exhibits D1 and D2 at the time of the July 15, 2011 hearing, and they are consecutively numbered as pages 99 through164 of the Transcript of that hearing. Citations in this Brief to Tr1 are to pages of the transcript of the July 15, 2011 hearing and the

Division's Exhibits offered and admitted at that time. Citations to LF1 are to the first Legal File, which has Case No. ED98030 on the Title Page. The hearing of the other three Appeals was conducted February 1, 2012. There were three packages of the Division's Records and each was marked as Exhibit D1 with the relevant appeal number. All three Exhibits are consecutively numbered in Volume 2 of the Transcript of that February 1, 2012 hearing. There was considerable repetition among those three Exhibits and many pages from the Exhibits used at the July 15, 2011 hearing also were included. Citations to Tr2 followed by a number are to page(s) of that transcript. Citations to LF2 are to the Legal File which has Case No. ED98677 on the cover. Claimant Coday often cites to both transcripts in this Brief as most of the underlying facts regarding her conduct are discussed in each.

All five of the Coday Appeals involve the same conduct and the same facts which occurred more-or-less continuously from early May, 2009 through mid-March, 2010. The findings of fraud and assessments of penalties are all based on Ms. Coday's decision, made early during that period, that she need not report certain commission payments she received once a month.

The Division of Employment Security divided those claims and resulting benefit payments into two groups and issued two sets of determinations, the earliest being more than a year before the more recent. The first set of determinations established

overpayments on a finding that Ms. Coday was paid more benefits than she was eligible to receive and assessed a penalty based on alleged fraud or willful failure to report earnings; the second set established additional overpayments based upon the same alleged failure to report earinings and imposed a more severe penalty.

INTRODUCTION IN THE SUPREME COURT

This Substitute Brief follows the same format as the one filed in the Missouri Court of Appeals, Eastern District. Point VI in the Eastern District Brief had a confusing word processing error which Appellant has attempted to correct. There are citations to recently decided opinions, such as *Byers v. Human Resource Staffing*, ___ S.W.3d _____, No. E.D. 99109 (Mo. App. E.D. June 28, 2013) and *Speed v. Division of Employment Security*, ___ S.W.3d ____, WD 75346 (Mo. App. W.D. June 25, 2013). And in her Argument under Point I Appellant mentions a 1999 opinion from the District of Columbia, *Gardiner v. District of Columbia Department of Employment Services,*736 A.2d 1012 (D.C. 1999), which was cited by the Respondent in the Court of Appeal and by the Eastern District in it Memorandum. Otherwise, Appellant makes the same arguments here as she did in the Court of Appeals and before the Labor and Industrial Relations Commission.

Claimant/Appellant Melissa Coday admits that she made an error in judgment when she filed her claims for unemployment benefits and that as a result she received

unemployment benefits for which she was not eligible and which she should repay. She maintains, however, that her error was not malicious or fraudulent as those terms are customarily used, but was the result of her unusual, if not unique, circumstance. Appellant Coday has testified that she considered that the Design Design commissions might have an impact on her claim for benefits; but having an awareness of her interests is not malice. It is not a willful, knowing violation of the law. It is undisputed that she tried without success to get guidance from the Division and acted in ignorance of the rules described by the Division's witnesses at the hearings.

There is no discovery in these administrative proceedings. Appellant Coday does not know why the Division waited a year before making the second set of overpayment and penalty determinations, and she does not know why the Division assessed an enhanced penalty of !00% based upon an earlier punishment for the same conduct, an earlier penalty determination which is still on appeal and not final. There may not be a reason. But affirming that enhanced penalty may be the most obvious and injurious error made by the Commission.

STATEMENT OF FACTS

Melissa Coday worked full-time for Sullivan Private Label for twenty years. Tr1 70-71. When her hours at Sullivan Private Label were reduced by half in July 2008 she started working part-time for Design Design, Inc. Tr1 70-71; Tr2 64. This

was work she could do during the evenings, primarily from her home. *Id.* She last worked for Design Design in March of 2010. Tr2 64. She found full-time employment to replace the Sullivan Private Label job and did not claim any unemployment benefits after the week of March 6, 2010. Tr2 73-75. She nonetheless received commission checks from Design Design through October of 2010. *Id.* After she was laid off from Sullivan Private Label in May 2009 and until she found another full-time job in March 2010, she claimed and received unemployment benefits. Ms. Coday's disputes with the Division all concern monthly commission payments she received from Design Design.

Design Design, Inc. provides greeting cards, wrapping paper and similar products to gift shops and other retailers. Tr1 73; Tr2 76. Ms. Coday worked as an account representative. She had a list of accounts in her assigned territory in Eastern Missouri and Southern Illinois. Tr1 71. She was paid by commission. Customers would place an order by fax, mail or telephone to Claimant at her home and she would process the order and send it along to Design Design electronically. Tr1 72; Tr2 76. On some days Ms. Coday might receive orders from several retailers. Tr1 75. Other days there might be only one order or no order at all. *Id.* Sometimes many days would pass and there would be no orders for Ms. Coday to transmit on to Design Design. Tr1 75-76. She usually worked ten to fifteen hours a week, on average. Tr1 83.

Much of the Design Design merchandise was seasonal, wrapping paper for Christmas for example, and the largest orders would necessarily be placed months in advance of a particular holiday. Tr1 73; Tr2 73-77. Design Design apparently understood that gain from these largest orders would not be realized by its customers, the retailers, until consumers actually were making holiday purchases. Design Design granted its customers extended payment terms in many cases so that no payment would be due for several months. Tr1 73.

Claimant Melissa Coday was not paid her commission by Design Design until Design Design was actually paid by the retailers who ordered the merchandise. Tr1 72-76, 104; Tr2 65, 148. She was paid once a month, on or about the 20th, by direct deposit from Design Design into her bank account. *Id.* If a particular retailer had been granted several months to pay its bill, Ms. Coday could not expect to receive her commission until those months had passed. *Id.* And sometimes retailers would be late with payments and not make them when they were due. *Id.* In such a case Ms. Coday would not receive any commission until Design Design was eventually paid. *Id.*

When she filed her weekly claims online she answered questions set out on the Division's "Weekly Benefits Claim Filing" form on its website. Tr1 78, D1 38-39. She answered the questions presented by stating whether or not she had been self-employed, went to school or refused any work during the week. *Id.* She agreed she

did not report her relationship with Design Design; if the question whether or not she was employed had come up, she would have answered in the negative. Tr1 82-86; Tr2 67. She considered hers to be a unique situation. Tr1 80; Tr2 67. She did not believe a "yes" or "no" answer to the question whether she did any work was accurate or appropriate. Tr2 67. She was "unemployed" in her view because she did not consider passing on orders in the evenings "working" at a job. Tr1 79. When she selected "no" in response to the prompt "did you do any work during this week?" the computer program automatically entered "no earnings" as the default position. Tr1 49.

Ms. Coday tried to get some guidance from the Division when she started the claims process in May 2009. Tr1 77-79; Tr2 68. The first time she appeared in person at the Missouri Career Center for her monthly check-in, she asked a receptionist who she should contact to discuss the proper method to report her commission payments. Tr1 79. That person did not know the answer and gave her a telephone number to call. *Id.* She made several attempts to call the Division but was not able to find anyone who would admit to knowing the answer. Tr1 88. On one occasion she waited a long time, perhaps 45 minutes, and no one answered the phone. Tr1 79. The Division's witness admitted it was difficult to communicate with Division employees at relevant times due to high unemployment rates. Tr1 63.

Ms. Coday recognizes in hindsight that she should have reported the money she received during the week she received it. Tr1 81, 86; Tr2 70, 76. She was reluctant to report the first payment in May, 2009 because she knew that was for orders transmitted by her well before she started to claim unemployment benefits. Tr1 88; Tr2 70. She considered that she was in the unique situation and was totally unemployed despite the fact that she might have worked a few hours each week transmitting orders to Design Design. Tr1 79-80; Tr2 68.

Melissa Coday's benefit year began May 3, 2009 and ended May 8, 2010. Tr1 114. Her weekly benefit amount was determined to be $320.00 and she was allowed to earn 20% of that amount, or $64.00, each week with no reduction of benefits. *Id.*

The Division learned that Claimant Coday had been receiving the monthly payments during a routine audit when Design Design responded on November 27, 2009 to a Benefit Audit and Investigation Form sent by the Division on October 29, 2009. Tr1 23, 146-147. Design Design provided the amounts paid on the 20th of each month. *Id.* The form requested that Design Design put down the number of hours Ms. Coday worked each week, but Design Design could not do so. Tr1 146. Nor was Design Design able to record the amounts earned by Ms. Coday during any week of unemployment. *Id.* The boxes on the form for weekly hours worked and weekly

amounts earned were returned blank. *Id.* The Division was puzzled by these responses. Tr1 51. The Division needs to know the week wages are earned. Tr1 51.

Nearly a year later, on September 7, 2010, the Division followed up with an inquiry to the Controller of Design Design, Ms. Lynne Benzer. Tr1, 147. Ms. Benzer explained Ms. Coday had quit March 19, 2010 to take another job. *Id.* She also confirmed that Ms. Coday earned the commissions whenever she placed an order; the commissions were paid after the orders were shipped, "maybe a month"; that there was no minimum guaranteed wage or commission; and that there was no record of hours worked. *Id.* Ms. Coday responded to an inquiry explaining that she was not entitled to be paid when orders were shipped, but only when the customer had actually paid the bills submitted by Design Design. Tr1 151.

In the absence of any factual information to explain what hours were worked or how much was earned during any week of unemployment claimed by Ms. Coday, the Division "pro-rated" the commissions, dividing each monthly payment by the number of days in each preceding month and asserting Ms. Coday earned that amount each day. Tr1 148-149. For example, the Division asserted Ms. Coday earned $51.85 on Sunday, May 3, 2009 and each day in May thereafter. Tr1 59-60. The Division admits there are no facts to show when the money was earned. Tr. 59-60.

On September 28, 2010 the Division retroactively determined Ms. Coday had been ineligible for benefits beginning May 3, 2009. Tr1 106. That determination was reconsidered twice, on October 12, 2010 and again on October 19, 2010. Tr1 107, 108. On October 21, 2010 and October 28, 2010 the Division determined Ms. Coday had been overpaid benefits in the amount of $8,970.00 during the weeks from May 9, 2009 through October 17, 2009. Tr1 109-112.

The basis for the $8,970.00 figure was the determination that Ms. Coday was self-employed, and not available for other work, during the period May through October, 2009. Tr1 106-110. The Division established the overpayment to be the maximum possible amount; every penny Ms. Coday had received. Tr1 37-46, 106-110. There was no penalty determination increasing the amount demanded because of any "fraud" on Ms. Coday's part, even though the Division knew of the Design Design monthly payment. *Id.*

The ineligibility determination of September 28, 2010 and the redeterminations of October 12 and October 19 are included in the record, Tr1 106-108, apparently because they were part of Ms. Coday's *pro se* appeal from the overpayment determination of October 28, 2010. Tr1 100-113. There was a hearing and the Appeals Tribunal reversed the ineligibility determination and in a separate decision modified and affirmed the overpayment. LF1, 18-23. The Appeals Tribunal recognized and held

Claimant was eligible for partial unemployment benefits for many weeks. Id at 21. Ms. Coday retained her attorney who filed an application for review of the overpayment decision of the Appeals Tribunal. There was no appeal from the Decision reversing the "self-employed not available for work" determination. The transcript of that first appeal was unintelligible, and so on March 11, 2011 the matter was remanded to the Appeals Tribunal for another hearing. (This is described in the Commission's Decision, LF1 69.) Ms. Coday was represented at that other hearing, which was successfully transcribed and is Tr1.

The Division assessed a "fraud' penalty on May 2, 2011 after the Appeals Tribunal had reversed the ineligibility determination and modified the amount of the overpayment. Tr1 37-39, 159. By then the Division had noticed the error of the Appeals Tribunal in the January 2011 overpayment Decision, and reduced the amount of the overpayment, to reflect that Ms. Coday was eligible for some benefits some weeks. *Id.* That fraud determination incorrectly stated that the overpayment determination of 10/28/10 had become final. Tr1159. That overpayment determination was then, and still is, being appealed.

On May 9, 2011 Appellant Coday's attorney sent a two page entry of appearance and appeal letter. Tr1 157-158. The Division was put on notice that Ms. Coday's attorneys "… enter their appearance with respect to any claim or determination that

Melissa Coday has been overpaid benefits … .” Tr1 157. The letter further advised the Division that Ms. Coday “ … hereby appeals from … any other determination arising from the alleged overpayment of benefits … .” Tr1 158.

Then, about a year after the first overpayment determination, on October 19 or 20, 2011, the Division made an additional determination of an overpayment and assessed another larger penalty because Ms. Coday had decided in May 2009 that she did not need to report the Design Design payments. LF2 2-3. On December 8, 2011 the Division issued another penalty determination. LF2104. Once again the determination falsely stated that the underlying overpayment determination that of 10/19/11 had become final. LF2 104, Tr2 207. It still is not final. The penalty imposed December 8, 2011was the maximum allowed, 100% of the alleged overpayment rather than 25%, because there was a prior fraud overpayment, according to the Divisions, which was the overpayment determination of October 28, 2010, which is still on appeal, now pending before this Court.

Ms. Coday maintains there is no evidence available to or produced by Design Design or the Division or herself to show that she worked or earned those sums during the preceding days, weeks or months. There is no evidence in the record before the Commission to show when the amounts were earned.

Ms. Coday did not and does not dispute the amounts paid to her on or about the 20th of each month from May through October, 2009 as reported by Design Design and recorded in the Division's records. *See* Tr 146. She also agrees she claimed benefits and was paid total benefits in the amount of approximately $345.00 each week. And she stipulates, for purposes of this appeal, that she was paid an amount in excess of her weekly benefit amount on May 20, 2009 during the week ending May 23, 2009; and that there is evidence of the following payments:

Date Payable	**Commission Paid**	**Week Ending**	**Benefits Paid**
5/20/09	?	5/23/09	$345.00
6/20/09	$1,503.65	6/20/09	$345.00
7/20/09	$1,174.76	7/23/09	$345.00
8/20/09	$1,09.84	8/22/09	$345.00
9/20/09	$1,643.15	9/26/09	$345.00
10/20/09	$1,974.94	10/24/09	$345.00
11/20/09	$1,694.87	11/21/09	$345.00
2/18/09	$3,645.68	12/19/09	$345.00
1/20/10	$1,295.25	1/23/10	$345.00
2/19/10	$1,963.79	2/20/10	$345.00
3/19/10	$2,342.05	N/A	

The benefits paid include $320.00 unemployment benefits plus $25.00 federal stimulus.

POINTS RELIED ON

POINT I.

The Commission erred in its Decision in the No. LC-11-03935 (Appendix 1-6; LF1 61-66) that Claimant had been overpaid regular benefits in the amount of $5,614.00 and stimulus payments of $125.00 because its Decision is not supported by competent, substantial evidence and is not in accordance with the law in that there was no evidence that payments Claimant received on or about the twentieth of each month "related to" or were in any way payment for work Claimant had done the previous month, nor was there any evidence that Claimant had the ability to show where the work which resulted in any monthly payment should be prorated to attribute an equal share to an equal amount of work done each day of the preceding month is arbitrary and not supported by any evidence; and further, in that the practice employed by the Commission placed an unlawful and unfair burden on Claimant to disprove

unsupported allegations; and further, in that when a claimant is paid wages on a certain date under circumstances when it is unknown or uncertain when the work to earn those wages was done, the wages should be deemed to be earned and payable the week they are paid.

***General Motors Corp. v. Buckner,* 49 S.W.3d 753 (Mo.App. E.D. 2001)**

***Hill v. Norton-Young, Inc.*, 305 S.W.3d 491 (Mo.App. E.D. 2010)**

Section 288.030.1 (28) R.S. Mo.

POINT II.

The Commission further erred in its Decision in No. LC-11-03935 (Appendix 1-6; LF1 61-66) that Claimant willfully failed to disclose earnings and material facts because its decision is not supported by competent, substantial evidence and is not in accordance with the law in that there is no evidence that Claimant acted with the specific intent to obtain benefits in

violation of the law; and further, there is no evidence that Claimant was aware of that she was required to report the monthly commission payments every week before she received them in the manner submitted by the Division and approved by the Commission; therefore she could not have intentionally deliberately or willfully failed to report those wages.

***Welsh v. Mentor Mgmt., Inc.*, 357 S.W.3d 277 (Mo.App. E.D. 2012)**

Tenge v.Washington Group International, Inc., 333 S.W.3d 492 (Mo.App. E.D. 2011).

POINT III.

The Commission erred in its Decision No. LC-11-03936 (Appendix 7-8; LF1 103-104) assessing a penalty under Section 288.380.9 R.S.Mo. because the Decision is not supported by competent, substantial evidence and is not in accordance with the law in that in that there is no evidence that Claimant acted with the specific intent to obtain benefits in violation of the law; and further, there

is no evidence that Claimant was aware of that she was required to report the monthly commission payments every week before she received them in the submitted by the Division and approved by the Commission; therefore she could not have intentionally committed fraud by misrepresenting, misstating, or failing to disclose any material fact .

***Welsh v. Mentor Mgmt., Inc.*, 357 S.W.3d 277 (Mo.App. E.D. 2012)**

Tenge v.Washington Group International, Inc., 333 S.W.3d 492 (Mo.App. E.D. 2011).

POINT IV.

The Commission erred in its Decision in No. LC-12-00535 (Appendix 9, LF2 40) that Claimant's appeal was not timely filed because the Decision is not supported by competent, substantive evidence and is not in accordance with the law in that:

A. The deputy's determination at issue, that Claimant had been overpaid because she was paid benefits during a period she earned wages. was a reconsidered determination of Claimant's benefits for those weeks in accordance with Section 288.070.5 and so was governed by the thirty day appeal period, which may be extended for good cause in accordance with Section 288.070.10;

B. The deputy's determination at issue was not a penalty assessment under Section 228.380.9 so that the 30 day appeal period of 228.380.9(b) does not apply;

C. Claimant's earlier appeal from the reconsidered determination resulting in the overpayment which is the subject of No. LC-11-03935 (See Point I above) should be considered an appeal from this overpayment determination; and/or

D. Claimant had good cause to extend the 30 day appeal period because she acted reasonably and in good faith.

***Rector v. Kelly*, 183 S.W.3d 356, (Mo. App. 2006)**

***King v. Division of Employment Security*, 964 S.W. 3d 823 (Mo. APP. 1998)**

POINT V.

The Commission erred in its Decision in NO. LC-12-00535 affirming the overpayment of benefits in the amount of $6,844.00 because its Decision is not supported by competent, substantial evidence and is not in accordance with the law in that:

A. The deputy's determination that Claimant was overpaid because she was paid benefits during a period when she earned wages was a reconsidered determination made later than one year following the end of the benefit year and so the Division lacked jurisdiction under Section 288.070.5 R.S. Mo.; and/or

B. There was no evidence that payments Claimant received on or about the twentieth of each month "related to" or were in any way payment for work Claimant had done the previous month, nor was

there any evidence that Claimant had the ability to show where the work which resulted in any monthly payment should be prorated to attribute an equal share to an equal amount of work done each day of the preceding month is arbitrary and not supported by any evidence; and further, in that the practice employed by the Commission placed an unlawful and unfair burden on Claimant to disprove unsupported allegations; and further, in that when a claimant is paid wages on a certain date under circumstances when it is unknown or uncertain when the work to earn those wages was done, the wages should be deemed to be earned and payable the week they are paid.

***Wagner v. Unemployment Compensation Comm'n*, 188 S.W.2d 342 Mo. 1946).**

***Crawford v. Division of Employment Security*, 376 S.W.3d 658 (Mo. banc, 2012)**

POINT VI.

The Commission further erred in its Decision in NO. LC-12-00535 (Appendix 9, LF2 40) that Claimant willfully failed to disclose earnings and material facts because its decision is not supported by competent, substantial evidence and is not in accordance with the law in that there is no evidence that Claimant acted with the specific intent to obtain benefits in violation of the law; and further, there is no evidence that Claimant was aware of that she was required to report the monthly commission payments every week before she received them in the manner submitted by the Division and approved by the Commission; therefore she could not have intentionally deliberately or willfully failed to report those wages.

***Welsh v. Mentor Mgmt., Inc.*, 357 S.W.3d 277 (Mo.App. E.D. 2012)**

Tenge v.Washington Group International, Inc., 333 S.W.3d 492 (Mo.App. E.D. 2011).

POINT VII.

The Commission erred in its Decision in No. LC-12-00536 (Appendix 15-19; LF2 91, 69-72) that the appeal was not timely filed because the Decision is not supported by competent, substantial evidence and is not in accordance with the law in that:

A. The only evidence was that Claimant acted reasonably and in good faith under the circumstances; and/or

B. Claimant's earlier appeal from the reconsidered determination which is the subject of No. LC-11-03935 (See Point I above) should be considered an appeal from this overpayment determination.

***Rector v. Kelly*, 183 S.W.3d 356, (Mo. App. 2006)**

***King v. Division of Employment Security*, 964 S.W. 3d 823 (Mo. APP. 1998)**

Section 288.070.5 RSMO

POINT VIII.

The Commission further erred in its Decision in LC-12-00536 (Appendix 15-19; LF2 91, 69-72) that claimant was overpaid for her waiting week because its Decision is not supported by competent, substantial evidence in that claimant satisfied the requirements for receiving her waiting week payment under Section 288.040.1(4) R.S.Mo.

Section 288.040.1 (4)

POINT IX.

The Commission erred in its Decision in Case No. LC-12-0537 (Appendix 20-24; LF2 118-121, 140) assessing a penalty of $6,419.00 under Section 28.380.9 R.S.Mo. because the Decision is not supported by competent, substantial evidence and is not in accordance with the law in that in that:

A. There is no evidence that Claimant acted with the specific intent to obtain benefits in violation of

the law; and further, there is no evidence that Claimant was aware of that she was required to report the monthly commission payments every week before she received them in the manner submitted by the Division and approved by the Commission; therefore she could not have intentionally committed fraud by misrepresenting, misstating, or failing to disclose any material fact .

B. **The imposition of the penalty was based upon an overpayment determination which is invalid and unlawful as it was a redetermination made without authority or jurisdiction more than one year after Claimant's benefits year ended in violation of Section 288.070.5, R.S.Mo.;**

C. The imposition of the penalty of 100% of the overpaid benefits, rather than 25%, was based upon a "prior" penalty "of record" which had been assessed for the same alleged fraudulent at and was based upon a matter which was, and is, under appeal.

***Welsh v. Mentor Mgmt., Inc.*, 357 S.W.3d 277**

(Mo.App. E.D. 2012)

Tenge v.Washington Group International, Inc., 333

S.W.3d 492 (Mo.App. E.D. 2011).

ARGUMENT

Standard of Review

The Appellate Court's review of unemployment compensation cases is limited to deciding whether the Commission's decision is supported by competent, substantial evidence and authorized by law. Section 288.210 R.S.Mo.*; Williams v. Enterprise Rent-A-Car Services, LLC*, 297 S.W.3d 139, 142 (Mo.App. E.D. 2009). Whether the facts require that a claimant be disqualified or ineligible for benefits is a question of law which this Court reviews *de novo*. See *Wagner v. Unemployment Compensation Comm'n*, 198 S.W.2d 342, 344 (Mo. banc 1946); *Williams v. Enterprise Rent-A-Car, supra*, 297 S.W.3d at 143. Eligibility requirements are strictly construed in favor of the claimant/employee and against the disallowance of benefits. *See* Section 288.020 R.S.Mo; *Mo. Division of Employment Sec. v. Labor Industrial Relations Comm'n,*

S.W.2d 145, 148 (Mo. banc 1983). Decisions regarding good cause for filing a late appeal are reviewed for abuse of discretion. *Todaro v. Labor and Industrial Relations Commission*, 660 S.W.2d 763, 765 (Mo.App. 1983). Whether or not a document filed by a claimant is an appeal is reviewed *de novo*, and a failure to recognize that a claimant has filed an appeal is a failure to apply the law. *Rector v. Kelly*, 183 S.W.3d 356, (Mo. App. 2006)

POINT I.

The Commission erred in its Decision in the No. LC-11-03935 (Appendix 1-6; LF1 61-66) that Claimant had been overpaid regular benefits in the amount of $5,614.00 and stimulus payments of $125.00 because its Decision is not supported by competent, substantial evidence and is not in accordance with the law in that there was no evidence that payments Claimant received on or about the twentieth of each month "related to" or were in any way payment for work Claimant had done the previous month, nor was there any evidence that Claimant had the ability to show where the work which resulted in any monthly payment should be prorated to attribute an equal share to an equal amount of

work done each day of the preceding month is arbitrary and not supported by any evidence; and further, in that the practice employed by the Commission placed an unlawful and unfair burden on Claimant to disprove unsupported allegations; and further, in that when a claimant is paid wages on a certain date under circumstances when it is unknown or uncertain when the work to earn those wages was done, the wages should be deemed to be earned and payable the week they are paid.

In its Rule 84.16(b) Memorandum the Eastern District acknowledged the problem with the Decision of the Labor and Industrial Relations Commission when it noted that it, like the Commission, was acting ". . . in the absence of any evidence as to when Claimant earned the commissions" she received from Design Design. See p. 5 of the Rule 84.16(b) Memorandum. If there was no evidence, then it was erroneous to find that she earned wages in equal portions every day of every week. Such a finding cannot be based on competent, substantial evidence.

Commissions from Design Design Were Due and Payable to Claimant Coday on the 20th of Each Month and Are Only Wages for the Week When They Were Paid.

A person like Melissa Coday who claims unemployment benefits can be "totally unemployed" or "partially unemployed" Section 288.030.1(28) R.S.Mo. Such a claimant is "partially unemployed" during any week if the wages payable that week do not exceed 120% of her weekly benefit amount. *Id.* A partially unemployed claimant is eligible for partial benefits equal to her weekly benefit amount less any wages greater than 20% of her weekly benefit amount. Section 288.030.1 R.S.Mo. An insured worker like Ms. Coday can be eligible for benefits if she is partially unemployed. Sections 288.040.1 and 288.060. In Ms. Coday's case, she was eligible to receive some benefits any week her wages were less than $384.00 (120% of her weekly benefit amount). The amount of those benefits would be $320.00 less wages in excess of $64.00 (20% of her weekly benefit amount). Section 288.060. A statement or determination that a claimant has been paid excessive wages or earnings is a statement concerning the claimant's eligibility for benefits.

Once a claimant is determined to be an insured worker the Division's deputy is to determine the claimant's eligibility for benefits for each week benefits are claimed during the benefit year. Section 288.070.4. If the eligibility determination for a later weekly claim for benefits is the same as the claim for preceding weeks in the benefit year, the determination does not need to be in writing. Section 288.070.5.

It cannot be said that Ms. Coday did work for Design Design during each of those weeks. She probably worked some evenings during some of those weeks and very likely did little or no work during some of those weeks. Tr1 75-76, 83. She certainly did not have orders to transmit every day of each of those weeks. *Id.*

More importantly, it is undisputed that the regular payments on the 20th of each month were not at all related to orders transmitted by Ms. Coday the previous month. The payment of $1,503.65 made on June 20, 2009, for example, certainly was not related to any orders transmitted to Design Design by Ms. Coday in May. They were due and payable to Ms. Coday on June 20, 2009, and not a day before, because Design Design had been paid by retailers located in the territory assigned to Ms. Coday at some point the previous month or so. Tr1 72-76, 104; Tr2 65, 141. The payments to Design Design made by those retailers certainly were not because of orders transmitted from them via Claimant Coday during the month of May. They very likely were related to merchandise ordered through Ms. Coday months previously. Those orders could have been for certain holidays, Valentine's Day or St. Patrick's Day perhaps, and the merchandise would have been shipped by Design Design to the retailer in time to be placed on display and available for sale to a consumer prior to the holiday. Tr1 73; Tr2 73-77. The retailer who had placed the order would not have owed any money to Design Design, perhaps, for months thereafter; and in fact might not have paid Design

Design when payments were due. And in any event, in every case, Ms. Coday was not entitled to receive any commissions until Design Design had received its money; only then would she get her percentage and she could only expect it on the 20th of the next month. Tr1 73; Tr2, 3-77.

The critical question in this case is not whether the commissions Ms. Coday received from Design Design were "wages" under Section 288.036.1; they were. Nor is there any question of the amounts received the twentieth day of each month. The issue is when were they payable or paid under Section 288.036.1 and 288.030.1(28):

> Section 288.030(26)(a) [now (28)(a) and (b)] references unemployment to a point in time because a person is deemed unemployed in any week "with respect to which no wages are payable." When section 288.036 defines wages, it references wages to a point in time by using the language "payable" when it refers to remuneration and "with respect to which it is payable" when it refers to holiday and vacation pay. Although the employment security law does not define "payable," Black's Law Dictionary 1128 (6th ed. 1990) defines the term "payable" as follows: "Capable of being paid; . . . justly due; legally enforceable. A sum of money is said to be payable when a person is under an obligation to pay it." The term "payable," as used in the context of wages to determine

> eligibility for unemployment compensation benefits, requires some legal obligation on the part of the employer to compensate employees.

General Motors Corp. v. Buckner, 49 S.W.3d 753, 757 (Mo. App. E.D. 2001).

Under these circumstances when the Claimant received wages during a time of unemployment but it is not certain when the work was done to earn those wages, they are deemed to be payable and earned the week they are paid. *General Motors Corp. v. Buckner, supra.* The only evidence is the testimony of Ms. Coday that she was paid by Design Design only after Design Design was paid by its customers, so that on February 20, 2010, for example, Design Design would have paid Ms. Coday a commission based upon Design Design's receipts for merchandise shipped at some unknown point. Tr2 64-65. The orders likely were placed through Ms. Coday at various times in the past. This is why Ms. Coday was uncertain how to report those earnings when she initially started to claim benefits because she knew the Design Design payments in May and June of 2009 reflected work she did months previously. In any event, the arrangement between Ms. Coday and Design Design was that her commissions were payable and paid on or about the 20th of each month. These payments can only be considered payable the week they were paid, and so can only be wages earned that week. *General Motors Corp. v. Buckner, supra.*

General Motors Corp. v. Buckner involved an unusual occurrence, an odd set of facts. Appellant Coday submits her situation in May 2009 when she started to claim benefits while the monthly commission payments from Design Design continued was, and is, unusual and the treatment she received thereafter was odd. But the applicable statutory language is the same and the definition of "payable" has not changed. *General Motors Corp. v. Buckner, supra.* is the best fit. It supports Appellant's argument. There is no statute, regulation, or case which justifies the assumption employed by the Division and approved by the Commission.

In its brief in the Court of Appeals, the Division cited a case from another jurisdiction, *Gardner v. District of Columbia Dept. of Employment Services*, 736 A.2d 1012 (D.C. 1999) where a payment which "was designated to be for a four-week period" was considered to be wages payable for each of those four weeks. The distinction, of course, is that the monthly commission payments from Design Design were not "designated" by Design Design or anyone else as being payable for any particular week. Therefore, *Gardner* actually is consistent with *General Motors Corp. v. Buckner.* Those Design Design commissions must have been "payable" the day they were paid because there is no evidence that they were "payable" any other time. *Buckner, supra.*

The Division's overpayment calculations and determinations are all assumptions made by a Division deputy based upon an unsworn, ambiguous statement attributed to Design Design and reported on a form dated September 7, 2010. Tr1 147; Tr2 23-24, 137. The pro-rated figures are a guess -- nothing more. And this "guess" can only be based upon hearsay within hearsay within hearsay. Claimant Coday objected to the hearsay within the Division's Exhibits. Tr2 12, 15, 16. Such hearsay which is timely objected to cannot support a finding of fact by the Division, the Appeals Tribunal or this Commission. *Hill v. Norton-Young, Inc.*, 305 S.W.3d 491, 494 (Mo. App. E.D. 2010). See also *Cach, LLC v. Askew*, 358 S.W.3d 58, (Mo. banc 2012) (hearsay within hearsay is not evidence even in a business record). Even if the September 7, 2010 comment was not hearsay received subject to Claimant's objection, it is too vague to support the assumptions that Ms. Coday worked and earned wages certain weeks. It is more than unfair to make assumptions as the Commission has done (that Ms. Coday worked and earned the same amount every day of each month) which are clearly not true and are not supported by any evidence, and thus push the burden onto the Claimant. Accordingly, the evidence only supports a finding that Ms. Coday was overpaid no more than $345.00 in benefits for each of the weeks she received a commission payment, the weeks ending May 23, June 20, July 23, August 22 and September 26, 2009, for a total of $1,725.00.

The Division's practice of placing the burden on Claimant Coday to prove she was not paid wages during the weeks she claimed benefits and did not engage in fraud is a violation of Claimant Coday's due process rights.

The Division admits that there is no evidence of when Ms. Coday worked for Design Design. Tr2 52, 54. The weak assumptions about when Ms. Coday worked and earned the Design Design commissions were used because Ms. Coday could not provide detailed evidence to contradict those assumptions. Tr2 28. The Commission likewise clearly believed the maximum overpayment should be imposed because Ms. Coday could not provide details about the hours she worked each week or when she earned the particular commissions paid around the twentieth of each month any better than Design Design or the Division. LF1 63. The Commission thus placed the burden on Ms. Coday to prove her innocence. This is not a trivial matter. The Division can do more than fine Ms. Coday thousands of dollars as it has done in this case; there is the possibility of criminal prosecution and imprisonment, garnishment and the seizure of her property. See e.g. Tr2 22, 27. The Division's records, marked as exhibits and admitted into evidence show that Design Design could not say when Ms. Coday worked or when she earned the commissions. It is not only illogical to assess the maximum overpayment possible and punish Ms. Coday with the largest penalty the law allows

because she can do no better than Design Design, it is a violation of her right to due process. See *Wilson v. Labor and Industrial Relations Comm'n*, 693 S.W.2d 328 (Mo. App. W.D. 1985). Her right to an appeal is meaningless if she is punished because she has not come forward with evidence which does not exist.

The assumption used by the Division and endorsed by the Commission is illogical. Placing a burden on Ms. Coday which neither she nor Design Design could ever satisfy is unfair generally and unconstitutional in this context. And because there was absolutely no evidence that the Design Design commissions were earned the week they were paid, or were related in any sense to work done that week, the Commission's findings are unlawful and should be reversed.

POINT II.

The Commission further erred in its Decision in No. LC-11-03935 (Appendix 1-6; LF1 61-66) that Claimant willfully failed to disclose earnings and material facts because its decision is not supported by competent, substantial evidence and is not in accordance with the law in that there is no evidence that Claimant acted with the specific intent to obtain benefits in violation of the law; and further, there is no evidence that Claimant was aware of that she was

required to report the monthly commission payments every week before she received them in the manner submitted by the Division and approved by the Commission; therefore she could not have intentionally deliberately or willfully failed to report those wages.

In its Decision, the Commission noted that Claimant understood that there was a problem with respect to her Design Design commission payments. She tried to obtain clarification from the Division of Employment Security, waited on hold for as long as 45 minutes without speaking with a representative and finally gave up. *See* Appendix, p 3. Then she made the decision to answer "no" in response to the question "did you do any work" because the Design Design order were irregular, never kept her busy more than a few hours a week, and compensation was uncertain in terms of amount, as well as time of payment. She also admitted, at one point, to a concern that if she revealed the Design Design work, she would be considered to be not unemployed and so would lose all unemployment benefits. [1]

[1] She was correct; when the Division did learn about Design Design, it determined she was self-employed and ineligible for benefits. Tr1, 106. Ms. Coday appealed, and the determination was reversed. Tr1, 21.

The Division's witness agreed the Division's telephone system was very busy during that time of high unemployment. Tr1 63. If Ms. Coday had gotten through she may have been told to over-estimate her earnings every week and call later with the exact amount earned, Tr1 62-62. It is not clear that this would have been a practical solution in this case, since Ms. Coday was never able to get a call through so her question could be answered, and could not learn from Design Design when her commission payments had been earned. What is undisputed, however, is that she was not told or informed of this option.

Perhaps the most significant evidence, undisputed by anyone and admitted by the Division, is that Design Design did not and could not tell the Division when Ms. Coday did the work which resulted in the particular payments. Neither could Ms. Coday. Her situation is a square peg which the Division is trying to force into a round hole. Ms. Coday's failure to explain the monthly payments on a timely basis is a result of her inability to get through the over-worked bureaucracy and find a human being with the knowledge and the time to help her.

Generally, to be 'willful" an act must be done (1) intentionally and (2) with the specific intent to violate or disobey the rule or regulation at issue. *See e.g. Carter County School Dist., R-1 v Palmer*, 582 S.W.2d 347, 349 (Mo. App. S.D. 1979). This Court has used essentially the same analysis to determine if a claimant's conduct was

"willful" within the meaning of Missouri's Employment Security Law. *Welsh v. Mentor Mgmt., Inc.*, 357 S.W.3d 277 (Mo.App. E.D. 2012); *Tenge v. Washington Group International, Inc.*, 333 S.W.3d 492, (Mo. App. E.D. 2011).

In *Welsh v. Mentor Mgmt.*, an employee was fired after he sent an email with his comments and concerns to the entire staff at the office where he worked even though it was addressed to and intended for his immediate supervisor. This was not the first time it had been done, and he had been warned. The Commission specifically noted that the claimant in *Welsh* was not credible; but nonetheless the Commission's finding of willfulness was reversed. The Court noted that in order to "willfully" violate a rule or requirement the claimant must be aware of the requirement and knowingly or consciously violate it; an error in judgment is not a willful violation within the meaning of the Missouri Employment Security law. *Welsh, supra*, 357 S.W.3d at 261.

In *Tenge* a worker was fired when he did not report an incident, which the employer considered a violation of its safety regulations. The Appeals Tribunal/Commission found that the incident should have been reported and that the claimant "knowingly" violated the regulation by not reporting it. The Court accepted that these were the facts; that the regulation applied and that the claimant consciously chose not to report it. *Supra*. But an additional fact was that the *Tenge* claimant had a reason for not reporting the incident: he thought he did not need to report it because

there was no injury. *Id.* The *Tenge* claimant made a mistake but it was not a "willful" violation of the regulation because he did not intend to break a rule. The rationale of *Welsh* and *Tenge* should apply here: *to willfully fail to comply with the wage reporting requirement a claimant must (1) be aware of the requirement and (2) knowingly or consciously intend to violate it.* There is no evidence in the record that either (1) or (2) apply here.

POINT III.

The Commission erred in its Decision No. LC-11-03936 (Appendix 7-8; LF1 103-104) assessing a penalty under Section 288.380.9 R.S.Mo. because the Decision is not supported by competent, substantial evidence and is not in accordance with the law in that in that there is no evidence that Claimant acted with the specific intent to obtain benefits in violation of the law; and further, there is no evidence that Claimant was aware of that she was required to report the monthly commission payments every week before she received them in the submitted by the Division and approved by the Commission; therefore she could not have

intentionally committed fraud by misrepresenting, misstating, or failing to disclose any material fact .

Section 288.380.9 provides that any individual who receives unemployment benefits by intentionally misrepresenting, misstating, or failing to disclose any material fact has committed fraud and is subject to a penalty of 25% or 100%, depending on whether or not the there was a prior penalty. There is no doubt that when Ms. Coday responded to questions or prompts indicating that she had not worked the week she filed her claims, she was acting on her on volition: It was not an accident; she was not being forced to select one box rather than the other. She did not know, however, that her answers were false given her understanding of her situation. She "intended" to learn the rules or requirements of the Division, but could not get anyone to respond to her phone calls. She "intended" to claim the unemployment benefits she eventually received. There is no evidence, however, that she knew the statutory definitions mentioned above or the Division's policy for filing claims when a person is working for commissions which would only be paid in the distant future as described by the Division's witness. Like the worker in *Tenge*, she did not intend to break the rule, therefore there was no "misconduct" which would justify a denial of benefits. Certainly then there was no evidence of

"fraud" which would justify a penalty of 25% or 100% in addition to the repayment of benefits.

It is important to recognize that the actions of Ms. Coday on a particular date, such as whether or not she answered "no" in response to a question about work when she filed her weekly claim, is a question of fact. Whether or not the facts amount to "misconduct" or "fraud" within the meaning of the Missouri Employment Security Law is a question of law for this Court. When, as here, there is no evidence that a claimant knew she was breaking the rules at the time she acted, there is no evidence of intentional violation of a rule and findings of the Commission to the contrary must be reversed: *Welsh v. Mentor Mgmt., supra; Tenge, supra*.

POINT IV.

The Commission erred in its Decision in No. LC-12-00535 (Appendix 9, LF2 40) that Claimant's appeal was not timely filed because the Decision is not supported by competent, substantive evidence and is not in accordance with the law in that:

A. The deputy's determination at issue, that Claimant had been overpaid because she was paid benefits during a period she earned wages. was a reconsidered

determination of Claimant's benefits for those weeks in accordance with Section 288.070.5 and so was governed by the thirty day appeal period, which may be extended for good cause in accordance with Section 288.070.10;

B. The deputy's determination at issue was not a penalty assessment under Section 228.380.9 so that the 30 day appeal period of 228.380.9(b) does not apply;

C. Claimant's earlier appeal from the reconsidered determination resulting in the overpayment which is the subject of No. LC-11-03935 (See Point I above) should be considered an appeal from this overpayment determination; and/or

D. Claimant had good cause to extend the 30 day appeal period because she acted reasonably and in good faith.

A. The determination was a reconsidered determination of eligibility governed by the 30 day time period under Section 288.070 which can be extended for good cause.

The ruling of the Commission is predicated on a narrow and inaccurate characterization of the overpayment determination at issue. The Commission, as well as the Eastern District, labeled the overpayment determination of October 20, 2011 a penalty-for-fraud assessment under § 288.380.9 and therefore would not consider the Appellant's good cause for not filing her appeal within 30 days. That determination which is pages 2 and 3 of LF2, uses the language of § 288.380.10, which speaks of failure to disclose facts which would have made Claimant Coday ineligible for benefits. Earning wages during weeks unemployment benefits are claimed determines eligibility, as explained under Point I above. This October 20, 2011 determination thus also was a redetermination of eligibility under § 288.070.5 and "such determination" can be appealed within 30 days pursuant to § 288.070.6, or after 30 days for good cause under § 288.380.10. In any event, this redetermination was invalidated because it was made more than one year after the benefit year ended.

Whether an insured claimant who is partially unemployed is eligible to receive reduced benefits during a week when she has earnings depends upon the claimant's weekly benefit amount and her earnings as discussed above in the argument under Point I. Every time a weekly claim is paid it is a determination of eligibility under Section 288.070. *Wagner v. Unemployment Compensation Comm'n*, 188 S.W.2d 342 (Mo. 1946).

On September 28, 2010 it was retroactively determined that Ms. Coday was ineligible for benefits because she was not unemployed as she was working for Design Design. Tr1 106. That was reversed after Ms. Coday appealed. In the meantime, however, on October 21, 2010, a determination was made that Ms. Coday had been overpaid during the same period because of her willful failure to report earnings, which made her ineligible for benefits. Tr1 109-110. Ms. Coday's wage credits were to be cancelled pursuant to Section 288.380.10. *Id.* A few days later, on October 28, 2010 the determination was reconsidered and the wage credit cancellation was removed; but Claimant Coday still was allegedly overpaid because she willfully failed to disclose wages which made her ineligible for benefits. Tr1 111-112. This was a reconsidered determination of eligibility. *Wagner, supra.* The Division had jurisdiction or authority as it was made within a year of the end of the benefit year. Section 288.070.5; *Wagner, supra*.

Claimant Coday's benefit year ended May 8, 2010. *See e.g.* Tr1 114 (BYE 05-08-10). More than a year later, on October 20, 2011, the deputy determined that Claimant Coday had been overpaid benefits for the period October 3, 2009 through March 6, 2010 in the amount of $6,844.00 pursuant to Section 288.380.10 because she had not reported amounts earned which would have made her ineligible for benefits LF 2 2,3. This is a redetermination of her eligibility under Section 288.070. *Wagner,*

supra. Claimant had 30 days to appeal. Section 288.070.6 R.S.Mo. That 30 day period can be extended for good cause. Section 288.070.10.

The overpayment determination was not made pursuant to 288.380.9(1) and so 288.380.9(2) does not apply.

In its Decision in LC-12-00535 the Commission stated Claimant did not file her appeal within 30 days of the deputy's determination as required by Section 288.380.9 and there is no good cause exception to the timely filing of an appeal from a determination of a willful failure to disclose earnings or facts. This is a mixture of apples and oranges.

Section 288.380.9 has two relevant subsections:

> 9. (1) Any individual or employer who receives or denies unemployment benefits by intentionally misrepresenting, misstating, or failing to disclose any material fact has committed fraud. After the discovery of facts indicating fraud, a deputy shall make a written determination that the individual obtained or denied unemployment benefits by fraud and that the individual must promptly repay the unemployment benefits to the fund. In addition, the deputy shall assess a penalty equal to twenty-five percent of the amount fraudulently obtained or denied. If division records indicate that the individual or employer had a prior established

> overpayment or record of denial due to fraud, the deputy shall, on the present overpayment or determination, assess a penalty equal to one hundred percent of the amount fraudulently obtained.
>
> (2) Unless the individual or employer within thirty calendar days after notice of such determination of overpayment by fraud is either delivered in person or mailed to the last known address of such individual or employer files an appeal from such determination, it shall be final. Proceedings on the appeal shall be conducted in accordance with section 288.190.

The determination at issue is not a penalty assessment under Section 288.380.9; there is no finding of fraud. The assessment of the 25% penalty is such determination. *See* LF1 77. So is the assessment of the 100% penalty. LF2 104. But neither the overpayment determination of October 28, 2010 nor the overpayment determination of October 20, 2011 found fraud or penalties. *See e.g.* LF2 2-3. Thus they are not determinations under 288.380.9(1) and the 30 day period of 288.380.9(2) does not apply.

There is no other right to appeal from an overpayment determination specifically included in Section 288.380. Thus, if an overpayment is determined to exist under

subsections 10, 12 or 13 or 288.380 the claimant's right to appeal would be under Section 288.070.6, or it would not exist at all; an unconstitutional seizure of property without due process. MO Const. Art. 1, Section 10

The various subsections of 288.380 cannot be lumped together. *Crawford v. Division of Employment Security*, 376 S.W.3d 658-664 (Mo. banc 2012). Parts of one subsection of 288.380 cannot apply to other subsections. *Id.* Subparagraph (2) of subsection 9 applies only to subsection 9. *Id.* And in any event, even if the determination at issue was a subsection 9 determination it also was a determination under Section 288.070.6.

Even if the determination did fall under 288.380.9, there still would be an extension of the 30 day appeal period in this case. Sections of the Missouri Employment Security Law dealing with eligibility for benefits and overpayment of benefits may sometimes seem to overlap. See *Byers v. Human Resource Staffing*, ___ S.W.3d _____, No. E.D. 99109 (Mo. App. E.D. June 28, 2013). Statutory provisions relating to the same subject matter must be given a harmonious construction, consistent with the apparent purpose of the legislation. *Byers v. Human Resource Staffing, supra, slip opinion pp. 6-7, citing Crawford, supra.* The scope of subsection 9 set out above is broad. It can apply to employers who interfere with the receipt of benefits as well as unemployed workers claiming benefits. In a case such as this where another section,

288,070 dealing with benefit determinations also applies, the "good cause" extension of the 30 day period found in 288.070.10 should be available.

Claimant's appeal from the overpayment determination applicable to the weeks May 3, 2009 through October 31, 2009 should be considered and appeal from subsequent determinations that she was overpaid benefits for the weeks October 4, 2009 through March 6, 2010 and the week ending March 13, 2010.

Section 288.070.5 provides that an appeal from a determination regarding a claim for benefits for a certain week should be considered an appeal from the determination applicable to subsequent weeks claimed. As explained above, the Division reacted to Ms. Coday's claims for the weeks May 3, 2009 through March 13, 2010 as they were made by paying benefits. Then, starting in October, 2010, the Division retroactively decided she was not eligible for benefits for some of those weeks because of payments made to Ms. Coday by Design Design. LF1 3-4. Ms. Coday filed a timely appeal from the first overpayment determination. LF1 5-6. A year later, the Division retroactively determined Ms. Coday had been overpaid benefits for additional weeks claimed because she was ineligible for those benefits for exactly the same reason: payment of wages by Design Design. LF2 2-3, 54-55. The Appeal from the overpayment determination for the first set of weeks claimed must be considered an appeal from the various

overpayment determinations applicable to later weeks claimed because the reason for the overpayment determinations are the same. Statutes such a 288.070 dealing with appeals and the procedures implementing them should be construed liberally in favor of allowing appeals to proceed so the merits of an issue can be addressed. *Sherrill v. Wilson*, 653 S.W.2d 661, 663 (Mo. banc 1983). *See also* Section 288.020 R.S.Mo; *Mo. Division of Employment Sec. v. Labor Industrial Relations Comm'n,* S.W.2d 145, 148 (Mo. banc 1983).

There was good cause to file a late appeal, if the appeal was late

It has been noted that the Design Design commissions were received throughout the period when Ms. Coday was claiming and receiving benefits: May, 2009 through early March, 2010. Clearly it was foreseeable, probably inevitable, that the earlier determination of overpayment and penalty assessment for the period ending October 3, 2009 (see Point I and Point II above) would be followed by similar determinations regarding the period October 4, 2009 through March 13, 2010. Therefore, after Ms. Coday filed her first, timely Notice of Appeal *pro se*, after her attorneys had entered their appearance before the Commission, the Division and after there had been an assessment of a 25% penalty, Ms. Coday's attorneys sent a separate notice to the Division on May 8, 2011 stating:

> **COME NOW**, Martin L. Perron and The Perron Law Firm, P.C. and enter their appearance on behalf of Melissa Coday with respect to any claim or determination that Melissa Coday has been overpaid benefits or is required to repay overpaid benefits and/or any penalty.

Tr1 157-158. The above quote from the letter of May 8, 2011 is included in the Supplemental Entry of Appearance and Appeal from Overpayment Determination(s) of December 13, 2011. Tr2 97-102, 165-170, 194-199. This document explains that Ms. Coday, through her attorney, wanted to appeal from all the overpayment determinations which were apparently coming in installments.

The letter of May 8, 2011 alone was enough to alert the Division that Ms. Coday was represented by an attorney with respect to all overpayment issues; but the Division's practices is not to send determinations to counsel. Tr2 87. The Division cannot, however, interfere with a claimant's right to legal representation or modify the scope of the attorney/client relationship. See *Rector v. Kelly*, 183 S.W.3d 356, (Mo. App. 2006); *King v. Division of Employment Security*, 964 S.W. 3d 823 (Mo. App. W.D. 1998). Certainly that letter is an indication of her intent to appeal all overpayment determinations. There are other such indications.

Ms. Coday received a Notice dated September 2, 2011 announcing "Overpayment Established." Tr2, 103. That Notice also stated, quite deceptively, that

claims had been "paid on the wrong claim program" resulting in an overpayment which was not her fault and would not result in any penalty. *Id.* The Notice also advised another letter would be sent advising her of the amount of the overpayment. That Notice was not identified as a determination and there was no statement of appeal rights. *Id.*

According to the Division's records there was a determination dated September 8, 2011 that there was an overpayment of $295.00 for the week ending March 13, 2010. Tr2, 189. Ms. Point VII and Point VII below. Ms. Coday either did not receive that determination or somehow overlooked it. (The Division's witness suggested it was of no consequence to Ms. Coday; it was created only to correct the Division's records. Tr2 34-35. Perhaps it was never sent.) But she did receive two letters dated September 6, 2011 informing her of alleged wages from Design Design for the period September 27, 2009 through March 6, 2010. Tr2 172-173. After consulting with her attorney, she sent a letter in response, dated September 16, 2011, stating she did not receive wages during those weeks and adding that she could not have willfully or deliberately failed to disclose wages or earnings. Tr2 83-87, 106. That letter of September 16, 2011 should have been regarded as an appeal from any overpayment determination, including the one dated September 8, 2011. *Rector v. Kelly, supra; King v. Division of Employment Security, supra;* Section 288.070.4.

Ms. Coday used her mother's home as her address as she was staying at temporary residences until she obtained a new permanent address and she was traveling in connection with her new job and was often away from her home. Tr2 56. She did not get her mail on a daily basis. *Id.* In December, 2011 she received a Billing Statement demanding that she send money to the Division. She had regularly received, and continues to receive, such billing statement demands even though all her appeals are pending and no determination is final. Like the others, this billing statement threatened garnishment, the seizure of her property and further legal action if she did not pay. This billing statement was noteworthy, however, because it referred to a "NEW OVERPAYMENT" of October 19, 2011. Ms. Coday was not aware of any new overpayment determination dated October 19 or otherwise. She brought this billing statement to the attention of her attorney who prepared the Supplemental Entry of Appearance and Appeal from Overpayment Determination(s) of December 13, 2011 asserting again Claimant Coday's intention to contest and appeal any overpayment determination or penalty assessment.

Ms. Coday did eventually receive the October 20, 2011 (not October 19) overpayment determination. Tr2 57. She does not know when she received it, or when she first noticed it, but it was after the 30-day appeal deadline had passed. Tr2 57-59.

Claimant Coday submits that if neither the May 8, 2011 letter nor the September 16, 2011 letter are deemed to be appeals from every overpayment or penalty determination she nonetheless has so persistently demonstrated her clear intention to appeal from any and every overpayment determination that her appeal from the October 20, 2011 determination (and that of September 8, 2011) should be considered timely under *Rector* and *King*, *supra.* The fact that her attorney had entered his appearance was ignored by the Division. The Division has made a number of clerical or administrative error or misjudgments, as shown by the number of "reconsidered" determinations and the fluctuating amounts of the alleged overpayments. Taken as a whole, Claimant Melissa Coday has acted reasonably under the circumstances and in good faith since she filed her first appeal, which is "good cause" to file a late notice of appeal. 8 C.S.R. 10-5.010 (C); *Rector*, *supra*; *King*, *supra.*

The above facts, which are largely supported by the Division's own records, such as the regular correspondence from Claimant directly and by and through her attorney, all must be evaluated when considering whether or not there is good cases to extend the time to appeal. *Byers v. Human Resource Staffing*, *supra*, *slip opinion p 4.* In *Speed v. Division of Employment Security*, ___ S.W.3d ____, WD 75346 (Mo. App. W.D. June 25, 2013) the issue was whether or not a claimant had shown "good cause" for failing to appear for a telephone hearing. The claimant there had not read the notice

of telephone hearing carefully and called in prior to the scheduled time. A tape recorded message instructed her to wait. After waiting a while she hung up. When she call again later in the day, she was too late. The Division's position was that the notice of hearing stated the correct time and failure to read and understand could not be considered a reasonable, good faith effort to comply with the rules. The Court of Appeals disagreed, noting that the claimant's premature call " … was a reasonable affirmative effort .. ." which established the claimant' good faith. *Speed v. Division of Employment Security, supra, slip opinion at p.5*. The Commission's refusal to grant the Claimant a hearing on the merits of her appeal was an abuse of discretion and so was reversed. The same result should follow here.

POINT V.

The Commission erred in its Decision in NO. LC-12-00535 affirming the overpayment of benefits in the amount of $6,844.00 because its Decision is not supported by competent, substantial evidence and is not in accordance with the law in that:

A. The deputy's determination that Claimant was overpaid because she was paid benefits during a period when she earned wages was a reconsidered determination

made later than one year following the end of the benefit year and so the Division lacked jurisdiction under Section 288.070.5 R.S. Mo.; and/or

B. There was no evidence that payments Claimant received on or about the twentieth of each month "related to" or were in any way payment for work Claimant had done the previous month, nor was there any evidence that Claimant had the ability to show where the work which resulted in any monthly payment should be prorated to attribute an equal share to an equal amount of work done each day of the preceding month is arbitrary and not supported by any evidence; and further, in that the practice employed by the Commission placed an unlawful and unfair burden on Claimant to disprove unsupported allegations; and further, in that when a claimant is paid wages on a certain date under circumstances when it is unknown or uncertain when the work to earn those wages was done, the wages should be deemed to be earned and payable the week they are paid.

The difference between the overpayment determination at issue here and the one which was discussed in Point II above is the timing. The Division lacked authority or jurisdiction to issue the overpayment determinations of September and October, 2011 and therefore those determinations should be reversed.

As mentioned above in the argument under Point IV, the determination that Ms. Coday had been paid benefits in the amount of $6,844.00 was made on October 20, 2011, more than a year after her benefit year ended. Thus, the Division had no authority to make that retroactive determination of ineligibility for the week ending October 10, 2009 through the week ending March 6, 2010. Section 288.070.5.

The overpayment determinations are reconsidered eligibility determinations based upon the amount of wages payable and paid to Ms. Coday during periods of partial unemployment. In order to decide if there has been an overpayment, and if so, how much, the Division necessarily had to recalculate and redetermine eligibility for benefits under Sections 288.040, 288.060 and 288.070 for each of the weeks for which Ms. Coday claimed and received benefits. This can be seen from the Decision of the Commission which modified the Appeals Tribunal in LC-11-03935. There the Commission calculated the eligibility for benefits and found that Ms. Coday was eligible for some benefits many of the weeks claimed, so that the amount of the claimed overpayment was reduced. *See* Appendix, Pages 4-5. This is the process

which necessarily was followed by the Division when it made the overpayment redeterminations in October, 2010. The Division did not have any authority or jurisdiction to make any redetermination, however, because more than one year had passed since Ms. Coday's benefit year ended. The Division is allowed to change a determination regarding eligibility for benefits within one year following the end of a benefit year, but only for good cause. *Wagner, supra.* The Division cannot make any redetermination more than one year after the end of a claimant's benefit year.

It was appropriate for the Commission to consider an argument that a redetermination of benefits was made without authority because more than one year had passed since the end of the Claimant's benefit year. *Crawford v. Division of Employment Security, supra*. In this case Claimant Coday made such an argument to the Commission. *See* the Brief of Claimant Melissa Coday filed with the Commission in April, 2012, pgs. 13-14. (This Brief had been filed with the Eastern District as an attachment to a motion. Appellant does not know if it is part of the record before this Court; but the issue was not disputed by the Division in Eastern District.) The Commission erred by failing to respond to that argument and reverse the overpayment determination October, 2011 because the Division had no authority. This Court should correct that error.

POINT VI.

The Commission further erred in its Decision in NO. LC-12-00535 (Appendix 9, LF2 40) that Claimant willfully failed to disclose earnings and material facts because its decision is not supported by competent, substantial evidence and is not in accordance with the law in that there is no evidence that Claimant acted with the specific intent to obtain benefits in violation of the law; and further, there is no evidence that Claimant was aware of that she was required to report the monthly commission payments every week before she received them in the manner submitted by the Division and approved by the Commission; therefore she could not have intentionally deliberately or willfully failed to report those wages.

Welsh v. Mentor Mgmt., Inc., 357 S.W.3d 277 (Mo.App. E.D. 2012)

Tenge v.Washington Group International, Inc., 333 S.W.3d 492 (Mo.App. E.D. 2011).

Claimant Coday did not intentionally or willfully fail to report earnings or disclose any other material fact because she did not have the necessary state of mind: She was not attempting to obtain or receive benefits in violation of the law. In this respect, Claimant Coday's argument here is the same as that advanced under Point II above. Ms. Coday's single decision or conclusion that she did not need to report the Design Design monthly payments had been made before the weeks at issue here.

POINT VII.

The Commission erred in its Decision in No. LC-12-00536 (Appendix 15-19; LF2 91, 69-72) that the appeal was not timely filed because the Decision is not supported by competent, substantial evidence and is not in accordance with the law in that:

A. The only evidence was that Claimant acted reasonably and in good faith under the circumstances; and/or

B. Claimant's earlier appeal from the reconsidered determination which is the subject of No. LC-11-03935 (See Point I above) should be considered an appeal from this overpayment determination.

This Point concerns a determination dated September 8, 2011 that there was an overpayment of $295.00 for the week ending March 13, 2010, Tr2, 189. This was her "waiting week" under the statute mention below in Point VII. Ms. Coday either did not receive that September 8, 2011, determination or somehow overlooked it. Perhaps it was never sent. But she send a letter September 16, 2011, repeating once again that she did not receive wages during the weeks at issue and adding that she could not have willfully or deliberately failed to disclose wages or earnings. Tr2 83-87, 106. Claimant incorporates her argument under Point IV generally, and states in particular that letter of September 16, 2011 should have been regarded as an appeal from any overpayment determination, including the one dated September 8, 2011. *Rector v. Kelly, supra; King v. Division of Employment Security, supra;* Section 288.070.4.

POINT VIII.

The Commission further erred in its Decision in LC-12-00536 (Appendix 15-19; LF2 91, 69-72) that claimant was overpaid for her waiting week because its Decision is not

supported by competent, substantial evidence in that claimant satisfied the requirements for receiving her waiting week payment under Section 288.040.1(4) R.S.Mo.

This Point also concerns the September 8, 2011 that there was an overpayment of $295.00 for the week ending March 13, 2010. Tr2, 189. That was her "waiting week" under Section 288.040.1(4):

> (4) Prior to the first week of a period of total or partial unemployment for which the claimant claims benefits he or she has been totally or partially unemployed for a waiting period of one week. No more than one waiting week will be required in any benefit year. During calendar year 2008 and each calendar year thereafter, the one-week waiting period shall become compensable once his or her remaining balance on the claim is equal to or less than the compensable amount for the waiting period.

If the above overpayments are reversed in total Ms. Coday should be eligible for the waiting week payment and this determination would need to be reversed. If the above overpayment determinations are reversed in part, then Claimant requests that the matter of her waiting week be remanded to the Commission to then direct the Division to recalculate Ms. Coday's eligibility for waiting week benefits

payment.

POINT IX.

The Commission erred in its Decision in Case No. LC-12-0537 (Appendix 20-24; LF2 118-121, 140) assessing a penalty of $6,419.00 under Section 28.380.9 R.S.Mo. because the Decision is not supported by competent, substantial evidence and is not in accordance with the law in that in that:

A. There is no evidence that Claimant acted with the specific intent to obtain benefits in violation of the law; and further, there is no evidence that Claimant was aware of that she was required to report the monthly commission payments every week before she received them in the manner submitted by the Division and approved by the Commission; therefore she could not have intentionally committed fraud by misrepresenting, misstating, or failing to disclose any material fact.

B. The imposition of the penalty was based upon an overpayment determination which is invalid and unlawful

as it was a redetermination made without authority or jurisdiction. More than one year after Claimant's benefits year ended in violation of Section 288.070.5, R.S.Mo.;

C. The imposition of the penalty of 100% of the overpaid benefits, rather than 25%, was based upon a "prior" penalty "of record" which had been assessed for the same alleged fraudulent at and was based upon a matter which was, and is, under appeal.

This Point IX raises essentially the same issues as Points II and III above, and claimants arguments there are incorporated by reference here. As Ms. Coday did not act with the specific intent to violate or disobey the wage reporting requirements and secure benefits she was not entitled to receive, then she did not act "willfully" and did not "intentionally" fail to disclose wages or other facts, and so did not commit fraud with in the meaning of Section 288.090.9. *See. Carter County School Dist., R-1 v Palmer, supra; Welsh v. Mentor Mgmt., Inc., supra*; *Tenge v. Washington Group International, Inc., supra*.

Even if there was a proper finding of fraud, the assessment of a penalty of 100% (rather than 25%) that is, a penalty of almost $6,500, is not supported by the facts or justified under the statute. Section 288.380.9 R.S.Mo. provides:

> In addition, the deputy shall assess a penalty equal to twenty-five percent of the amount fraudulently obtained or denied. If division records indicate that the individual or employer had a prior established overpayment or record of denial due to fraud, the deputy shall, on the present overpayment or determination, assess a penalty equal to one hundred percent of the amount fraudulently obtained.

Section 288.380. 9 R.S.Mo.

The basis of this 100% penalty presumably was the "prior" penalty which was never final and is currently is still on appeal. See Point III above. The Division's witness admitted that she was curious and uncertain of the reason for the 100% penalty. Tr2 36. The Division was not aware of the appeal of the 25% penalty to this court. Tr2 29, 39-41. The Division "saw" that there had been a prior 25% penalty when the computer system reviewed Ms. Coday's situation and although it appeared the system was "still working with" the earlier overpayment in some fashion, the computer program had no discretion but to assess a 100% penalty. Tr2 31-33.

The Division's witness was not sure whether the Division would consider all of the sequentially claimed weeks of unemployment during this single benefit year as one incident of fraud or several incidents. Tr2 43-44. It is neither logical nor fair to do so in this case. Section 288.380.9 cannot be construed so that "a prior established

overpayment or record of denial due to fraud" could be an uninterrupted series of claims which, for some unknown reason, the Division separated into two bunches of redeterminations made more than a year apart. Such statutes are to be strictly construed in favor of the claimant/employee and against the disallowance of benefits. *See Section 288.020 R.S.Mo*; *Mo. Division of Employment Sec. v. Labor Industrial Relations Comm'n*, S.W.2d 145, 148 (Mo. banc 1983).

By anyone's account, and according to all the evidence, everything had happened by the time the Division made the very first determination. There was no reason offered, no explanation given, for waiting almost a year to make the second set of overpayment and penalty determinations. There were not multiple wrong acts. The Commission recognized that Ms. Coday initially did not have the specific intent to mislead the Division regarding her status, but went on to scold her for not continuing to call the Division until she spoke with someone. LF1 65. Claimant Coday contends this is not fraud, it is at worst an act of understandable ignorance. But it also is one act, made at one time. Ms. Coday's decided early on the her situation with Design Design was not work as contemplated by the reporting prompts she received while claiming benefits, The first penalty should not have counted against Ms. Coday as it was not final. But even if it was final, or becomes final, Ms. Coday should not be penalized twice for a single act of "fraud."

CONCLUSION

All appeals were timely filed and Decisions of the Commission to the contrary should be reversed. Any overpayment for the period May 3, 2009 through October 3, 2009 (LC-11-03935) should be limited to $1,725.00 as Ms. Coday only had payable wages five weeks during that period. Any findings of willful, intentional or fraudulent failure to report wages should be reversed.

There should be no penalty assessed in LC-11-03936; and if there was a penalty it should be limited to 25% of the overpayment. The Decisions in LC-1200535, LC-12-00536 and LC-12-00537 should also be reversed because the Division had no jurisdiction or authority to make those determinations more than one year after the end of claimants' benefit year. If there was an overpayment for the period October 4, 2009 through March 6, 2010 it should be limited to $1, 725 plus, perhaps, a waiting week payment of $295 and any penalty would be no more than 25% of that sum.

CERTIFICATION PURSUANT TO RULE 84.06(c)

COMES NOW Claimant/Appellant Melissa Coday and certifies that the number of words in this Brief does not exceed 15,000 (about14,339 words) and that the number lines of text (about 1,500) do not exceed 2,200; and that this Brief includes the information required by Rule 55.03, R.S.Mo.

CERTIFICATE OF SERVICE

COMES NOW Appellant and certifies that a copy of the foregoing was served via this Court's electronic filing system upon the attorney of record for Respondent Division of Employment Security this 18th day of July, 2013: Bart A. Matanic, Bart.Matanic@labor.mo.gov, Counsel, Department of Labor and Industrial Relations, P.O. Box 59, Jefferson City, MO 65102-0599.

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