STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 15-05414

vs.

Referee Decision No. 0027252588-02U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the employer's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision wherein the claimant was held eligible for benefits.

Pursuant to the appeal filed in this case, the Reemployment Assistance Appeals Commission has conducted a complete review of the evidentiary hearing record and decision of the appeals referee. *See* §443.151(4)(c), Fla. Stat. The Commission's review is generally limited to the evidence and issues before the referee and contained in the official record.

On appeal to the Commission, evidence was submitted which had not been previously presented to the referee. The parties were advised prior to the hearing that the hearing was their only opportunity to present all of their evidence in support of their case. Florida Administrative Code Rule 73B-22.005 provides that the Commission can consider newly discovered evidence only upon a showing that it is material to the outcome of the case *and* could not have been discovered prior to the hearing by an exercise of due diligence. The Commission did not consider the additional evidence because it does not meet the requirements of the rule.

The issue before the Commission is whether the claimant was paid sufficient wages for insured work during the base period to establish monetary eligibility within the meaning of Section 443.091(1)(g), Florida Statutes.

The referee's findings of fact state as follows:

> The claimant filed a claim for benefits effective September 28, 2015, establishing a base period running from April 1, 2014, through March 31, 2015. The claimant worked for [the employer], and was paid wages of $2,124.00 in the 2nd quarter of 2014 and $2,583.00 in the 3rd quarter of 2014. Total base period wages are $4,707.00. The claimant did not otherwise work as an employee during the base period.

Based on these findings, the referee held the claimant eligible for receipt of benefits. Upon review of the record and the arguments on appeal, the Commission concludes the record was not developed sufficiently; consequently, the case must be remanded.

When an employee with earnings from "insured work," a position covered by the reemployment assistance program, applies for benefits, threshold calculations are required pursuant to Chapter 443, Florida Statutes, to determine whether the individual employee/claimant has sufficient earnings from insured work to qualify for the receipt of benefits. To be monetarily qualified to receive benefits, the total of all wages for insured work earned during a statutorily defined "base period" must be at least $3,400, and equal to or greater than 1.5 times the claimant's high quarter earnings. The "base period" is defined by Section 443.036(7), Florida Statutes, as the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year. As such, the calculations necessary to determine whether a claimant is monetarily qualified depends upon the date the claimant filed his or her request for benefits and the "base period" earnings.

At issue in this case is whether the claimant's earnings are accurately reflected on the October 5, 2015 Wage Transcript and Determination (WTD), whether any adjustments to the WTD should be made based on additional documentation or evidence, whether the adjustments made as a result of the referee's decision are factually and legally supported, and ultimately, whether the claimant is monetarily qualified to receive benefits.

The record reflects the claimant was employed by an employee leasing company, and performed construction work for a client company, from December 5, 2013, through September 20, 2014.[1] Department of Economic Opportunity records reflect the claimant originally filed a claim for benefits September 29, 2014, and

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[1] Referee Decision No. 0024036462-02 (December 5, 2014) held the claimant not disqualified to receive benefits based on the separation and the employer's account charged. No appeal was taken by the employer and the decision has become final.

established a benefit year beginning September 28, 2014. Upon expiration of that benefit year, the claimant established a new claim year beginning on September 28, 2015. The determination and referee decision immediately under review are limited to addressing this benefit year and the claimant's corresponding base period earnings.

Complicating the analysis in this case, the claim was filed during a week in which a change of quarter occurs. Florida Administrative Code Rule 73B-11.013 directs:

> (8) Effective Date of Claim. Unless otherwise provided by Section 443.036(9), F.S., the effective date of an initial, additional or reopened claim will be the Sunday immediately preceding the filing date, with the following exceptions:
> (a) Change of Calendar Quarter. When an initial claim is filed during a week in which a change of calendar quarter occurs, the claimant will have the option of filing the claim effective the beginning of the new calendar quarter.

Based on the above-cited rule, the claimant may elect to have the claim recognized as effective October 2015, which requires the base period to shift to the period of July 1, 2014, through May 31, 2015. As the case file does not reflect the claimant has elected to change the filing quarter, we analyze the case based on the stated claim effective date of September 28, 2015, and a corresponding base period of April 1, 2014, through March 31, 2015. If the claimant has affirmatively elected for the claim to be effective October 2015, the following rationale will still be applicable, but the base period, and wage credits, will be different.

The original WTD reflected the claimant's base period earnings are: $1,224 during the second quarter of 2014; $2,583 during the third quarter of 2014; $0 earnings during the fourth quarter of 2014; and $0 earnings during the first quarter of 2015. Applying the formula set forth in Section 443.111(2), Florida Statutes, the claimant was not monetarily qualified to receive benefits based on these earnings because the total base period wage credits were not greater than 1.5 times the high quarter.[2] The claimant appealed this unfavorable determination and a subsequent denial of a request for reconsideration. The claimant, the employer, and the client company, all participated at the hearing.

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[2] Total base period wages: $1224 + $2583 + $0 + $0 = $3,807.00
The claimant's high quarter = $2,583 1.5 x $2,583 = $3,874.50

The undisputed testimony at the hearing reflects the claimant has been paid an additional $1,800 in back wages[3] in addition to the wage credits reflected in the WTD as the result of a settlement of a lawsuit filed against the client company and/or employer. Without explanation as to why or what facts he relied upon, the referee made findings that the claimant was paid earnings of $2,124 in the second quarter of 2014. This was an increase of $900 from the amount reflected on the WTD; however, there was no competent testimony supporting this finding and, therefore, it is rejected. The record reflects the claimant testified he wanted the $1,800 in back pay award to be added to his wage transcript, and that the referee asked the claimant if he would accept adding approximately $900 to the wage transcript. The claimant responded that he wanted "whatever it's going to take" to result in the claimant being held eligible. The record reflects the amount of back pay was $1,800, not $900. The decision is void of reasoning concerning how the referee calculated the amount of $900 and applied that amount of earnings to the second quarter of 2014. Accordingly, the case must be remanded for additional fact-finding regarding this evidence.

At the previous hearing, the employer asserted that the back pay should be applied to the period in which it was paid, not when the work was performed. The applicable rule, 73B-11.016(1)(b), states as follows:

> (b) Assignment of Wages to Calendar Quarters. Wages will generally be counted as reported by the employer. *Upon request by the claimant or employer and for the purpose of determining the claimant's weekly benefit amount and maximum available credits, wages may be assigned to the calendar quarter in which the wages were earned*, but can be used in only one base period (emphasis added).

While the rule is discretionary, we hold that where a request is made by a claimant for additional wage credits based on a back-pay award or settlement of a claim for additional wages due to an employer's alleged breach of a legal duty, the claimant is *presumptively* entitled to have the back pay assigned to the period in which it would have been earned, *provided* the claimant can produce sufficient evidence to support such an assignment. *See Martinez v. Reemployment Assistance Appeals Commission*, 118 So. 3d 878, 881-82 (Fla. 3d DCA 2013). On remand, the referee is directed to develop the record as to whether the settlement agreement or other competent evidence provides an adequate basis for properly assigning some or all of the back pay to one or more base period calendar quarters. Only if there is no

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[3] Per the settlement agreement, the claimant received $1,800 in back wages and another $1,800 for liquidated damages. Back pay awards are earned income; liquidated damages, however, are not earned income. §§443.036(16) and 443.1217, Fla. Stats.

way to establish which back pay wages were earned during each calendar quarter of the base period should the referee credit the wages to the quarter in which they were paid. Fortunately, the record in this case reflects the claimant earned a consistent wage of $12 per hour and worked a fairly consistent schedule. After developing the record and addressing the documentary evidence provided for use at the hearing, the referee should be able to calculate the claimant's actual earnings on a weekly basis and, therefore, be able to attribute the correct earnings to the correct quarter of the base period.

On remand, the referee is directed to address the documents provided for use by the parties for the prior hearings. They must be marked as exhibits, authenticated, and, should any of the documents be rejected, the referee must specify in the decision grounds for the rejection. Of special importance are the following documents, all of which the referee should attempt to authenticate and elicit testimony regarding:

- The settlement agreement between the parties.
- The May 20, 2015 letter to the claimant from his attorney regarding the method of calculation of the proposed settlement amount.
- The "wage & hour report" spreadsheet.

From these documents, it appears that the claimant calculated his claim with a designation of $72 in back pay for each week for a 25-week period he worked for the employer. On remand, the referee must determine if this is correct and make findings accordingly. The record also must be developed and findings included regarding the employer's assertion that, of these 25 weeks, only 17 of those weeks were worked during the base period of the claim. Upon proper examination of all this evidence, the referee should be able to determine which weeks the claimant worked in each calendar quarter, apply the weekly back pay award, and then recalculate the quarterly earnings to determine whether the claimant qualifies for benefits pursuant to Section 443.111(2), Florida Statutes. In applying the back pay award, however, the referee cannot add back pay only to the low quarter. All back pay attributable to any week in any base period quarter must be added to the appropriate quarter, and monetary qualification determined on the revised wage credits.

Also at hearing, the employer questioned the claimant about whether he had reported the back pay on his income tax. While the claimant's personal tax reporting is beyond the Commission's jurisdiction, Chapter 443, Florida Statutes, directs that the employer is required to report to the Department of Economic Opportunity or its tax collection service provider, the Florida Department of Revenue, an accurate reporting of wages paid to the claimant. To date, Department records do not reflect that the employer has filed an amended wage credit report that reflects the $1,800 in back pay issued to the claimant.

Finally, our review reflects one more issue that, while not raised in the WTD to date, is crucial to the claimant's eligibility for benefits for the current benefit year. The claimant's WTD currently does not clearly reflect any wages earned after the beginning of the claimant's prior claim year, September 28, 2014. If the claimant is found to have sufficient earnings to establish a valid claim for the claim year beginning September 28, 2015 as required by Sections 443.091(1)(g) and 443.111(2), Florida Statutes, the Department is directed to investigate whether the claimant has also met the separate *requalification* requirement for a second-year claim as required pursuant to §443.091(2), Florida Statutes.[4]

[4] "An individual may not receive benefits in a benefit year unless, after the beginning of the next preceding benefit year during which she or he received benefits, she or he performed service, regardless of whether in employment as defined in s. 443.036, and earned remuneration for that service of at least 3 times her or his weekly benefit amount as determined for her or his current benefit year."

The decision of the appeals referee is vacated and the case is remanded for further proceedings.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

Frank E. Brown, Chairman
Thomas D. Epsky, Member
Joseph D. Finnegan, Member

This is to certify that on
5/31/2016 ,
the above Order was filed in the office of the Clerk of the Reemployment Assistance Appeals Commission, and a copy mailed to the last known address of each interested party.
By: Kimberley Pena
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
REEMPLOYMENT ASSISTANCE PROGRAM
PO BOX 5250
TALLAHASSEE, FL 32314 5250

*47895856 *

Docket No.0027 2525 88-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant ***EMPLOYER/Appellee***

APPEARANCES Claimant
Employer

DECISION OF APPEALS REFEREE

Important appeal rights are explained at the end of this decision.

Derechos de apelación importantes son explicados al final de esta decisión.

Yo eksplike kèk dwa dapèl enpòtan lan fen desizyon sa a.

Issues Involved:

WAGE CREDITS: Whether the claimant was paid sufficient base period wages to qualify for unemployment compensation benefits, pursuant to Sections 443.036(21), (27), (45); 443.091(1)(g); 443.111; 443.1216, Florida Statutes; Rule 73B-11.016, Florida Administrative Code.

ADDITIONAL WAGE CREDITS: Whether the claimant earned additional wages for insured work during the base period, pursuant to Sections 443.036(21), (27), (45), 443.111; 443.1216, Florida Statutes; Rule 73B-11.016, Florida Administrative Code.

Findings of Fact: The claimant filed a claim for benefits effective September 28, 2015, establishing a base period running from April 1, 2014 through March 31, 2015. The claimant worked for the employer, and was paid wages of $2,124.00 in the 2ndquarter of 2014 and $2,583.00 in the 3rdquarter of 2014. Total base period wages are $4,707.00. The claimant did not otherwise work as an employee during the base period.

Conclusions of Law: To qualify for Reemployment Assistance benefits, the claimant must have:

(a) Base period wages for insured work in two or more calendar quarters of the base period; and

(b) Total base period wages equaling at least 1.5 times the wages paid during the high quarter of the base period, but not less than $3400.

The "base period" is the first four of the last five completed calendar quarters immediately preceding the first day of the benefit year. The "high quarter" is the calendar quarter in which the most wages were paid. The weekly benefit amount equals one twenty-sixth of the total wages paid during the high quarter, but not less than $32 or more than $275. Available benefits equal twenty-five percent of total base period wages, with a maximum established by law.

For claims submitted during a calendar year, the duration of benefits is limited to:

1. Twelve weeks if this state's average unemployment rate is at or below 5 percent.

2. An additional week in addition to the 12 weeks for each 0.5 percent increment in this state's average unemployment rate above 5 percent.

3. Up to a maximum of 23 weeks if this state's average unemployment rate equals or exceeds 10.5 percent.

The maximum amount of benefits for any claims filed in the calendar year 2015 is $3,850, or 19 weeks times the weekly benefit amount, based on an unemployment rate of 8.5%. The maximum amount of benefits for any claims filed in the calendar year 2015 is 16 weeks times the weekly benefit amount (up to $3,850 if the weekly benefit amount is $275), based on an unemployment rate of 7.0%.

The law provides that a claimant will be eligible for benefits only if wages were paid for insured work during the base period of the claim. Department regulations provide that wages will be assigned to a calendar quarter as reported by the employer. However, upon request by the claimant or employer for the purpose of determining the claimant's weekly benefit amount and maximum available credits, wages may be assigned to the calendar quarter in which the wages were earned, but can be used in only one base period.

The record reflects that the claimant was paid wages in two quarters of the base period, for a total of $4,707.00. The claimant meets the statutory requirements of wages in more than one calendar quarter of the base period and total base period wages of at least $3400. However, the law also requires total wages equaling at least 1.5 times the wages paid in the high quarter. The high quarter of this claim is the 3rd quarter, 2014, in which the claimant was paid $2583.00.00. High quarter wages, multiplied by 1.5, produces $3,874.50. The claimant's total wages exceed this amount. The claimant has met all of the requirements necessary to establish monetary eligibility on this claim.

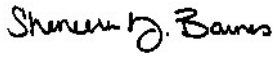
Decision: The reconsideration determination dated October 21, 2015, finding that no change to the wage transcript shall be made is REVERSED. It is further held that the monetary determination dated October 5, 2015, is MODIFIED to reflect wages of $2,124.00 in the 2ndquarter of 2014 and $2,583.00 in the 3rdquarter of 2014 from the employer, (#). The

claimant has established monetary eligibility on this claim.

If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the department and set forth in a separate overpayment determination, unless specified in this decision. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

This is to certify that a copy of the above decision was distributed/mailed to the last known address of each interested party on December 7, 2015.

W. Childers
Appeals Referee



By:

SHANEDRA BARNES, Deputy Clerk

IMPORTANT - APPEAL RIGHTS: This decision will become final unless a written request for review or reopening is filed within 20 calendar days after the distribution/mailed date shown. If the 20th day is a Saturday, Sunday or holiday defined in F.A.C. 73B-21.004, filing may be made on the next day that is not a Saturday, Sunday or holiday. If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the Department and set forth in a separate overpayment determination. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

A party who did not attend the hearing for good cause may request reopening, including the reason for not attending, at connect.myflorida.com or by writing to the address at the top of this decision. The date of the confirmation page will be the filing date of a request for reopening on the Department's Web Site.

A party who attended the hearing and received an adverse decision may file a request for review to the Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org.** If mailed, the postmark date will be the filing date. If faxed, hand-delivered, delivered by courier service other than the United States Postal Service, or submitted via the Internet, the date of receipt will be the filing date. To avoid delay, include the docket number and claimant's social security number. A party requesting review should specify any and all allegations of error with respect to the referee's decision, and provide factual and/or legal support for these challenges. Allegations of error not specifically set forth in the request for review may be considered waived.

IMPORTANTE - DERECHOS DE APELACIÓN: Esta decisión pasará a ser final a menos que una solicitud por escrito para revisión o reapertura se registre dentro de 20 días de calendario después de la distribución/fecha de envìo marcada en que la decisión fue remitida por correo. Si el vigésimo (20) día es un sábado, un domingo o un feriado definidos en F.A.C. 73B-21.004, el registro de la solicitud se puede realizar en el día siguiente que no sea un sábado, un domingo o un feriado. Si esta decisión descalifica y/o declara al reclamante como inelegible para recibir beneficios que ya fueron recibidos por el reclamante, se le requerirá al reclamante rembolsar esos beneficios. La cantidad específica de cualquier sobrepago [pago excesivo de beneficios] será calculada por la Agencia y establecida en una determinación de pago excesivo de beneficios que será emitida por separado. Sin embargo, el límite de tiempo para solicitar la revisión de esta decisión es como se establece anteriormente y dicho límite no es detenido, demorado o extendido por ninguna otra determinación, decisión u orden.

Una parte que no asistió a la audiencia por una buena causa puede solicitar una reapertura, incluyendo la razón por no haber comparecido en la audiencia, en connect.myflorida.com o escribiendo a la dirección en la parte superior de esta decisión. La fecha de la página de confirmación será la fecha de presentación de una solicitud de reapertura en la página de Internet del Departamento.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Servicios de Reempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org.** Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y el número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

ENPÒTAN - DWA DAPÈL: Desizyon sa a ap definitif sòf si ou depoze yon apèl nan yon delè 20 jou apre dat distribisyon/postaj. Si 20yèm jou a se yon samdi, yon dimanch oswa yon jou konje, jan sa defini lan F.A.C. 73B-21.004, depo an kapab fèt jou aprè a, si se pa yon samdi, yon dimanch oswa yon jou konje. Si desizyon an diskalifye epi/oswa deklare moun k ap fè demann lan pa kalifye pou alokasyon li resevwa deja, moun k ap fè demann lan ap gen pou li remèt lajan li te resevwa a. Se Ajans lan k ap kalkile montan nenpòt ki peman anplis epi y ap detèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt detèminasyon, desizyon oswa lòd pa ka rete, retade oubyen pwolonje dat sa a.

Yon pati ki te gen yon rezon valab pou li pat asiste seyans lan gen dwa mande pou yo ouvri ka a ankò; fòk yo bay rezon yo pat ka vini an epi fè demann nan sou sitwèb sa a, connect.myflorida.com oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat cofimasyon page sa pral jou ou ranpli deman pou reouvewti dan web sit depatman.

Yon pati ki te asiste odyans la epi li resevwa yon desizyon negatif kapab soumèt yon demann pou revizyon retounen travay Asistans Komisyon Apèl la, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Faks: 850-488-2123); https://raaciap.floridajobs.org. Si poste a, dat tenm ap dat li ranpli aplikasyon. Si fakse, men yo-a delivre, lage pa sèvis mesaje lòt pase Etazini Sèvis nan Etazini Nimewo, oswa soumèt sou Entènèt la, dat yo te resevwa ap dat li ranpli aplikasyon. Pou evite reta, mete nimewo rejis la ak nimewo sosyal demandè a sekirite. Yon pati pou mande revizyon ta dwe presize nenpòt ak tout akizasyon nan erè ki gen rapò ak desizyon abit la, yo epi bay sipò reyèl ak / oswa legal pou defi sa yo. Alegasyon sou erè pa espesyalman tabli nan demann nan pou revizyon yo kapab konsidere yo egzante.

An equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. All voice telephone numbers on this document may be reached by persons using TTY/TDD equipment via the Florida Relay Service at 711.