IN THE
SUPREME COURT OF MISSOURI

MELISSA CODAY	)	
	)	
Appellant,	)	
	)	
vs	)	**Case No. SC93361**
	)	
	)	
DIVISION OF EMPLOYMENT SECURITY,	)	
	)	
	)	
Respondent.	)	

Appeal from the Labor and Industrial Relations Commission
Division of Employment Security

SUBSTITUTE BRIEF OF RESPONDENT DIVISION OF EMPLOYMENT SECURITY

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Statement of Facts

The Claimant, Melissa Coday, worked full-time for the Sullivan Private Label Company. Tr1. 70-71.[1] After being told that her pay at Sullivan would be cut in half at some point in the foreseeable future, she also started working for Design Design. Tr1. 70. According to Claimant, Sullivan Private Label laid her off in May 2009. Claimant's Br. at 8. Design Design was in the business of providing greeting cards, wrapping paper and similar items to retailers. Tr1. 73; Tr2. 76. At Design Design, Claimant had a territory and accounts in eastern Missouri and southern Illinois. Tr1. 71. Customers had the ability to place orders with Claimant or directly with the company. Tr1. 71. On average, Claimant spent about 10-15 hours each week on her work for Design Design. Tr1. 83. Claimant admitted that if she took an order and, assuming it later shipped in full, she knew the commission value of

[1] "Tr1" refers to the transcript of the first hearing, held on July 15, 2011. "Tr2"refers to the transcript of the second hearing, held on February 1, 2012.

the order to her. Tr1. 84. She received 14 percent of shipped sales. Tr1. 83. She did not keep records of the orders she received. Tr1. 84.

Claimant did not report the fact that she was doing work for Design Design to DES. Tr1. 82-86; Tr2. 67. She did not consider her work for Design Design to be working at a job. Tr1. 79. Even as to the weeks where she could confirm that she received direct deposits of commissions from Design Design, Claimant stated that she was reluctant to report the income because it might result in her benefits being stopped:

> I felt that if I had reported that I had earnings that week, the system was not set up to under—the system was not set up to accommodate or understand the way that my earnings were paid. And I felt like if I reported earnings for that week, that might somehow indicate that I had a job, and my benefits would stop, and completely, even though I wasn't being paid on any of the other weeks of the month . . ..

Tr1. 86. She further admitted that "it would've been more accurate to report in the weeks where I actually was paid." Tr1. 86.

Claimant testified that in the early days when Design Design became her sole source of income, she attempted to contact the Division of Employment Security. Tr1. 79, 88. She indicated that because it was the height of the unemployment crisis, she was not able to get through. Tr1. 79.

For each week during the relevant period when Claimant claimed unemployment benefits, she responded that she did not work during the week. Tr1. 82. She left Design Design in March of 2010, Tr2. 64, when she found full-time employment, Tr2. 73-75.

The Division conducted a routine audit and learned that Claimant had done work for and received remuneration from Design Design. Tr1. 23, 146-47. The company was unable to provide the hours worked by Claimant, nor the amounts she earned on a weekly basis. Tr1. 53-54, 146. The Division later followed up with Design Design, but the company was still unable to provide the hours worked by Claimant. Tr1. 147.

Because the Division was unable to determine wages earned by Claimant on a weekly basis, it prorated the commissions she earned to obtain a daily amount. Tr1. 148-49. The Division's witness pointed out

that "[w]ages are reportable when earned. When they are paid is irrelevant. It's when they are earned." Tr1. 60. While the Division did not know the days that Claimant did work during the weeks in question, it was clear that "sometime during that period of time, she earned that money." Tr1. 60.

According to the Division witness, people paid by commission pose an issue for the Division, but there are instructions given to claimants in that situation:

> So people pay by commissions, obviously normally paid someone after the fact, do pose an issue. But the Division has, for years, given instructions to claim, in that case, report, when in doubt, over report, and then if you don't make quite as much as you reported, call us and we'll adjust it, and pay you any additional benefits that you may be due. So—but we couldn't do that in Ms. Coday's case because she didn't bother to tell us she was working.

Tr1. 61.

On September 28, 2010, the Division determined that Claimant had been totally ineligible for benefits beginning May 3, 2009. Tr1. 106. This determination was reconsidered twice. Tr1. 107, 108. The final

result was that on October 21 and 28, 2010, the Division determined that Claimant had been overpaid benefits of $8,970 from May 9, 2009 through October 17, 2009. Tr1. 109-112.

After Ms. Coday appealed, the determination of complete ineligibility was reversed, but the overpayment was affirmed as modified in Appeal No. 10-34721. Legal File ("LF")1, 18-23.[2] Ms. Coday filed an Application for Review to the Commission, but because the transcript was unintelligible, the matter was remanded to the Appeals Tribunal for another hearing. Tr1. 69. On May 2, 2011, the Division assessed a fraud penalty, and also corrected an error to reduce the overpayment because Claimant was eligible for partial benefits some weeks. Tr1. 37-39, 159.

[2] Claimant provides a summary of the appeals in her Introduction. Claimant's Br. at 7-10. In accord with Claimant's citations, "LF1" refers to the first Legal File, which has Case No. ED98030 on the cover. "LF2" refers to the second Legal File, which has Case No. ED 98677 on the cover.

On December 8, 2011, the Division assessed another overpayment and penalty, this time of 100 percent, based on Claimant's failure to report the remuneration she received from Design Design, as she had been paid benefits during a period that she had earned wages and was ineligible. LF2 2-3, 104.

On January 19, 2012, the Commission affirmed as modified an overpayment of $5,614.00 and $125.00 in stimulus payments from May 3 through October 3, 2009. LF1. 66. Claimant filed a timely appeal to the Court of Appeals. LF1. 67-76. Also on January 19, 2012, the Commission affirmed as modified a 25% overpayment penalty for these same benefits. LF1. 103-04. Claimant filed a timely appeal to the Court of Appeals. LF1. 105-110. On June 4, 2012, the Commission affirmed the dismissal of the appeal of the October 20, 2011 determination of overpaid benefits. LF2. 40. It held that "there is no good cause exception to the timely filing of an appeal from a determination of overpayment due to willful failure to disclose facts or falsification of facts." LF2. 40. Claimant filed a timely appeal to the Court of Appeals. LF2. 41-53. Also on June 4, 2012, the Commission affirmed as modified the referee's dismissal of Appeal No. 11-30264.

LF2. 91. Claimant filed a timely appeal to the Court of Appeals. LF2. 92-103. Finally, again on June 4, 2012, the Commission affirmed the assessment of a 100% overpayment penalty. LF2. 140. Claimant filed a timely appeal to the Court of Appeals. LF2. 141-52.

The Court of Appeals issued an unpublished Memorandum opinion affirming the Commission's decisions. Appendix at A-24. After Claimant unsuccessfully sought rehearing or transfer from the Court of Appeals, this Court granted transfer.

Standard of Review

Judicial review of Commission decisions in employment security matters is governed by Section 288.210. This section provides in part as follows:

> The findings of the commission as to the facts, if supported by competent and substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the appellate court shall be confined to questions of law. The court, on appeal, may modify, reverse, remand for rehearing, or set aside the decision of the commission on the following grounds and no other:
>
> (1) That the commission acted without or in excess of its powers;
>
> (2) That the decision was procured by fraud;
>
> (3) That the facts found by the commission do not support the award; or
>
> (4) That there was no sufficient competent evidence in the record to warrant the making of the award.

It is the function of the reviewing court to decide whether the Commission reasonably could have made its findings and drawn its conclusions. *Burns v. Labor and Industrial Relations Commission*, 845

S.W.2d 553 (Mo. banc 1993). The court must determine "whether, considering the whole record, there is sufficient competent and substantial evidence to support the award." *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003).

A court defers to the Commission's determination of the credibility of witnesses. *Sartori v. Kohner Props., Inc.*, 277 S.W.3d 879,883 (Mo. App. 2009). If evidence before the administrative body would warrant either of two opposed findings, the reviewing court is bound by the administrative determination, and it is irrelevant that there is supportive evidence for the contrary finding. *Pulitzer Pub. Co. v. Labor and Industrial Relations Commission*, 596 S.W.2d 413 (Mo. banc 1980); *Ewing v. SSM Health Care*, 265 S.W.3d 882 (Mo. App. 2008). "'[T]he Commission determines the weight of and credibility of the evidence, and, when that evidence conflicts, the Commission's determination of the facts is conclusive.'" *Peck v. La Macchia Enterprises*, 202 S.W.3d 77,82 n.6 (Mo.App. 2006) (citation omitted). A Court does not "reweigh the evidence; the Commission judges the weight to be given to conflicting evidence and the credibility of witnesses." *Panzau v. JDLB., Inc.*, 169 S.W.3d 122, 126 (Mo.App. 2005). Thus, a reviewing court

affirms those decisions of the Commission which are supported by substantial and competent evidence taken from the whole record. *E.P.M. Inc. v. Buckman*, 300 S.W. 3d 510, 513 (Mo. App. 2009). However, when reviewing questions of law, courts are not bound by the Commission's conclusions of law or its application of the law to the facts. *Difatta-Wheaton v. Dolphin Capital Corp.*, 271 S.W.3d 594, 595 (Mo. banc 2008).

Argument

I. The Burden of Proof to Obtain Benefits is Always on the Claimant. [Responds to Point I].

This Court stated the following in *Haynes v. Unemployment Commission*, 183 S.W.2d 77, 80 (Mo. 1944):

> [W]e think it is apparent that the burden of proof to establish a claimant's right to benefits under the Unemployment Compensation Law rests upon the claimant. An unemployed individual is eligible to receive benefits only if the commission finds that the required conditions have been met. The claimant assumes the risk of non-persuasion and we think that general rule applicable to ordinary court proceedings applies. 'The burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmation of the issue . . . . This burden of proof never shifts during the course of the trial.'

Id. (internal citations omitted); *see also O'Dell v. Division of Employment Security*, 376 S.W. 2d 137, 142 (Mo. 1964) (it is a

claimant's burden to prove by competent and substantial evidence that they are eligible for unemployment benefits); *Welsh v. Mentor Management*, 357 S.W. 3d 277, 281 (Mo. App. 2012) (same); *Lester E. Cox Medical Center v. Labor and Industrial Relations Commission*, 593 S.W. 2d 610, 612 (Mo. App. 1980) (same).[3] A finding that a claimant is ineligible for benefits need not be supported with affirmative substantial evidence because the burden is on the claimant to show they are eligible for benefits. *See Haynes*, 183 S.W. 2d at 80.

Accordingly, the burden of proof was at all times on the Claimant.

II. Wages and Commissions are Payable When Earned Not When Paid. [Responds to Point I].

General Motors Corporation v. Buckner, 49 S.W. 3d 753 (Mo. App. 2001), relied upon by Claimant, does not stand for the proposition that

[3] Accordingly, all of Claimant's complaints about the alleged unfairness of placing the burden of proof on her, *see, e.g*, Claimant's Br. at 42-43, are not well taken.

wages and commissions are due and payable the week they are paid. Wages are payable when they are legally due. *Buckner*, 49 S.W. 3d at 758, citing *Labor and Industrial Relations Commission v. Division of Employment Security*, 856 S.W. 2d 376 (Mo. App. 1993). The Claimant's wages were legally due when she sent in the order. Tr1. 84 (Claimant testified that she knew the value of the commissions she would receive); Tr1. 83 (commission structure was 14 percent of shipped sales). A wage is payable when Employer has "some legal obligation . . . to compensate employees." *Buckner*, 49 S.W. 3d at 757. Because the placement of the order obliged Employer to pay Claimant, that is when the payment was due.

It should also be noted that *Buckner* arose from an unusual set of facts. There was a layoff at a GM plant in Wentzville due to a strike in Michigan. *Id.* at 754. Plants nationwide typically shut down for Independence Week, though qualifying employees would get a combination of shutdown pay and holiday pay for that week. *Id.* A settlement of the strike reached several weeks after Independence Week provided for a special payment to be made to GM employees who were on strike or layoff status due to the Michigan labor dispute. *Id.* at

755. The Court held that the special payment was not payable for Independence Week because at that time the employees had no legal right to the payment. *Id.* at 758. Additionally, the settlement did not specify that the special payment was for Independence Week. *Id.* Here, by contrast, Claimant had an expectation of payment based on her sales. Tr1. 83, 84. *Buckner* should be limited to its unusual circumstances.

III. There is No Good Cause Exception for the Filing of an Appeal to a Fraud Overpayment. Even if there were a Good Cause Exception, Claimant Would Not Qualify. [Responds to Points IV, VII].

There is no good cause exception for the filing of an appeal to a fraud overpayment. Sect. 288.380.9(2) RSMo provides: "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." Notably absent from Sect. 288.380.9(2) is any mention of a "good cause"

provision for filing a late appeal such as appears in Sect. 288.070.10 ("The ten-day period mentioned in subsections 1 and 2 of this section and the thirty-day period mentioned in subsection 6 of this section may, for good cause, be extended.") Because there is no provision for a late filing of an appeal in Sect. 288.380.9(2) it should be viewed like other statutory provisions in the Employment Security law, where if there is no provision for a late appeal, then there is no late appeal. For example Section 288.210 does not contain a provision for filing a late notice of appeal, and the decisions are legion holding that Courts must dismiss a late appeal under that statute. *See, e.g., Dunlap v. Division of Employment Security*, 353 S.W. 3d 710, 711 (Mo. App. 2011); *Colletti v. Division of Employment Security*, 339 S.W. 3d 598, 599 (Mo. App. 2011). Similarly, Sect. 288.200 allows thirty days to file an Application for Review with the Commission with no provision for filing late with good cause. Neither the Commission nor the Courts have statutory authority to review late appeals in such cases. *See Boles v. Division of Employment Security*, 353 S.W. 3d 465, 468 (Mo. App. 2011).[4]

[4] Slightly older cases spoke of the Commission and the Courts being

Even if there were a good cause exception, not reading one's mail does not make good cause. *Todaro v. Labor and Industrial Relations Commission*, 660 S.W. 2d 763 (Mo. App. 1983), is instructive on this issue. There, the Claimant failed to file an appeal with the Appeals Tribunal in a timely manner. *Id.* at 764.[5] While the Court did not use those words it appears that, like the Claimant in this case, he just did not realize what the deadline was. *Id.* at 764-65. The Court held that this was not good cause. *Id.* at 766. The Court held that the notice he

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divested of jurisdiction when a claimant filed a late Application for Review to the Commission. *See, e.g., Haislar v. Haislar Construction Co., Inc.*, 142 S.W. 3d 210, 212 (Mo. App. 2004). More recently, Courts have discussed this issue as a lack of statutory authority to review when the notice of appeal to the Court of Appeals is timely. *Boles*, 353 S.W. 3d at 468 n. 4, citing *Beebe v. Naviaux*, 327 S.W. 3d 576, 578 (Mo. App. 2010). The end result has been the same.

[5] At the time apparently there was a ten day deadline for filing the appeal with the Appeals Tribunal. *Id.* at 764.

received clearly set out his remedy (which was to appeal). *Id.*[6] However, like Claimant here, the Claimant in *Todaro* did nothing. *Id.; see also Guyton v. Division of Employment Security*, 375 S.W. 3d 254, 256 (Mo. App. 2012) (failure to read notice of hearing not good cause); *Jenkins v. Manpower on Site at Proctor & Gamble*, 106 S.W. 3d 620, 625 (Mo. App. 2003) (same).

Similarly in *Taylor v. St. Louis ARC, Inc.*, 285 S.W. 3d 775 (Mo. App. 2009), Claimant filed an appeal from a deputy's determination three days late. *Id.* at 776. The Commission did not allow a late filing. *Id.* The Court held that the Commission did not abuse its discretion and noted that "[t]his Court's sense of justice is not shocked by the dismissal of plaintiff's cause as Claimant failed to contact anyone regarding questions concerning filing her appeal until after the expiration of the thirty-day limit." *Id.* at 777. Claimant here apparently did not take any steps to file an appeal until the deadline had expired. Thus, even assuming it is necessary to reach this issue,

[6] The Division notices similarly set out the remedy of an appeal. *See, e.g.*, LF2. 2-3.

the Commission did not abuse its discretion by not permitting a late appeal.

IV. Proration of Wages Received on a Monthly Basis is Required by Regulation and by the Nature of Unemployment Benefits. [Responds to Point I].

The Commission's decision in Appeal No. 10-34721, LF1. 61-66, prorated Claimant's income on a weekly basis, noting that neither Claimant nor Design Design could pinpoint their accrual more accurately, and that, while her counsel objected, counsel also could not provide information to more accurately divide the commissions. LF1. 63. In the absence of records from employer or employee indicating otherwise, proration on a weekly basis is the only reasonable way to allocate Claimant's commission income. 8 CSR 10-3.050(2) requires this procedure. The regulation provides: "The weekly equivalent of any monthly payment shall be twenty-three percent (23%) of the amount of the monthly payment or forty-six percent (46%) of the amount of any semimonthly payment." Further, benefits in general are determined on a week-by-week basis. Sect. 288.070 RSMo; *Lost in the Fifties, LLC v. Meece*, 71 S.W. 3d 273, 279-280 (Mo. App. 2002) ("If the

employee were eligible for benefits, the length of time he would receive those benefits would be determined on a week-by-week basis"); *see also Martin v. Division of Employment Security*, 384 S.W. 3d 378, 383 (Mo. App. 2012) ("After initially filing for unemployment compensation, the claimant must file weekly claims, which are reviewed by a deputy who makes a written determination as to whether the claimant is entitled to benefits for that week"). In the absence of records to the contrary, there does not seem to be any fairer way to allocate benefits other than to prorate them to obtain a weekly amount of wages.

Moreover, Claimant's argument that her commissions should only count for the week when she received them has been rejected by other courts.[7] In *Gardner v. District of Columbia Department of Employment*

[7] Missouri courts have held that in the employment security context, other states' "constructions are persuasive because the employment security enactments of the several states form an integral part of the national plan for social security and represent a cooperative effort by the states and the national government to carry out a common purpose for the general welfare." *Agri-Foods, Inc. v. Industrial Commission*, 511

Services, 736 A.2d 1012 (D.C. 1999), claimant received severance pay in a lump sum payment that stated it was designated to be for a four-week period. *Id.* at 1013-14. He argued that his eligibility for weekly payments depended on whether he received the severance pay during the week for which he sought benefits. *Id.* at 1015. The Court rejected his argument and held that the severance pay was properly prorated into weekly calculations because it was for a four-week period. *Id.* at 1015-16. Because Missouri law also calculates benefits so that it is a week-by-week calculation, the same theory should apply here, and the Court should adopt the holding in *Gardner* and similarly reasoned cases. *See Cooper v. Texas Workforce Commission*, 343 S.W. 3d 310, 314 (Tex. App. 2011) (requiring that a monthly pension benefit be prorated to a weekly amount to determine whether claimant entitled to unemployment benefits; claimant had argued the pension payment

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S.W. 2d 898, 903 (Mo. App. 1974). This Court has stated that when construing a statute, decisions of courts of other states construing similar statutes are of value. *In re Shaw's Estate*, 175 S.W. 2d 588, 590 (Mo. 1943).

should only count for the week he received it); *Sorenson v. Meyer*, 370 N.W. 2d 173, 178 (Neb. 1985) (requiring proration of lump sum severance pay; Court cautioned against allowing a claimant to obtain both severance payments and unemployment for the same time).

Moreover, accepting Claimant's argument would allow claimants to manipulate the unemployment system. Persons receiving unemployment and working irregular hours could simply request employers to just pay them once a month and then claim benefits for the other weeks of the month. Or a claimant working under a short-term contract for an online university could ask to be paid only one time and claim benefits for the other weeks involved. The Unemployment Trust Fund should not be manipulated so easily by how often an employer pays a claimant. Had Claimant gotten Design Design to simply compensate her on a weekly basis, it would have been relatively straightforward to determine how much she was entitled to in benefits each week. The Trust Fund should not suffer for the arrangement that occurred.

V. The Redeterminations of October, 2011 were Timely. Alternatively, there is no One-year Time Limit when a Redetermination is Based on Fraud. [Responds to Points V, IX].

The redeterminations that Claimant objects to as being past one year after the end of the benefit year are not new determinations. Rather they are redeterminations based on her partial success at obtaining a reversal of complete ineligibility for benefits. LF1. 18-23. As such they should not be subject to a one-year limitation after the benefit year from Sect. 288.070.5. Any other result would be an absurd one because it would mean that the Division would be unable to comply with the directives of Appeals Tribunals, the Commission, and the Courts, as appellate review could easily take more than one year after the end of the benefit year. Legislation, of course, should not be read to achieve an absurd result. *See, e.g., State ex rel. McNary v. Hais*, 670 S.W. 2d 494, 495 (Mo. banc 1984).

Even if the deputy here had been making the redeterminations in the absence of any appeal and remand, no limitations period applies when a redetermination is necessitated by fraud. Sect. 288.380.9(1) provides:

> 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.

As can be seen from the statute, there is no limitation on when the determination can take place. It is simply "[a]fter the discovery of facts indicating fraud. . .." It would be difficult to expect that all instances of fraud would be detected within one year, which is most likely the reason there is no limitation on the time for discovery of fraud.

Further, Sect. 288.380.9 is the later enacted law and thereby is controlling if there is a conflict with Sect. 288.070.5. Section 288.380.9 took effect in 2005. *See* 2004 Mo. Laws 525 (HB 1268); V.A.M.S. Sect. 288.380 (2005). Sect. 288.070.5 was in effect before that time as Sect. 288.070.3. *See* Sect. 288.070.3 RSMo; V.A.M.S. Sect. 288.070 (2005). "Where there are two acts on one subject, both should be given effect if possible, but if they are repugnant in any of their provisions, the later act, even *sans* a specific repealing clause, operates to the extent of the repugnancy to repeal the first." *Colabianchi v. Colabianchi*, 646 S.W. 2d 61, 63 (Mo. banc 1983) (citing additional cases). "[T]his is true though the law does not favor repeal by implication." *Id.* Accordingly, to the extent that Sect. 288.380.9 provides for no time limit on when a fraud determination can be made, it controls over Sect. 288.070.5 because it is the later enacted statute.

VI. Claimant's Conduct Was Willful. [Responds to Points II, III and VI].

Claimant's argument that she did not act willfully is unavailing. At the outset, it may be helpful to compare what the word "willful"

means in various contexts. As was stated in *DePaul Hospital School of Nursing v. Southwestern Bell Tel. Co.*, 539 S.W. 2d 542, 548 (Mo. App. 1976):

> It is apparent the use of the term in criminal and civil jurisprudence are in most instances poles apart. 'The meaning of the word 'willful' depends upon the context in which it appears; and particularly the kind and nature of the statute. Where the term is used in connection with the statute defining criminal conduct, the word 'willful' usually requires something more than deliberate and intentional as opposed to accidental and includes an intent of a wrongful or evil purpose . . . But where the statute relates to a civil rather than a criminal penalty the meaning of the word connotes only voluntary and intentional action as contrasted with accidental . . . the word 'willful' (does) not require proof of an evil intent but that it is sufficient if the failure to act was either intentional or plainly indifferent to the requirements of the statute.' *Stanton v. Machiz*, 183 F.Supp. 719, 725(3) (D.C.Maryland 1960); *see also United States v. Illinois Central*

Railroad Co., 303 U.S. 239, 242—3, 58 S.Ct. 533, 82 L.Ed. 773 (1938).

Here we are concerned with the civil definition of voluntary and intentional action. Under this definition, there is little doubt that Claimant's actions were voluntary and intentional. Claimant did not report the fact that she was doing work for Design Design. Tr1. 82-86; Tr2. 67. Incredibly, she did not consider her work for Design Design to be working at a job. Tr1. 79. Even as to the weeks where she could confirm that she received direct deposits of commissions from Design Design, Claimant stated that she was reluctant to report the income because it might result in her benefits being stopped. Tr1.86. She further admitted that "it would've been more accurate to report in the weeks where I actually was paid." Tr1. 86. Claimant knew what she was doing, knew that her income from Design Design would affect her eligibility for benefits, and knew that she was required to report this income to the Division. Claimant's failure to report that she was working at Design Design and the income she was earning from Design Design was a voluntary and intentional act that constituted fraud.

VII. The One Hundred Percent Penalty Assessed Was Proper. [Responds to Point IX].

Claimant contends in her Point IX that the one-hundred percent penalty assessed in Case No. LC-12-0537 (LF2118-121, 140) was improper. But it was consistent with the statute. Sect. 288.030.9(1) provides:

> 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.

The fact that the previous penalty was on appeal is not relevant. DES is aware of no provision of law that provides for a stay of the effect of a prior finding when an appeal is taken. *Compare* Mo. Rule Civ. P. 81.09 (discussing when a judgment appealed from is stayed). Accordingly, it was entirely appropriate for DES to take into account the previous fraud to assess a one-hundred percent penalty.

Nor is there anything in the statute that suggests that the prior fraud must occur in a different year or occasion for the Division to enforce the one hundred percent penalty.

Claimant describes her conduct as an "uninterrupted series of claims…." Claimant's Br. at 73. But, this is best described as a number of separate weekly fraudulent claims. "The unemployment claim process is a series of filings by the claimant; a series of opportunities for the employer to protest; and a series of examinations and determinations by the Division over the course of the "benefit year."' *Heavy Duty Trux Limited v. Labor and Industrial Relations Commission,* 880 S.W.2d 637, 645 (Mo.App. 1994); *Buell v. Texas*

County Library, 2013 WL 3483762 at *7 (Mo. App.). There is a potential for litigation at each step in the process and the relevant issues to be decided in any particular litigation depends upon where you are in the process. *Heavy Duty Trux*, 880 S.W.2d at 645. "[T]here may be different findings regarding eligibility for unemployment benefit throughout the benefit year." *Buell*, 2013 WL 3483762 at *8. "It is clear under Missouri law that a claimant may meet the requirements for eligibility one week and not the next…." *Id*. (citing *RPCS, Inc. v. Waters*, 190 S.W.3d 580, 589 (Mo.App. 2006)). In theory, the first fraudulent weekly claim should have a 25% penalty and all of the other fraudulent weekly claims should have 100% penalties. However, the Division often groups weeks of claims together, which works to the benefit of the debtor. Point IX should be denied.[8]

[8] If the Court disagrees concerning application of the one-hundred percent penalty, then Claimant would still be subject to a twenty-five percent penalty under the statute.

VIII. The Division Agrees with Claimant that Her Entitlement to Waiting Week Benefits is Dependent on the Court's Resolution of Her Other Points on Appeal. [Responds to Point VIII].

Claimant's Point VIII essentially argues that her eligibility for a waiting week payment is dependent on the resolution of the other points in her appeal. In general, the Division agrees that Claimant's waiting week payment eligibility depends on the result of the other issues in her appeal and should be decided accordingly.

Conclusion

The Commission's decisions should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this brief was served by the electronic filing system on August 28, 2013 on:

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CERTIFICATE OF WORD COUNT

I hereby certify the following:

1. The foregoing brief has been prepared in Microsoft Word 2003, 14 point Century Schoolbook font.

2. The foregoing brief complies with the word count limitations.

3. The foregoing brief contains 6,282 words.

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