Industrial Claim Appeals Office
Precedential Decisions Index

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INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 31652-2009
Social Security: [omitted]

IN THE MATTER OF THE CLAIM OF

[OMITTED]

Claimant,

v.

FINAL ORDER

[OMITTED]

Employer.

CONCERNING THE EFFECT OF A CHANGE IN THE EMPLOYER'S ACCOUNT NUMBER WHEN THE EMPLOYER BECAME A REIMBURSABLE EMPLOYER (headnote not in original)

Pursuant to Regulation 11.2.16.1, 7 Code Colo. Reg. 1101-2, by unanimous decision of the entire panel this decision is determined to interpret a statute, and is designated as precedential. The holding of this decision is as follows: The claimant was not separated from employment when the employer became a reimbursable employer and was assigned a new account number. Rather, a separation from employment requires some change in a claimant's employment status.

The employer has appealed the hearing officer's decision that was issued November 4, 2009. The hearing officer determined the claimant is entitled to an award of unemployment benefits pursuant to § 8-73-108(4)(a), C.R.S. 2009 (lack of work). We vacate the hearing officer's decision and the initial deputy's decision which granted the claimant an award of benefits.

This case was before the hearing officer because the employer appealed an initial deputy's decision dated September 23, 2009 which granted the claimant an award of unemployment benefits pursuant to § 8-73-108(4)(a). The decision identified the employer, [omitted] by Employer Account Number [omitted], and stated:

> The employer laid the claimant off when they began paying her from a different account number. Therefore she is not responsible for the separation.

We take administrative notice that an additional deputy's decision dated September 23, 2009 imposed a disqualification from receipt of unemployment benefits. That decision identified [omitted] by Employer Account Number [omitted].

The claimant worked for [omitted] from February 2008 through December 21, 2008. [Omitted] is a nonprofit organization, and made a request to be designated as "reimbursable" in early 2009. That request was granted, effective January 1, 2009, and [omitted] was assigned a different tax account for use thereafter, identified by Employer Account Number [omitted]. Although the claimant was separated from the employment prior to this change in account numbers her last wages were paid after January 1, 2009 and were reported to the new account.

The hearing officer found that pursuant to Department of Labor practice, the deputy was obligated to determine the reason for the claimant's "separation from each account number." Further, the hearing officer found that the claimant's separation from [omitted] Employer Account Number [omitted] was due to lack of work when the employer began paying the claimant from the new account. The hearing officer affirmed the deputy's decision. We conclude that the hearing officer's decision and the initial deputy's decision are erroneous as a matter of law.

The Division of Employment and Training (Division) maintains a separate account for each employer, credits the account with premiums paid by the employer, and charges benefits paid to the employer's former workers to the account. Section 8-76-103(1)(a), C.R.S. 2009. However, a nonprofit organization is not required to pay premiums if it elects to become a "reimbursable" employer. Section 8-76-110(2), C.R.S. 2009. In that event, the nonprofit organization reimburses the Division for unemployment compensation payments made to its former workers. Section 8-76-110(3), C.R.S. 2009.

An "employer" is generally defined as any "employing unit" which has at least one individual performing services in "employment." *See* §§ 8-70-113 and 8-70-114, C.R.S. 2009. The amount of unemployment benefits available for a claim is computed based on wages paid for employment with an employer during the claim's base period, which is the first four of the last five completed calendar quarters prior to filing the initial claim. *See* §§ 8-73-104(1), 8-70-103(2), C.R.S. 2009. All separations from employment in the base period are adjudicated individually. *See* § 8-73-108(3)(a)(I), C.R.S. 2009.

The record shows the claimant filed her initial claim with an effective date of August 30, 2009, so her base period is the four calendar quarters from April 1, 2008 through March 31, 2009. Thus her employment with [omitted] is in the base period.

However, we are aware of no provision that provides that merely because a nonprofit employer begins reporting an individual's wages to a different account the individual is deemed to be separated from employment. Indeed, it is the reason for an individual's separation from employment with a particular employer that establishes her entitlement to unemployment benefits based on wages earned in that employment. *See* § 8-73-108(1)(a), C.R.S. 2009; *Eckart v. Industrial Claim Appeals Office*, 775 P.2d 97 (Colo. App. 1989). Here, there is no indication that [omitted] is not one employer or employing unit. Further, the hearing officer did not find the claimant was separated from employment with [omitted] when or as a result of [omitted] beginning to report her wages to Employer Account Number [omitted]. *Cf. Dewhurst v. Industrial Claim Appeals Office*, 148 P.3d 378 (Colo. App. 2006) (an interstate transfer within the same company is not a separation from employment for purposes of the Act). Rather, the hearing officer found only that the claimant was separated from the account number. It follows that when there is no separation from employment, there is no entitlement to benefits based on that supposed separation.

Although the hearing officer relied on the fact that there was no predecessor/successor relationship established, we are not persuaded that circumstance is relevant. *See generally* § 8-76-104, C.R.S. 2009 (providing that when an employer acquires another employer it may also acquire the acquired employer's Employer Account). There is nothing in § 8-76-104 providing that a predecessor/successor relationship may be established when a nonprofit organization becomes a "reimbursable" employer.

IT IS THEREFORE ORDERED that the hearing officer's decision issued November 4, 2009 and the deputy's decision appealed by [omitted] and dated September 23, 2009 are vacated. The claimant was not separated from employment with [omitted] when [omitted] began reporting her wages to Employer Account Number [omitted] and the claimant's entitlement to benefits based on all wages earned in employment (reported to both Employer Account Number [omitted] and Employer Account Number [omitted] with [omitted] is determined by the reason for her separation from employment on December 21, 2008.

INDUSTRIAL CLAIM APPEALS PANEL

_____signature in original_____
John D. Baird

_____signature in original_____
Curt Kriksciun

_____signature in original_____
Dona Rhodes

_____signature in original_____
Thomas Schrant

_____signature in original_____
Robert M. Socolofsky

NOTICE

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Industrial Claim Appeals Office
P.O. Box 18291
Denver, CO 80218-0291

Division of Employment & Training
Attn: U.I. Benefits
251 E. 12th Ave.
Denver, CO 80203

Copies of this order were mailed to the parties at the addresses shown below on

01/20/10 by KG.

[omitted] [omitted]

[omitted]

INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 37235-2009
Social Security: [OMITTED]

IN THE MATTER OF THE CLAIM OF

[OMITTED],

Claimant,

v.

[OMITTED],

Employer.

FINAL ORDER

Pursuant to Regulation 11.2.16.1, 7 Code Colo. Reg. 1101-2, by unanimous decision of the entire panel this decision is determined to interpret a statute, and is designated as precedential. The holding of this decision is as follows: Section 8-73-108(4)(b)(II), C.R.S. does not provide an independent basis for an award of unemployment benefits. Rather that statutory provision must be read in conjunction with § 8-73-108(4)(b)(I), C.R.S. and provides exceptions to the requirement concerning notification to an employer of a health condition.

The employer has appealed the decision of the hearing officer dated December 18, 2009, that determined that the claimant was not at fault for the job separation and that granted an award of unemployment benefits under § 8-73-108(4)(b)(II), C.R.S. 2009. We modify the citation of law and otherwise affirm the award.

The claimant worked as a delivery driver in this employment. The hearing officer found that the employer discharged the claimant because he failed to report to work on September 24th and 25th. The hearing officer further found that the claimant was assaulted by his roommate on September 23rd and that the claimant was in the hospital as a result. He further found that both were arrested on September 24th. The claimant was released from jail the following day and was not convicted of any crime. The hearing officer found that the claimant did not cause the assault and notified the employer prior to his absences. The hearing officer concluded that the claimant was not at fault for the job separation and granted an award of unemployment benefits.

On appeal the employer argues that the claimant "technically" quit his job by failing to comply with the employer's policy regarding calling in prior to an absence. The employer further argues that the claimant's testimony to the contrary is "incorrect." However, we may

not reweigh the factual record and enter findings of our own. It is solely the responsibility of the hearing officer to weigh the evidence, to assess credibility, to resolve conflicts in the evidence and to determine the inferences to be drawn. *See Goodwill Industries of Colorado Springs v. Industrial Claim Appeals Office,* 862 P.2d 1042 (Colo. App. 1993). The hearing officer's factual findings are not contrary to the weight of the evidence in the record, so we may not alter them. *See Federico v. Brannan Sand & Gravel Co.,* 788 P.2d 1268 (Colo. 1990). Here, although the employer clearly disagrees with the hearing officer's factual finding that the claimant notified the employer that he would be absent, that finding is supported by the claimant's testimony. Therefore, since it is entirely the hearing officer's province to determine the credibility of witnesses, we are bound by that finding.

Section 8-73-108(4)(b)(I), C.R.S. 2009 provides for an award in certain circumstances involving the state of an individual's health or the state of health of an individual's family member. One of the conditions required by § 8-73-108(4)(b)(I) for an award is that the worker have notified the employer of the health condition prior to his separation from employment.

Section 8-73-108(4)(b)(II) provides as follows:

> In the event of an injury or sudden illness of the worker which would preclude verbal or written notification of the employer prior to such occurrence, the failure of the worker to notify the employer prior to such occurrence will not in itself constitute a reason for the denial of benefits if the worker has notified the employer at the earliest practicable time after such occurrence. Such notice shall be given no later than two working days following such occurrence unless the worker's physician provides a written statement to the employer within one week of the employer's request that the worker's condition made giving such notice impracticable and substantiating the illness or injury.

Statutes are construed to further the intent to render the entire statute effective and, also, to reach a just and reasonable result. Section 2-4-201(1)(b)-(c), C.R.S. 2009. Where the statute at issue is part of a comprehensive legislative scheme, the statute must be considered in relation to the other provisions to effectuate the legislative intent of the statutes. *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997); *DeJiacomo v. Industrial Claim Appeals Office,* 817 P.2d 552 (Colo. App. 1991). If the statutory language is unambiguous, there is no need to resort to interpretative rules of statutory construction

because we must presume the General Assembly meant what it clearly said. *Davison v. Industrial Claim Appeals Office*, 72 P.3d 389 (Colo. App. 2003).

We conclude that § 8-73-108(4)(b) is unambiguous, and reading the provisions of subparagraph (I) together with subparagraph (II), clearly provides that subparagraph (II) is intended only to excuse the requirement to notify the employer of a health condition which requires the claimant to refrain from working, where the claimant has suffered a sudden injury or illness that prevents timely notification. Section 8-73-108(4)(b)(II) does not provide an independent basis for awarding unemployment benefits, and it is not proper to grant an award pursuant to that statutory provision alone without reference to § 8-73-108(4)(b)(I). Here, we note that not all of the conditions required by § 8-73-108(4)(b)(I) for an award are present, and an award would not be warranted pursuant to § 8-73-108(4)(b)(I). In any event, the hearing officer did not find the claimant was discharged due to any failure to notify the employer of absences. Rather, the hearing officer found the claimant was discharged for his absences. *See Eckart v. Industrial Claim Appeals Office*, 775 P.2d 97 (Colo. App. 1989) (it is the hearing officer's responsibility to determine the direct and proximate cause of a separation from employment, which establishes entitlement to unemployment benefits based on wages earned in that employment). This finding is supported by the evidence, and we may not alter it. *See Samaritan Institute v. Prince-Walker*, 883 P.2d 3 (Colo. 1994).

Nevertheless, the hearing officer also found that at least the first of the claimant's two absences were attributable to the claimant's health condition, and as we understand the decision, were outside the claimant's control and prevented him from going to work. *See Mountain States Telephone and Telegraph Co. v. Industrial Commission*, 637 P.2d 401 (Colo. App. 1981); *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). The findings support the conclusion that the claimant is not at fault for the separation from employment, and the award of unemployment benefits is therefore warranted pursuant to § 8-73-108(4), C.R.S. 2009. *See Santa Fe Energy Co. v. Baca*, 673 P.2d 374 (Colo. App. 1983). The decision shall be modified accordingly.

IT IS THEREFORE ORDERED that the hearing officer's decision issued December 18, 2009, is modified to provide that the claimant is entitled to an award of unemployment benefits pursuant to § 8-73-108(4). The award is otherwise affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

John D. Baird

Curt Kriksciun

Dona Rhodes

Thomas Schrant

Robert M. Socolofsky

NOTICE

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Attn: U.I. Benefits
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Denver, CO 80203

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03/10/10 by KG.

[OMITTED]

[OMITTED] [OMITTED]

INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 37826-2009
Social Security: [OMITTED]

IN THE MATTER OF THE CLAIM OF

[OMITTED],

Claimant,

v.

[OMITTED],

Employer.

FINAL ORDER

Pursuant to Regulation 11.2.16.1, 7 Code Colo. Reg. 1101-2, by unanimous decision of the entire panel this decision is determined to interpret a statute, and is designated as precedential. The holding of this decision is as follows: Payment of unused vacation pay made at the time of a claimant's job separation is "additional remuneration" within the meaning of § 8-73-110(1)(a), C.R.S.

The Division of Employment and Training (Division) has appealed the hearing officer's decision dated January 12, 2010 which determined that the claimant's receipt of unemployment benefits was not delayed due to receipt of vacation pay at the time of the claimant's job separation. We reverse that portion of the decision.

Section 8-73-110(1)(a), C.R.S. concerns receipt of other remuneration and provides:

> "An individual who is separated from employment and, because of the separation, receives additional remuneration not otherwise referred to in this section and the remuneration is not wages shall have his or her benefits postponed for a number of calendar weeks after separation from employment that is equal to the total amount of the additional remuneration, divided by the individual's usual weekly wage. The postponement required by this subsection (1) shall begin with the calendar week in which the payment was received. If the number of weeks does not equal a whole number, the remainder shall be disregarded. Notwithstanding section 8-74-107(1)(f), any wages earned by an

> individual in a calendar week during postponement shall be disregarded."

Here, an initial deputy's decision dated November 13, 2009 determined that the claimant received "additional remuneration" because of his separation from employment. The decision determined that the claimant's receipt of unemployment benefits is delayed from October 11, 2009 through December 19, 2009.

Based on the evidence presented in the claimant's appeal of the deputy's decision, the hearing officer found the claimant was separated from employment because of a layoff and received additional remuneration in the form of a severance allowance in the amount of $8,880.90. The hearing officer also found that the claimant received a payment of $6,512.96 in unused vacation pay. The hearing officer determined that the claimant's unemployment benefits were disallowed for six weeks on account of the severance payment. However, the hearing officer found that the vacation pay was not "additional remuneration" within the meaning of the statute and no postponement was appropriate for that payment. The hearing officer therefore disallowed benefits for six weeks from October 11, 2009 to November 21, 2009. The postponement was only for the "severance" payment and not for the unused vacation pay.

On appeal, the Division argues that the payment made for unused vacation is "remuneration" that he received on account of his employment and because of his separation. We agree with the Division and reverse that portion of the hearing officer's decision.

Prior to the amendments that took effect in 2009, § 8-73-110, C.R.S. concerned the receipt of certain types of "remuneration." Among the types of remuneration were back pay awards, § 8-73-110(2), pension or other retirement payments, § 8-73-110(3), and various kinds of disability or sick payments. Section 8-73-110(4), (5) & (6). Prior to June 2, 2009, subsection (1) of § 8-73-110 designated certain payments of other remuneration as "vacation pay," "wages in lieu of notice," "separation bonuses," and "severance allowances. Section 8-73-110(1), C.R.S. 2008. As noted, however, the amendment to § 8-73-110(1) eliminated these previous categories and specified that receipt of "additional remuneration" due to a separation from employment postpones benefits for an equal number of weeks. Colo. Sess. Laws 2009, ch. 408 at 2248-2250.

Here, in our view the hearing officer erred in determining that the vacation pay was not paid "because of" the claimant's separation. Whether or not the vacation pay was "earned" during the claimant's employment is immaterial to the reason for the payment, which is indisputably because of the claimant's separation from the employment. Further, in

our view the hearing officer should have construed the amended statute to include as "remuneration" all payments in the previous categories as well as other payments made on account of the claimant's job separation. Consequently, the hearing officer erred in determining that the payment of vacation pay here did not postpone the claimant's eligibility to receive benefits as required by the applicable version of § 8-73-110(1).

This result is consistent with the legislative history available related to the amendments. Representative Pace testified before the House Business Affairs and Labor committee that the bill, House Bill 09-1076, was intended to "count all remuneration equally," including "sick leave, vacation pay, severance pay, and holiday pay." A representative testifying on behalf of the Division of Employment and Training, Michael Cullen, similarly stated that it did not "matter what the remuneration is" but that such things as "severance pay, separation bonuses, vacation pay, PTO, and sick pay" were all treated as additional remuneration under the bill. *Concerning Remuneration Resulting from an Employee's Separation from Employment for the Purpose of Calculating the Postponement of Unemployment Insurance Benefits*: *Hearing on H.B. 09-1076 Before the House Business Affairs and Labor Committee*, 2009 Leg., 67th Sess. (January 28, 2009). Mr. Cullen also testified before the Senate Business Labor and Technology committee, reiterating that the proposed bill intended to treat all remuneration in similar ways, including "vacation pay, sick pay, severance, other cash payments, wages in lieu, separation bonus…." *Concerning Remuneration Resulting from an Employee's Separation from Employment for the Purpose of Calculating the Postponement of Unemployment Insurance Benefits*: *Hearing on H.B. 09-1076 Before the Senate Business Labor and Technology Committee*, 2009 Leg., 67th Sess. (March 4, 2009). In our view this legislative history supports the Division's position in this case that the claimant's receipt of vacation pay at the time of his separation should have postponed his eligibility to receive unemployment benefits.

IT IS THEREFORE ORDERED that the hearing officer's decision issued November 2, 2009, is reversed in part. The order is modified to reflect that the deputy's decision is reinstated and the postponement of unemployment benefits is from October 11, 2009 through December 19, 2009.

INDUSTRIAL CLAIM APPEALS PANEL

John D. Baird

Curt Kriksciun

Dona Rhodes

Thomas Schrant

Robert M. Socolofsky

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[OMITTED

[OMITTED] [OMITTED]

INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 8205-2010
Social Security: [OMITTED]

IN THE MATTER OF THE CLAIM OF

[OMITTED],

Claimant,

v.

[OMITTED],

Employer.

FINAL ORDER

Pursuant to Regulation 11.2.16.1, 7 Code Colo. Reg. 1101-2, by unanimous decision of the entire panel this decision is determined to interpret a statute, and is designated as precedential. The holding of this decision is as follows: A separation payment paid at the time of a claimant's job separation is "additional remuneration" within the meaning of § 8-73-110(1), C.R.S. regardless of whether the claimant was required to waive potential rights in order to receive the payment.

The Division of Employment and Training (Division) has appealed the hearing officer's decision dated March 25, 2010 which determined that the claimant's receipt of unemployment benefits was not delayed due to receipt of vacation pay and a severance payment. We reverse the hearing officer's decision.

Section 8-73-110(1)(a), C.R.S. concerns receipt of other remuneration and provides:

> "An individual who is separated from employment and, because of the separation, receives additional remuneration not otherwise referred to in this section and the remuneration is not wages shall have his or her benefits postponed for a number of calendar weeks after separation from employment that is equal to the total amount of the additional remuneration, divided by the individual's usual weekly wage. The postponement required by this subsection (1) shall begin with the calendar week in which the payment was received. If the number of weeks does not equal a whole number, the remainder shall be disregarded. Notwithstanding section 8-74-107(1)(f), any wages earned by an

> individual in a calendar week during postponement shall be disregarded."

We have previously held that unused and accumulated vacation pay received at the time of a claimant's job separation is "additional remuneration" within the meaning of § 8-73-110(1). *See* Precedential Decision Docket Number 37826-2009 dated 4-13-10 (concerning the payment of unused vacation pay made at the time of a claimant's job separation as "additional remuneration") at http://www.colorado.gov/cs/Satellite/CDLE-UnempBenefits/CDLE/1251569365187.

Here, an initial deputy's decision dated February 10, 2010 determined that the claimant received "additional remuneration" because of his separation from employment. The decision determined that the claimant's receipt of unemployment benefits is delayed from January 10, 2010 to November 27, 2010.

Based on the evidence presented in the claimant's appeal of the deputy's decision, the hearing officer found the claimant was separated from employment on January 15, 2010. On January 19 the claimant received additional remuneration in the form of what he characterized as "severance" in the amount of $99,999.98. The hearing officer found this payment was not received because of the claimant's separation from employment, but was received because the claimant waived certain potential legal rights. The hearing officer also found that the claimant received a payment of $11,798.38 in unused vacation pay which was earned by the claimant during his employment. The hearing officer determined that the payments were not "additional remuneration" and the claimant's receipt of unemployment benefits is not postponed because of the vacation pay or because of the severance payment. The hearing officer reversed the deputy's decision.

On appeal, the Division argues that the payments were paid because of the claimant's separation from employment, and therefore are "additional remuneration" as defined by § 8-73-110(1). We agree with the Division and reverse the hearing officer's decision.

Prior to the amendments that took effect in 2009, § 8-73-110, C.R.S. concerned the receipt of certain types of "remuneration." Among the types of remuneration were back pay awards, § 8-73-110(2), pension or other retirement payments, § 8-73-110(3), and various kinds of disability or sick payments. Section 8-73-110(4), (5) & (6). Prior to June 2, 2009, subsection (1) of § 8-73-110 designated certain payments of other remuneration as "vacation pay," "wages in lieu of notice," "separation bonuses," and "severance allowances." Section 8-73-110(1), C.R.S. 2008. However, the amendment to § 8-73-110(1) eliminated these previous categories and specified that receipt of "additional remuneration" due to a

separation from employment postpones benefits for an equal number of weeks. Colo. Sess. Laws 2009, ch. 408 at 2248-2250.

Here, as indicated, we have previously held that unused and accumulated vacation pay is "additional remuneration" within the meaning of § 8-73-110(1). Thus, the hearing officer erred by finding that the vacation pay received by the claimant was not "additional remuneration." Whether the vacation pay was "earned" during the claimant's employment is immaterial to the reason for the payment, which is indisputably because of the claimant's separation from the employment.

Moreover, the claimant conceded he had no actual legal claims against the employer at the time of his separation from employment. In any event, the severance payment was paid at the time of, and at least in part, because of the claimant's separation from employment. In our view the hearing officer should have construed the amended statute to include as "additional remuneration" all payments in the previous categories as well as other payments made because of the claimant's job separation. Consequently, the hearing officer erred in determining that payment of the unused vacation pay and the severance pay here does not postpone the claimant's eligibility to receive benefits as required by the applicable version of § 8-73-110(1).

This result is consistent with the legislative history available related to the amendments. Representative Pace testified before the House Business Affairs and Labor committee that the bill, House Bill 09-1076, was intended to "count all remuneration equally," including "sick leave, vacation pay, severance pay, and holiday pay." A representative testifying on behalf of the Division of Employment and Training, Michael Cullen, similarly stated that it did not "matter what the remuneration is" but that such things as "severance pay, separation bonuses, vacation pay, PTO, and sick pay" were all treated as additional remuneration under the bill. *Concerning Remuneration Resulting from an Employee's Separation from Employment for the Purpose of Calculating the Postponement of Unemployment Insurance Benefits*: *Hearing on H.B. 09-1076 Before the House Business Affairs and Labor Committee*, 2009 Leg., 67th Sess. (January 28, 2009). Mr. Cullen also testified before the Senate Business Labor and Technology committee, reiterating that the proposed bill intended to treat all remuneration in similar ways, including "vacation pay, sick pay, severance, other cash payments, wages in lieu, separation bonus…." *Concerning Remuneration Resulting from an Employee's Separation from Employment for the Purpose of Calculating the Postponement of Unemployment Insurance Benefits*: *Hearing on H.B. 09-1076 Before the Senate Business Labor and Technology Committee,* 2009 Leg., 67th Sess. (March 4, 2009). In our view this legislative history supports the Division's position in this

case that the claimant's receipt of vacation pay and severance pay at the time of his separation should have postponed his eligibility to receive unemployment benefits.

IT IS THEREFORE ORDERED that the hearing officer's decision issued March 25, 2010 is reversed. The claimant's receipt of vacation pay and severance pay postpones the claimant's eligibility to receive unemployment benefits as determined by the February 10, 2010 deputy's decision.

INDUSTRIAL CLAIM APPEALS PANEL

John D. Baird

Curt Kriksciun

Dona Rhodes

Thomas Schrant

Robert M. Socolofsky

NOTICE

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Colorado Court of Appeals
101 West Colfax Avenue, Suite 800
Denver, Co 80202

Industrial Claim Appeals Office
P.O. Box 18291
Denver, CO 80218-0291

Division of Employment & Training
Attn: U.I. Benefits
251 E. 12th Ave.
Denver, CO 80203

Copies of this order were mailed to the parties at the addresses shown below on

04/29/10 by KG.

[OMITTED

[OMITTED] [OMITTED]

INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 8830-2010
Social Security: [OMITTED]

IN THE MATTER OF THE CLAIM OF

[OMITTED],

Claimant

v.

[OMITTED],

Employer

FINAL ORDER

Pursuant to Regulation 11.2.16.1, 7 Code Colo. Reg. 1101-2, by unanimous decision of the entire panel this decision is determined to interpret a statute, and is designated as precedential. The holding of this decision is as follows: To calculate the number of weeks that benefits are postponed, the total amount of additional remuneration should be calculated prior to dividing by the individual's usual weekly wage and disregarding any fractional week.

The Division of Employment and Training (Division) appeals the hearing officer's determination calculating the postponement of the claimant's unemployment benefits based upon certain payments of additional remuneration. We modify the hearing officer's decision to reflect that the period of postponement of the claimant's benefits is from December 13, 2009 to March 6, 2010.

Section 8-73-110(1)(a), C.R.S. concerns receipt of other remuneration and provides:

> An individual who is separated from employment and, because of the separation, receives additional remuneration not otherwise referred to in this section and the remuneration is not wages shall have his or her benefits postponed for a number of calendar weeks after separation from employment that is equal to the total amount of the additional remuneration, divided by the individual's usual weekly wage. The postponement required by this subsection (1) shall begin with the calendar week in which the payment was received. If the number of weeks does not equal a whole number, the remainder shall be disregarded. Notwithstanding section 8-74-107(1)(f), any wages earned by an

> individual in a calendar week during postponement shall be disregarded.

The hearing officer found that the claimant separated from the employer on December 15, 2009 and filed his claim for benefits effective January 31, 2010. The hearing officer also found that on December 13th the claimant received $16,771.26 for accrued vacation. The hearing officer calculated the payment for vacation as equal to 7.9331996 weeks of the claimant's regular pay of $2,114.06. The hearing officer also found that on December 15th the claimant received a payment of $9,160.94 as a severance allowance, which was equal to 4.333396 weeks of the claimant's regular pay.

The hearing officer calculated that the postponement of the claimant's benefits because of the vacation pay was seven weeks from December 13, 2009 to January 30, 2010. Because this postponement was prior to the effective date of the claim, the hearing officer concluded that it had no effect on the claimant's receipt of benefits. The hearing officer also calculated that the postponement of the claimant's benefits because of the severance allowance was four weeks from January 31, 2010 to February 27, 2010. In making both calculations the hearing officer disregarded the fractional weeks pursuant to the statute.

The Division asserts that the hearing officer erred in calculating the two periods of postponement separately. Rather, the Division argues that the hearing officer should have added the payments together, calculated the weeks of postponement of benefits, and only then disregarded any fractional week that resulted. The Division points out that when the periods are calculated separately and both fractional weeks disregarded, it has an effect on the total number of weeks that benefits are postponed. We agree with the Division's argument and therefore modify the decision to reflect that the postponement of benefits is from December 13, 2009 to March 6, 2010.

In our opinion this result is consistent with the language of §8-73-110(1)(a). As noted above, the statute provides that benefits are postponed for a number of weeks "equal to the *total amount* of the additional remuneration." (emphasis added). When interpreting statutes the objective is to implement the legislative intent. In order to do so, we must first examine the statutory language and afford the words their plain and ordinary meanings. *Weld County School District v. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). If the meaning of the statute is unambiguous, there is no need to resort to interpretive rules of statutory construction. *City of Thornton v. Replogle*, 888 P. 2d 782 (Colo. 1995). Where possible, we should avoid forced, subtle, or strained construction of statutory language. *Miller v. Industrial Claim Appeals Office*, 985 P.2d 94 (Colo. App. 1999). Here, the statutory reference to the "total

amount of the additional remuneration" requires that separate payments be added prior to the calculation of the number of weeks of postponement.

Therefore, we agree with the Division that the deputy correctly applied the statute. The deputy's decision added the two payments, resulting in a total of $25,932.20, which when divided by the claimant's wage resulted in a postponement of benefits of 12.266539 weeks. Disregarding the fractional week resulted in a postponement of 12 weeks. That period is from December 13, 2009 through March 6, 2010. Accordingly, the hearing officer's decision is modified to reflect the postponement for that period. We note, as did the hearing officer, that a portion of that period is prior to the effective date of the claim and has no effect on the claimant's receipt of unemployment benefits.

IT IS THEREFORE ORDERED that the hearing officer's decision issued March 30, 2010 is modified to reflect that the period of postponement is from December 13, 2009 through March 6, 2010.

INDUSTRIAL CLAIM APPEALS PANEL

John D. Baird

Curt Kriksciun

Dona Rhodes

Thomas Schrant

Robert M. Socolofsky

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NOTICE

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Denver, CO 80203

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05/18/10 by KG.

[OMITTED] [OMITTED]

[OMITTED]

INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 9428-2010
Social Security: [OMITTED]

IN THE MATTER OF THE CLAIM OF

[OMITTED],

Claimant,

v.

[OMITTED],

Employer.

FINAL ORDER

Pursuant to Regulation 11.2.16.1, 7 Code Colo. Reg. 1101-2, by unanimous decision of the entire panel this decision is determined to interpret a statute, and is designated as precedential. The holding of this decision is as follows: When an individual is discharged for the presence of marijuana in his system during working hours as evidenced by a test administered pursuant to a statutory or regulatory requirement or a previously established, written drug policy he or she is properly disqualified. Disqualification is warranted regardless of whether he or she used "medical marijuana" pursuant to a physician recommendation and where there is no contention which would support a conclusion that the claimant did not act volitionally.

The employer has appealed the hearing officer's decision that determined the claimant is entitled to an award of unemployment benefits. We reverse.

The employer's drug policy and the applicable federal regulation prohibits off-duty use of "illegal" drugs, including marijuana, and addresses drug screens. After the claimant was involved in an accident at work he was subjected to a drug test, which was positive for marijuana. The hearing officer found the claimant was discharged because he violated the employer's drug policy and the regulation.

However, the hearing officer found the claimant was not impaired at work. The hearing officer also found that a physician "prescribed" marijuana to assist the claimant with severe back pain, and the presence of marijuana in his system was due to his use of this "medical marijuana." Finding that the use of medical marijuana is permitted by Colorado law, the hearing officer found that it was not shown that the presence of marijuana in an individual's system is illegal under federal law. Considering the claimant not "to be at volitional fault" and not disqualified, the hearing officer granted an award of unemployment

benefits pursuant to § 8-73-108(4), C.R.S. We conclude that the claimant is disqualified from receipt of unemployment benefits pursuant to § 8-73-108(5)(e)(IX.5), C.R.S. (disqualification warranted for the presence in an individual's system during working hours of a not medically prescribed controlled substance, when certain conditions are met).

The Federal Controlled Substances Act (21 U.S.C. 801, *et seq*) includes five schedules which list substances which are subject to control. A "controlled substance" is defined as a drug or other substance included in one of the five schedules. 21 U.S.C. 802(6). Assignment of specific substances to one of the five schedules is made on criteria including the substance's potential for abuse, currently accepted medical use in treatment in the United States, and international treaties. 21 U.S.C. 811, *et seq*. Schedule I includes substances which have a "high potential for abuse," have "no currently accepted medical use in treatment in the United States," and for which there "is a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. 812(b)(1). Marijuana (referred to as "marihuana" in the Federal Controlled Substances Act) is a Schedule I substance. 21 U.S.C. 812 (Schedule I) (c)(10). There is no provision for the prescription of Schedule I substances.

The Uniform Controlled Substances Act, enacted by the Colorado legislature in 1992, also includes five schedules of controlled substances. *See* § 18-18-203, C.R.S. *et seq*. However, marijuana is not listed as a scheduled controlled substance, and is listed separately as a controlled substance in § 18-18-406, C.R.S. Similar to the provisions of the Federal Controlled Substances Act, there is no provision in the Uniform Controlled Substances Act or in Colorado law for the prescription of marijuana. [refer to HB 10-1284 pg. 9, § 12-43.3-202(1)(g) – directing the state licensing authority to recommend to the Federal Drug Enforcement Administration consideration of rescheduling, for pharmaceutical purposes, medical marijuana from a schedule I controlled substance to a schedule II controlled substance) (schedule II controlled substances are defined by 21 U.S.C. 812(b)(2) as a substance which has a high potential for abuse, has a currently accepted medical use, and use of the substance can lead to severe psychological or physical dependence].

Although the hearing officer considered the "legality" of the use of medical marijuana in Colorado, we disagree with the hearing officer's implicit inferences regarding the interplay between the Colorado Employment Security Act, §§ 8-70-101 to 8-82-105, C.R.S. (Act), and the constitutional framework for the medical use of marijuana. *See* Colo. Const. art. XVIII, § 14. In particular we note that the constitutional provisions address exceptions to state criminal laws. Colo. Const. art. XVIII, § 14(2)(a)-(c); *see also* § 18-18-406.3(1)(b), C.R.S. ("Section 14 of article XVIII of the state constitution creates limited exceptions to the criminal laws of this state . . .") As members of the executive branch of government we

have no authority to pass on the constitutionality of statutory schemes. *See Kinterknecht v. Industrial Commission*, 175 Colo. 60, 485 P.2d 721 (1971). However, we adhere to the general principles of statutory construction and construe statutes in harmony with constitutional provisions, being cognizant of the objectives sought to be accomplished in each provision. *See, e.g., In re U. S. Dist. Court for Dist. of Colo.* 179 Colo. 270, 274-275, 499 P.2d 1169, 1171 (Colo. 1972). As noted above, the constitutional amendment regarding the medical use of marijuana creates certain exceptions to the criminal laws of the state pertaining to the use of marijuana. *See People v. Clendenin*, ___ P.3d ___, Case No. 08CA0624 (Colo. App., Oct. 29, 2009) (considering medical marijuana amendment in context of duties of primary care-giver under the amendment). At present, certain criminal penalties related to the medical marijuana constitutional amendment have been enacted into law. Section 18-18-406.3, C.R.S.

Section 8-73-108(5)(e)(IX.5) provides for disqualification when, insofar as pertinent here, for:

> The presence in an individual's system, during working hours, of not medically prescribed controlled substances, as defined in section 12-22-303(7), C.R.S., . . . as evidenced by a drug . . . test administered pursuant to a statutory or regulatory requirement or a previously established, written drug . . . policy of the employer and conducted by a medical facility or laboratory licensed or certified to conduct such tests.

"Medical use" is defined by the constitutional provisions as "the acquisition, possession, production, use, or transportation of marijuana … related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition . . .." Colo. Const. art. XIX, § 14(1)(b). Here, the employer's policy prohibited off-the-job use of not medically prescribed controlled substances, and the constitutional provisions specifically provide that no employer shall be required to accommodate the medical use of marijuana in any work place. Colo. Const. art. XVIII, § 14(10)(b). We find no constitutional impediment to enforcing § 8-73-108(5)(e)(IX.5) as currently written.

Moreover, to the extent that the hearing officer found the marijuana used by the claimant was "medically prescribed" to exclude a disqualification under § 8-73-108(5)(e)(IX.5), he erred. Section 8-73-108(5)(e)(IX.5) does not impose a disqualification unless the drugs at issue are "not medically prescribed … controlled substances defined in section 12-22-303(7), C.R.S." Section 12-22-303(7), in turn, refers to a criminal statute, § 18-18-102(5), C.R.S., to define "controlled substance." Marijuana is a controlled substance

under that provision ("Controlled substance means a drug . . . including . . . marihuana, and marihuana concentrate."). Thus, in order to prevent the application of 8-73-108(5)(e)(IX.5) it must be determined whether marijuana can be "medically prescribed" as referenced in the statute.

The Act does not define what it means for a drug to be "medically prescribed" under § 8-73-108(5)(e)(IX.5). However, a "prescription" for purposes of regulating pharmaceuticals and pharmacists "means the finished product of the dispensing of a prescription order in an appropriately labeled and suitable container." Section 12-22-102(29), C.R.S. A "prescription order" is considered an "order" under § 12-22-102(22.5)(a), which states that an order can mean the following:

> A prescription order which is any order . . . authorizing the dispensing of a single drug . . . that is written, mechanically produced, computer generated and signed by the practitioner, transmitted electronically . . . or produced by other means of communication by a practitioner to a licensed pharmacy or pharmacist and that includes the name or identification of the patient, the date, the symptom or purpose for which the drug is being prescribed, if included by the practitioner at the patient's authorization, and sufficient information for compounding, dispensing, and labeling.

In any event, the record does not indicate that the claimant had a prescription. Indeed, the "Physician Certification" (admitted as exhibit A) specifically states that it is "not a prescription for the use of marijuana."

The General Assembly has recently enacted a comprehensive scheme for regulating "medical marijuana." *See* SB 10-109; HB 10-1284; HB 10-1352. The recently enacted statutes do not include any provision for prescribing marijuana, and the General Assembly has not provided for an exception for use of "medical marijuana" in § 8-73-108(5)(e)(IX.5). Although the hearing officer found the claimant was not at "volitional fault" in the circumstances, there was no contention by the claimant which would support a conclusion that he did not act volitionally. *See City and County of Denver v. Industrial Commission*, 756 P.2d 373 (Colo. 1988) (the claimant has the burden to show his behavior was not volitional). The dispositive circumstances are whether the claimant reasonably believed his use of medical marijuana would be permitted by the employer. *See Zelingers v. Industrial Commission*, 679 P.2d 608 (Colo. App. 1984) (claimant's reasonable belief that action permitted by the employer may support conclusion that claimant did not act volitionally).

We are aware that § 24-34-402.5, C.R.S. provides that it is unlawful for an employer to prohibit off-the-job legal activities as a condition of employment and under certain circumstances. However, there has been no contention that the provisions of that statute are applicable.

Here, a drug test was administered to the claimant pursuant to the employer's previously established, written drug policy, and marijuana was present in the claimant's system during working hours. The hearing officer made no findings concerning whether the facility which conducted the test is licensed or certified. However, we believe the purpose of that provision is to insure the accuracy of the test, and since the claimant conceded that he had marijuana in his system during working hours such findings are unnecessary. Under these circumstances, the claimant is properly disqualified pursuant to § 8-73-108(5)(e)(IX.5).

IT IS THEREFORE ORDERED that the hearing officer's decision issued April 14, 2010 is reversed. The claimant is disqualified from receipt of unemployment benefits pursuant to § 8-73-108(5)(e)(IX.5), based on his separation from employment.

INDUSTRIAL CLAIM APPEALS PANEL

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John D. Baird

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Curt Kriksciun

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Dona Rhodes

_____
Thomas Schrant

_____
Robert M. Socolofsky

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Attorney Generals Office
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Industrial Claim Appeals Office
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Denver, CO 80218-0291

Division of Employment & Training
Attn: U.I. Benefits
251 E. 12th Ave.
Denver, CO 80203

Copies of this order were mailed to the parties at the addresses shown below on

7/21/2010 by AL.

[OMITTED]

[OMITTED]

INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 31562-2010
Social Security: [OMITTED]

IN THE MATTER OF THE CLAIM OF

[OMITTED]

Claimant

v.

FINAL ORDER

[OMITTED]

Employer

Pursuant to Regulation 11.2.16.1, 7 Code Colo. Reg. 1101-2, by unanimous decision of the entire panel this decision is determined to interpret a statute, and is designated as precedential. The holding of this decision is as follows: A claimant's weekly unemployment benefits are reduced when he or she receives a pension, retirement or retired pay, or annuity that has been contributed to at any time by a base period employer.

The Division of Employment and Training (Division), in its capacity as an interested party, appeals the hearing officer's decision not to reduce the claimant's unemployment benefits by the amount she receives from monthly pension payments. *See* § 8-70-103(17)(a), C.R.S. (an "interested party" to a benefits decision includes the Division); § 8-73-104(1), C.R.S. (any interested party may appeal decision and obtain review by Panel). We conclude that the hearing officer erred by not reducing the claimant's unemployment benefits due to the claimant's receipt of a monthly pension previously contributed to by the employer and, therefore, reverse the hearing officer's decision.

Section 8-73-110(3)(a)(I), C.R.S. provides that an individual's weekly benefit amount shall be reduced by "[t]he prorated weekly amount of a pension, retirement or retired pay, or annuity that has been contributed to by a base period employer." Subsection (C) of § 8-73-110(3)(a)(I), C.R.S. similarly requires the reduction of benefits for "the prorated weekly amount of any other similar periodic or lump-sum retirement payment from a plan, fund, or trust which has been contributed to by a base period employer."

The amount of unemployment benefits available for a claim is generally computed by using wages paid for employment during the claim's base period, which is the first four of the last five completed calendar quarters prior to filing the initial claim. *See* §§ 8-73-104(1), 8-70-103(2), C.R.S. (An alternative base period is provided for in § 8-73-103(1.5), C.R.S., but was not applied in this case.)

The hearing officer found that the claimant's base period ran from October 1, 2008 through September 31, 2009. The claimant worked from June 1986 to July 31, 2001 and the claimant has received a monthly pension payment of $3,000 since August 1, 2001, based on her employment with the employer from June 1986 through September 31, 2001. The claimant subsequently returned to work for the employer from April 6, 2009 through August 14, 2009; however, the employer did not contribute to the claimant's pension plan during this second period of employment. The hearing officer's findings are not contrary to the weight of the evidence in the record of the hearing, and we may not alter them. *See Federico v. Brannan Sand & Gravel Co.*, 788 P.2d 1268 (Colo. 1990).

The hearing officer concluded that because the employer did not contribute to the claimant's pension during her base period employment, no reduction of her unemployment benefits was required. We are not bound by the hearing officer's conclusions in this regard. *See Clark v. Colorado State University*, 762 P.2d 698 (Colo. App. 1988). Based on the purpose of the statutory reductions and the plain language of the statute, we conclude that the claimant's unemployment benefits must be reduced because of her receipt of a pension that was contributed to by the employer prior to her base period.

The offset provisions of § 8-73-110(3) are intended to prevent individuals whose employment has been terminated from receiving both unemployment benefits that have been funded by her former employer and retirement benefits that have been funded by her former employer. *See generally Redin v. Empire Oldsmobile, Inc.*, 746 P.2d 52 (Colo. App. 1987); *Cericalo v. Industrial Claim Appeals Office*, 114 P.3d 100 (Colo. App. 2005). The employer contributed to the claimant's pension and the claimant received unemployment benefits according to her employment with this employer during her base period. Therefore, reducing the claimant's unemployment benefits because of her receipt of a monthly pension furthers the intent of the statute to avoid "double dipping" by retired persons. *Redin v. Empire Oldsmobile, Inc.*, 114 P.2d at 54.

We note that other provisions of the statute prevent the reduction of unemployment benefits of those who are not fully retired by not reducing benefits due to an individual's receipt of a lump-sum retirement payment contributed to by a base period

employer under certain conditions, including the requirement that the individual reinvest the proceeds into an individual retirement account or KEOGH plan. Section 8-73-110(3)(a)(II)(B), C.R.S.

However, we are satisfied that the General Assembly clearly intends to have a claimant's benefits reduced when the claimant receives retirement payments from a plan, fund, or trust to which an employer in the base period contributed, regardless of when the employer made the contributions. In this case, it is not disputed that the employer is a "base period employer" as that term is used in § 8-73-110(3)(a)(I)(B). *See* § 8-70-103(2), C.R.S. ("base period" means first four of last five completed calendar quarters immediately preceding first day of claimant's benefit year). In order to reduce the claimant's benefits the statute plainly requires only that the retirement proceeds come from a plan "contributed to by a base period employer." *See, e.g., Board of Med. Examiners v. Duhon*, 895 P.2d 143, 146 (Colo. 1995) (statutes construed to give effect to legislative intent and first look to language of statute itself; if language unambiguous there is no need to resort to statutory construction).

Furthermore, prior versions of § 8-73-110 required a reduction in benefits where an employer contributed to the retirement trust or fund, provided that the employer paid wages to the claimant during the claimant's base period. *See, e.g.*, § 82-4-10(3)(a) and (c), C.R.S. 1963 (reducing retirement payments from trust or fund contributed to by an employer unless there are no wages in base period paid by employer).

IT IS THEREFORE ORDERED that the hearing officer's decision issued October 26, 2010 is reversed and the claimant's benefits are subject to reduction pursuant to § 8-73-110(3)(a)(I)(B), C.R.S.

INDUSTRIAL CLAIM APPEALS PANEL

_____
John D. Baird

_____
Curt Kriksciun

_____
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_____
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Colorado Court of Appeals
101 West Colfax Avenue, Suite 800
Denver, Co 80202

Attorney Generals Office
State Services Section
1525 Sherman St., 7th Floor
Denver, Co 80203

Industrial Claim Appeals Office
P.O. Box 18291
Denver, CO 80218-0291

Division of Employment & Training
Attn: U.I. Benefits
251 E. 12th Ave.
Denver, CO 80203

Copies of this order were mailed to the parties at the addresses shown below on

1/13/2011 by KG.

[OMITTED]

[OMITTED]

INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 31147-2010
Social Security: [OMITTED]

IN THE MATTER OF THE CLAIM OF

[OMITTED],

Claimant,

v.

[OMITTED],

Employer.

FINAL ORDER

Pursuant to Regulation 11.2.16.1, 7 Code Colo. Reg. 1101-2, by unanimous decision of the entire panel this decision is determined to interpret a statute and is designated as precedential. The holding of this decision is as follows: A retention bonus paid at the time of a claimant's job separation is "additional remuneration" within the meaning of § 8-73-110(1), C.R.S., regardless of whether the claimant was required to waive potential rights in order to receive the payment.

The Division of Employment and Training (Division), as an interested party to these proceedings pursuant to § 8-70-103(17)(a), C.R.S., appeals the hearing officer's decision to the extent that the hearing officer determined that money received by the claimant as a retention bonus did not constitute "other remuneration" or affect the timing of any benefits to which the claimant may be entitled. We reverse that portion of the hearing officer's decision.

The hearing officer found that the claimant was offered a retention bonus of $7,973.33 to stay until the established lay off date of August 24, 2010. The claimant was laid off at that time due to a lack of work and received the bonus. The claimant also received vacation pay that the hearing officer determined did not affect the claim. The hearing officer considered the retention bonus to be wages and did not postpone the claimant's entitlement to benefits.

Section 8-73-110(1)(a), C.R.S. concerns receipt of other remuneration and provides:

> An individual who is separated from employment and, because of the separation, receives additional remuneration not otherwise referred to in this section and the remuneration is not wages shall have his or her benefits postponed for a number of calendar weeks after separation from employment that is equal to the total amount of the additional remuneration, divided by the individual's usual weekly wage. The postponement required by this subsection (1) shall begin with the calendar week in which the payment was received. If the number of weeks does not equal a whole number, the remainder shall be disregarded. Notwithstanding section 8-74-107(1)(f), any wages earned by an individual in a calendar week during postponement shall be disregarded.

The Division asserts that the bonus constitutes additional remuneration. We agree.

The hearing officer's evidentiary findings are not contrary to the weight of the evidence in the record of the hearing, and we may not alter them. *See Federico v. Brannan Sand & Gravel Co.,* 788 P.2d 1268 (Colo. 1990). Furthermore, to the extent the evidence was susceptible of conflicting inferences it was the hearing officer's responsibility to resolve the conflicts. *See Goodwill Industries of Colorado Springs v. Industrial Claim Appeals Office,* 862 P.2d 1042 (Colo. App. 1993).

However, we are not bound by the hearing officer's conclusions. *See Samaritan Institute v. Prince-Walker*, 883 P.2d 3 (Colo. 1994). Prior to the amendments that took effect in 2009, § 8-73-110, C.R.S. concerned the receipt of certain types of "remuneration." Among the types of remuneration were back pay awards, § 8-73-110(2), pension or other retirement payments, § 8-73-110(3), and various kinds of disability or sick payments. Section 8-73-110(4), (5) & (6). Prior to June 2, 2009, subsection (1) of § 8-73-110 designated certain payments of other remuneration as "vacation pay," "wages in lieu of notice," "separation bonuses," and "severance allowances. Section 8-73-110(1), C.R.S. 2008. Of particular relevance here was § 8-73-110(8), C.R.S., which provided for a reduction during the week of the receipt of an "other cash payment." As noted, however, the amendment to § 8-73-110 eliminated these previous categories and specified that receipt of "additional remuneration" due to a separation from employment postpones benefits for the number of weeks equal to the amount of the remuneration divided by the individual's usual weekly wage. Colo. Sess. Laws 2009, ch. 408 at 2248-2250.

The hearing officer's finding that the claimant was paid the retention bonus for agreeing to stay on until the plant closed does not diminish the fact that the bonus was paid "because of" the claimant's separation from the employment. In fact, the claimant testified that she received the retention bonus in addition to her regular paycheck. Tr. at 5-6. Thus, we construe the amended statute to include as "remuneration" all payments in the previous categories as well as other payments made on account of the claimant's job separation. Consequently, the hearing officer erred in determining that the payment here did not postpone the claimant's eligibility to receive benefits as required by the applicable version of § 8-73-110(1).

This result is consistent with the legislative history available related to the amendments. Representative Pace testified before the House Business Affairs and Labor committee that the bill, House Bill 09-1076, was intended to "count all remuneration equally," including "sick leave, vacation pay, severance pay, and holiday pay." A representative testifying on behalf of the Division of Employment and Training, Michael Cullen, similarly stated that it did not "matter what the remuneration is" but that such things as "severance pay, separation bonuses, vacation pay, PTO, and sick pay" were all treated as additional remuneration under the bill. *Concerning Remuneration Resulting from an Employee's Separation from Employment for the Purpose of Calculating the Postponement of Unemployment Insurance Benefits*: *Hearing on H.B. 09-1076 Before the House Business Affairs and Labor Committee*, 2009 Leg., 67th Sess. (January 28, 2009). Mr. Cullen also testified before the Senate Business Labor and Technology committee, reiterating that the proposed bill intended to treat all remuneration in similar ways, including "vacation pay, sick pay, severance, other cash payments, wages in lieu, separation bonus…." *Concerning Remuneration Resulting from an Employee's Separation from Employment for the Purpose of Calculating the Postponement of Unemployment Insurance Benefits*: *Hearing on H.B. 09-1076 Before the Senate Business Labor and Technology Committee*, 2009 Leg., 67th Sess. (March 4, 2009). In our view this legislative history supports the Division's position in this case that the claimant's receipt of the payment at the time of her separation should have postponed her eligibility to receive unemployment benefits.

The hearing officer found the retention bonus was "wages" but did not explain this determination. Nevertheless, we conclude that because the retention bonus is properly determined to be additional remuneration pursuant to § 8-73-110(1)(a), it is not "wages" for the purposes of this statute. Indeed, the claimant did not contend that she was not otherwise paid wages for her work time until the date of separation, and did not contend that the retention bonus was wages.

The claimant testified she worked 40 hours a week and earned $23 per hour. Tr. at 6. The amount of the separation payment was $7,973.33, which added to the vacation pay equals $8,319.25. The hearing officer did not require a postponement based on the claimant's receipt of the vacation pay because, when the retention bonus was disregarded, the vacation pay was less than one half of one week's pay. However, because vacation pay is also additional remuneration, that amount must be added to the retention bonus to determine the length of the postponement. This total remuneration divided by the claimant's usual weekly wage of $920 equals 9.04 weeks. Rounding off this figure results in a postponement of 9 weeks. The claimant received the payment on August 24, 2010, so the claimant is ineligible to receive unemployment benefits for nine weeks, from the week ending August 28, 2010 through the week ending October 23, 2010.

We note that the claimant contended in the hearing that other similarly situated workers received retention bonuses, but received inconsistent decisions concerning their eligibility to receive unemployment benefits. However, we do not have access to records of other cases. In any event, the record in this case supports our determination regardless of the disposition of other cases involving other claimants. *See Pero v. Industrial Claim Appeals Office*, 46 P.3d 484 (Colo. App. 2002).

IT IS THEREFORE ORDERED that the hearing officer's decision issued December 15, 2010, is reversed. The claimant is ineligible to receive unemployment benefits from the week ending August 28, 2010 through the week ending October 23, 2010, pursuant to § 8-73-110(1).

INDUSTRIAL CLAIM APPEALS PANEL

Signature in original
John D. Baird

Signature in original
Curt Kriksciun

Signature in original
Dona Rhodes

Signature in original
Thomas Schrant

Signature in original
Robert M. Socolofsky

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty (20) calendar days of the mailing date of this order, as shown below.

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Attn: U.I. Benefits
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Denver, CO 80203

Copies of this order were mailed to the parties at the addresses shown below on

2/4/2011 by AV.

[OMITTED]

[OMITTED] [OMITTED]

INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 917-2012
Social Security: [OMITTED]

IN THE MATTER OF THE CLAIM OF

[OMITTED],

Claimant,

v.

[OMITTED],

Employer.

FINAL ORDER

Pursuant to Regulation 11.2.16.1, 7 Code Colo. Reg. 1101-2, by unanimous decision of the entire panel this decision is determined to interpret a statute, and is designated as precedential. The holding of this decision is as follows: When an individual receives a lump-sum distribution or payment from a retirement plan, fund, or trust that has been contributed to by a base period employer and such distribution does not meet all of the criteria established in § 8-73-110(3)(a)(II), then such individual shall be determined to have received, from the date the payment was received by the individual, the individual's full-time weekly wage for a number of consecutive weeks equal to the amount of the lump-sum distribution only.

The claimant has appealed the hearing officer's corrected decision that was issued March 15, 2012. The hearing officer determined the claimant's eligibility to receive unemployment benefits is delayed because the claimant received a distribution from a retirement account contributed to by the employer, pursuant to § 8-73-110(3)(a), C.R.S. We modify the period of postponement required by the hearing officer, and otherwise affirm the decision.

Section 8-73-110(3)(a)(I), C.R.S. provides that an individual's weekly benefit amount shall be reduced by the prorated amount of a pension, retirement or retired pay, or annuity that has been contributed to by a base period employer or the prorated weekly amount of any other similar periodic or lump-sum retirement payment from a plan, fund, or trust which has been contributed to by a base period employer. *See* § 8-73-110(3)(a)(I)(C). Exceptions to this requirement are included in § 8-73-110(3)(a)(II), C.R.S., which states:

> An individual's weekly benefit amount shall not be reduced when an individual receives a lump-sum retirement payment from a plan, fund, or trust that has been contributed to by a base period employer when all of the following conditions are met:
>
> (A) The individual's separation from the employer awarding the payment is not due to a retirement pursuant to section 8-73-108(4)(m) or (5)(e)(XXIII);
>
> (B) The individual presents proof to the division within fourteen calendar days from date of claim or sixty calendar days of receipt of such lump-sum payment, whichever is later, that this total payment has been reinvested into an individual retirement account or KEOGH plan, as defined in 26 U.S.C. 408 or 26 U.S.C. 401, and such proof establishes that the investment is for a duration of at least one year; except that such lump-sum retirement payment shall not be considered to be received by the individual until the entire balance has been so received. Should a portion of the payment be ineligible for reinvestment and the claimant presents proof that the total eligible portion has been reinvested, only the remaining uninvested portion will be prorated in accordance with subparagraph (III) of this paragraph (a).
>
> Section 8-73-110(3)(a)(III), C.R.S., provides:
>
> When an individual receives a lump-sum retirement payment from a plan, fund, or trust that has been contributed to by a base period employer and such payment does not meet all of the criteria established in [§ 8-73-110(3)(a)(II)], then such individual shall be determined to have received, from the date the payment was received by the individual, the individual's full-time weekly wage for a number of consecutive weeks equal to the total amount of the lump-sum retirement payment, divided by the full-time weekly wage.

Finally, § 8-73-110(3)(c) defines "lump-sum retirement payment" as the "entire balance due the individual from the plan, fund, or trust that has been contributed to by a base period employer."

Here, a deputy's decision dated January 10, 2012, which replaced an initial deputy's decision dated April 27, 2011, determined the claimant "received" $142,718.56

as a distribution from a retirement plan that was contributed to by the employer. Because this amount was not reinvested in an IRA or Keogh plan the deputy found that the entire amount reduces the claimant's eligibility to receive unemployment benefits for 113 weeks. The claimant appealed the new deputy's decision and obtained a hearing.

The hearing officer found the claimant "last" separated from employment from [OMITTED] on November 5, 2012. The claimant earned approximately $30.00/hour and worked full-time. During the employment the employer contributed to a retirement account. Because she was at least 70 ½ years old, the claimant was required by law to take at least one annual retirement payment from the account. On April 1, 2011, the claimant withdrew $10,131.37. The claimant deposited these monies into a money market account. At the time of this distribution, the full value of the claimant's retirement account was $142,718.56.

The hearing officer's factual findings are not contrary to the weight of the evidence in the record of the hearing, and we may not alter them. *See Federico v. Brannan Sand & Gravel Co.,* 788 P.2d 1268 (Colo. 1990). Although the distribution was only $10,131.37, the hearing officer interpreted the statute as requiring the full value of the claimant's retirement account to calculate the period of postponement. Calculating the claimant's average weekly wage as $1,200, she found that the payment reduces the claimant's eligibility to receive benefits for 118.93 weeks, from March 27, 2011 until May 25, 2013.

On appeal, the claimant argues that the initial deputy's decision dated April 27, 2011—postponing the claimant's benefits from March 27, 2011 through May 21, 2011 based on a distribution of $10,131.37—should not have been reconsidered pursuant to § 8-74-105, C.R.S., and, thus, the new decision dated January 10, 2012 should be invalid. We are persuaded there was no error in the reconsideration by the deputy of the initial decision. § 8-74-105, C.R.S. (the deputy may reconsider a decision within a twelve-month period when there is an apparent procedural or substantive error). We also decline to address the claimant's request to waive an apparent overpayment as that is not the issue before us. However, we do agree the claimant's receipt of unemployment benefits should be postponed only based upon the $10,131.37 payment and not upon the full value of the claimant's retirement account.

Although we are bound by the hearing officer's factual findings, we are not required to adhere to the hearing officer's conclusions of law. *See Clark v. Colorado State University*, 762 P.2d 698 (Colo. App. 1988) (Panel not bound by hearing officer's conclusions).

The statute specifically defines "lump-sum retirement payment" as the "entire balance due the individual from the plan, fund, or trust that has been contributed to by a base period employer." § 8-73-110(3)(c), C.R.S. However, what is meant by "entire balance due" is not defined and has been interpreted to represent *only* the amount of the requested payment/distribution *and* the full value of an individual's retirement account with very different consequences on the postponement of an individual's unemployment benefits.

As with any statutory interpretation, when interpreting a provision of the Colorado Employment Security Act, we must give effect to the General Assembly's intent, and discern that intent by looking first "to the language of the statute itself, giving the statutory terms their plain and ordinary meaning." *See Safeway Stores 44 Inc. v. Indus. Claim Appeals Office*, 973 P.2d 677, 680 (Colo. App. 1998); *Ortega v. Indus. Claim Appeals Office*, 207 P.3d 895, 898 (Colo. App. 2009). Therefore, we must give the phrase "entire balance due" its plain, ordinary meaning. When an individual requests—or in the case before us, federal law requires an individual to withdraw—a partial distribution from their retirement account, then the entire balance of the requested amount is due to the individual from the employer. This result is consistent with the legislative history available related to the March 16, 1990 amendments of § 8-73-110, C.R.S. Senator Wells testified before the Senate Finance Committee that the bill, Senate Bill 90-171, was intended to "prohibit the trap" that employers may inadvertently set for former employees who request a retirement payment and the employer gives the money to them in partial amounts. *Concerning the Exception to the Reduction in Unemployment Insurance Compensation Benefits for Lump Sum Retirement Payments Which Are Reinvested in an Individual Retirement Account or Keogh Plan: Hearing on S.B. 90-171 Before Senate Finance Committee*, 1990 Leg., 48th Sess. (February 20, 1990). Senator Wells further testified during the Second Reading that the bill was intended to address situations where an "employer intentionally splits the money" rather than giving an individual all of a requested retirement payment at one time. *Concerning the Exception to the Reduction in Unemployment Insurance Compensation Benefits for Lump Sum Retirement Payments Which Are Reinvested in an Individual Retirement Account or Keogh Plan: Hearing on S.B. 90-171 Before Senate Finance Committee*, 1990 Leg., 48th Sess. (February 23, 1990); *see also Concerning the Exception to the Reduction in Unemployment Insurance Compensation Benefits for Lump Sum Retirement Payments Which Are Reinvested in an Individual Retirement Account or Keogh Plan: Hearing on S.B. 90-171 Before House Finance Committee*, 1990 Leg., 48th Sess. (February 28, 1990; March 2, 1990) (bill intended to address circumstances where an employer does not give

the payment "all at once" but "in chunks" and is in effect "dragging out disbursements from [a] retirement plan").

The offset provisions of § 8-73-110(3) are intended to prevent individuals whose employment has been ended from receiving both unemployment benefits that have been funded by a former employer and retirement benefits that have been funded by that same former employer. *See generally Redin v. Empire Oldsmobile, Inc.*, 746 P.2d 52 (Colo. App. 1987); *Cericalo v. Industrial Claim Appeals Office*, 114 P.3d 100 (Colo. App. 2005). Our interpretation of postponing the claimant's unemployment benefits based on the receipt of only the requested distribution furthers the intent of the statute to avoid "double dipping". *Redin v. Empire Oldsmobile, Inc.*, 114 P.2d at 54; *see generally Watkins v. Cantrell*, 736 F.2d 933, 937 (4th Cir. 1984) (pension offset requirement deemed to be one of a limited number of "fundamental standards" that must be met for a state to receive the benefits of federal certification); *U.S. Steel Corp. v. Unemployment Comp. Bd. of Review*, 858 A.2d 91, 98 (Pa. 2004) (noting that Congress added the provision to the Federal Unemployment Tax Act requiring, as a condition of certification, that the state law offset an individual's unemployment benefits by the amount of any public or private pension, or similar periodic retirement payment, received by the individual).

We also note that the Colorado Employment Security Act is to be liberally construed in favor of claimants to further its remedial and beneficial purposes. *See Denver Symphony Ass'n v. Indus. Comm'n*, 34 Colo. App. 343, 347- 48, 526 P.2d 685, 688 (1974); *see also Colorado Division of Employment and Training v. Hewlett*, 777 P.2d 704 (Colo. 1989) (the Colorado Employment Security Act is to be liberally construed to further its remedial and beneficent purpose). Our interpretation of § 8-73-110(3)(a)(III) and (3)(c) is consistent with the intent of the General Assembly to award unemployment benefits to persons who are unemployed through no fault of their own. *See* § 8-70-102, C.R.S. 2011; *Denver Post Corp. v. Indus. Comm'n*, 677 P.2d 436, 438 (Colo. App. 1984). It also avoids an unduly harsh and burdensome result by only requiring postponement of a claimant's unemployment benefits based on the distribution from the plan rather than on the full value of a retirement account; particularly in the case where the actual amount requested is just a small percentage of the full value of a retirement account. *See* § 2-4-201, C.R.S. 2011 (a just and reasonable result is intended by the enactment of statute); *Ingram v. Cooper*, 698 P.2d 1314, 1315 (Colo. 1985) (statutes should be interpreted to avoid a construction that defeats legislative intent or leads to an absurd result).

Consequently, the hearing officer erroneously determined the claimant's postponement of benefits was for 118.93 weeks. Only the amount of the $10,131.37

distribution reduces the claimant's eligibility to receive benefits from the week of receipt, which was the week-ending April 2, 2011. At the claimant's salary of $1,200 per week, the required postponement is 8 weeks. Since the remainder (0.44), $528, exceeds the claimant's weekly benefit amount of $489, an additional week of postponement is required for a total of 9 weeks.

IT IS THEREFORE ORDERED that the hearing officer's corrected decision issued March 15, 2012, is modified. The claimant is ineligible to receive unemployment benefits from the week ending April 2, 2011 through the week ending May 28, 2011, pursuant to § 8-73-110(3)(a).

INDUSTRIAL CLAIM APPEALS PANEL

signature in original
John D. Baird

signature in original
Brandee DeFalco-Galvin

signature in original
Lisa A. Klein

signature in original
Kris Sanko

signature in original
Robert M. Socolofsky

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty (20) calendar days of the mailing date of this order, as shown below.

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- The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, contact the Court of Appeals directly at 303-837-3785.**

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Denver, CO 80202

Attorney Generals Office
State Services Section
1525 Sherman St., 7th Floor
Denver, CO 80203

Industrial Claim Appeals Office
P.O. Box 18291
Denver, CO 80218-0291

CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on

10/1/2012 by [OMITTED].

[OMITTED] [OMMITED]

[OMITTED]

CC: REIMBURSEMENT UNIT (VIA ELECTRONIC MAIL)

INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 7909-2013
Social Security: [Omitted]

IN THE MATTER OF THE CLAIM OF

[Omitted],

Claimant,

v.

[Omitted],

Employer.

FINAL ORDER

Pursuant to Regulation 11.2.16.1, 7 Code Colo. Reg. 1101-2, by unanimous decision of the entire panel this decision is determined to interpret a statute, and is designated as precedential. The holding of this decision is as follows: The change to § 8-73-110(3)(a)(III), C.R.S. applies to those claims filed on or after April 4, 2013.

We designate this order as precedential at the request of the Division of Unemployment Insurance (Division). The designation is also appropriate because this is an issue of first impression and is important to ensure consistent application of the statute.

The Division has appealed the hearing officer's decision dated May 3, 2013 that postponed the claimant's eligibility for unemployment benefits based on the amount of a partial withdrawal of a retirement account. We modify the period of postponement required by the hearing officer and otherwise affirm the decision.

Section 8-73-110(3)(a)(I), C.R.S. provides that an individual's weekly benefit amount shall be reduced by the prorated amount of a pension, retirement or retired pay, or annuity that has been contributed to by a base period employer or the prorated weekly amount of any other similar periodic or lump-sum retirement payment from a plan, fund, or trust which has been contributed to by a base period employer. *See* § 8-73-110(3)(a)(I)(C). Exceptions to this requirement are included in § 8-73-110(3)(a)(II), C.R.S., which states:

> An individual's weekly benefit amount shall not be reduced when an individual receives a lump-sum retirement payment from a plan, fund, or trust that has been contributed to by a

> base period employer when all of the following conditions are met:
>
> (A) The individual's separation from the employer awarding the payment is not due to a retirement pursuant to section 8-73-108(4)(m) or (5)(e)(XXIII);
>
> (B) The individual presents proof to the division within fourteen calendar days from date of claim or sixty calendar days of receipt of such lump-sum payment, whichever is later, that this total payment has been reinvested into an individual retirement account or KEOGH plan, as defined in 26 U.S.C. 408 or 26 U.S.C. 401, and such proof establishes that the investment is for a duration of at least one year; except that such lump-sum retirement payment shall not be considered to be received by the individual until the entire balance has been so received. Should a portion of the payment be ineligible for reinvestment and the claimant presents proof that the total eligible portion has been reinvested, only the remaining uninvested portion will be prorated in accordance with subparagraph (III) of this paragraph (a).

Section 8-73-110(3)(a)(III), C.R.S., provides:

> When an individual receives a lump-sum retirement payment from a plan, fund, or trust that has been contributed to by a base period employer and such payment does not meet all of the criteria established in [§ 8-73-110(3)(a)(II)], then such individual shall be determined to have received, from the date the payment was received by the individual, the individual's full-time weekly wage for a number of consecutive weeks equal to the total amount of the lump-sum retirement payment, divided by the full-time weekly wage.

Finally, § 8-73-110(3)(c) defines "lump-sum retirement payment" as the "entire balance due the individual from the plan, fund, or trust that has been contributed to by a base period employer."

On April 4, 2013, the General Assembly amended § 8-73-110(3)(a)(III) as follows:

> When an individual receives a lump-sum retirement payment from a plan, fund, or trust that has been contributed to by a base period employer and *the* payment does not meet all of the criteria established in [§ 8-73-110(3)(a)(II)], then *the Division shall postpone the individual's benefits for a number of calendar weeks equal to the gross amount of the lump-sum payment divided by the individual's full-time weekly wage. However, when an individual receives a lump-sum retirement payment from a plan, fund, or trust as described in this subparagraph (III), but only reinvests a portion of that payment as required in subparagraph (II) of this paragraph (a), or when an individual otherwise withdraws an amount from a plan, fund, or trust that is less than the total lump sum of the account, then the Division shall consider only the portion that is received but not reinvested pursuant to subparagraph (II) of this paragraph (a) in determining the number of calendar weeks that the individual's benefits are postponed*. [Changes italicized.]

This change was effective on April 4, 2013 and "applies to unemployment insurance claims on or after" the effective date. HB13-1054, § 2.

Here, a deputy's decision dated March 20, 2013 determined the claimant received $33,348 as a distribution from a retirement plan that was contributed to by the employer. Because this amount was not reinvested in an IRA or Keogh plan, the deputy found that the entire amount reduces the claimant's eligibility to receive unemployment benefits for 48 weeks, from March 3, 2013 through February 1, 2014 with the remaining $114 to be applied to the week ending February 8, 2014. The claimant appealed the deputy's decision and obtained a hearing.

The hearing officer found the claimant separated from employment on February 15, 2013. The claimant's usual weekly wage was $692.40. During the employment, the employer contributed to the claimant's 401k retirement account which had a total value of $33,348.81. On March 8, 2013, the claimant withdrew $1,850 and rolled over the remaining monies in an IRA. The hearing officer determined the new law applies to this case and therefore concluded only the $1,850, representing 2.67 weeks based on his usual

weekly wage, postpones the claimant's receipt of benefits. Since the 0.67 week is greater than the claimant's weekly benefit amount of $398, the hearing officer determined the disallowance will run from March 3, 2013 to March 23, 2013.

On appeal, the Division argues HB13-1054 was signed on April 3, 2013 and is effective on unemployment claims that were effective on or after said date and since the claimant's action and claim were before the signing of this bill, HB13-1054 should not have been used. We agree that this legislative change is substantive and applies to claims that were effective on or after the signing of the bill, April *4*, 2013, and therefore conclude the entire amount of $33,348.81 is subject to offset.

The hearing officer's findings are not contrary to the weight of the evidence in the record, and we cannot change them. *See Federico v. Brannan Sand & Gravel Co.*, 788 P.2d 1268 (Colo. 1990). Although we are bound by the hearing officer's factual findings, we are not required to adhere to the hearing officer's conclusions of law. *See Clark v. Colorado State University*, 762 P.2d 698 (Colo. App. 1988) (Panel not bound by hearing officer's conclusions).

The change to the statute, allowing postponement of only the portion received when it is less than the total lump sum of the retirement account, was effective on April 4, 2013 and "applies to unemployment insurance claims on or after" the effective date. HB13-1054, § 2. As with any statutory interpretation, when interpreting a provision of the Colorado Employment Security Act, we must give effect to the General Assembly's intent, and discern that intent by looking first "to the language of the statute itself, giving the statutory terms their plain and ordinary meaning." *See Safeway Stores 44 Inc. v. Indus. Claim Appeals Office*, 973 P.2d 677, 680 (Colo. App. 1998); *Ortega v. Indus. Claim Appeals Office*, 207 P.3d 895, 898 (Colo. App. 2009). Here, however, "unemployment insurance claims on or after April 4, 2013" can be interpreted to apply to any *active* unemployment insurance claim on or after April 4, 2013 *or* to unemployment insurance claims that are *filed* on or after April 4, 2013 (and thus with an effective date of April 7, 2013). *See Mounkes v. Industrial Claim Appeals Office*, 251 P.3d 485 (Colo. App. 2010) (if statutory language is ambiguous, then rules of statutory construction or legislative history can be considered to discern legislature's intent). The former interpretation would be a retroactive application of the amendment; the latter, a prospective application.

Statutes are presumed to be prospective in their application. Section 2-4-202, C.R.S.; *see also* Colo. Const. art. II, § 11. This presumption is rooted in policy considerations, namely the notion of fair play and the desire to promote stability in the

law. *City of Colorado Springs v. Powell*, 156 P.3d 461, 464 (Colo. 2007); *see also Ingram v. Cooper*, 698 P.2d 1314, 1315 (Colo. 1985) (statutes should be interpreted to avoid a construction that defeats legislative intent or leads to an absurd result). Also, an amendment to a statute is not to be given retroactive application unless a contrary intent is clearly manifested within the amendment. *Kirby of Southeast Denver, Inc. v. Indus. Comm'n*, 732 P.2d 1232 (Colo. App. 1986) (quoting *McCartney v. West Adams Fire Protection District*, 40 Colo. App. 330, 574 P.2d 516 (1978)); *see also* § 2-4-303, C.R.S. In addition, to overcome this presumption of prospectivity, a statute must clearly reveal a legislative intent to have the statue applied retroactively. *Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6, 11-12 (Colo. 1993).

The legislative history available related to HB13-1054 does not evince such intent. Senator Lois Tochtrop testified before the Senate Finance Committee as follows: "And what we're doing on this bill is clarifying language that *future* unemployment … insurance claimants' wages and wait times would only be based on their account [sic] actually withdrawn from their retirement account rather than the full balance of the account." [Emphasis added.] *Concerning Lessening the Reduction of Unemployment Insurance Benefits Required When a Claimant Withdraws Amounts From a Retirement Plan as a Result of Unemployment: Hearing on H.B. 13-1054 Before Senate Finance Committee*, 2013 Leg., 71st Sess. (March 14, 2013). Therefore, we determine the change to § 8-73-110(3)(a)(III) applies prospectively rather than retrospectively: HB13-1054 applies to unemployment insurance claims that are *filed* on or after Thursday, April 4, 2013; i.e., unemployment insurance claims effective Sunday, April 7, 2013. *See* Rule 2.3.5.2, 7 Code Colo. Reg. 1101-2 ("If an individual files a claim on Thursday, Friday, or Saturday, the first day of the first week in the claims series shall begin on the Sunday immediately following the day on which said claim was filed.").

Here, the claimant last worked on February 15, 2013. The effective date of his claim is February 17, 2013. On March 8, 2013, the claimant received all the monies in his retirement account, kept $1,850, and rolled the remaining amount into an IRA. Consequently, these events associated with the claimant's claim occurred prior to the effective date of the statutory change. Therefore, the law in effect at this time—February 15 to March 8, 2013—was § 8-73-110(3)(a)(III), C.R.S. (2012) which requires a postponement of the number of consecutive weeks equal to the total amount of the lump-sum retirement payment, divided by the full-time weekly wage. *See Laszar v. Industrial Claim Appeals Office*, 230 P.3d 1263 (Colo. App. 2010) (claimant who reinvested the total distribution of retirement pay but prematurely withdrew a portion was ineligible for unemployment benefits based on the full distribution amount); *compare* Precedential Decision in Docket No. 917-2012, October 1, 2012 (Concerning Lump-Sum Distribution

or Payment From A Retirement Plan, Fund, or Trust Contributed To By A Base Period Employer); www.colorado.gov/cdle/PrecedentialDecisions. Consequently, the hearing officer erroneously determined the claimant's postponement of benefits was based on the $1,850 withdrawal rather than the total value of his retirement account, $33,348.81.

The hearing officer found the claimant's weekly wage was $692.40. We conclude on March 8, 2013, the claimant received "retirement pay" in the amount of $33,348.81 within the meaning of §8-73-110(3)(a)(I)(B). Therefore, the postponement is for 48.16 weeks or 48 weeks with a remainder of $110. *See generally Redin v. Empire Oldsmobile, Inc.*, 746 P.2d 52 (Colo. App. 1987); *Cericalo v. Industrial Claim Appeals Office*, 114 P.3d 100 (Colo. App. 2005) (the purpose of the offset provisions are to prevent unemployed individuals from receiving both unemployment benefits funded by the former employer as well as retirement benefits funded by the same employer). The disallowance is from the week ending March 9, 2013 through February 1, 2014 with the remaining $110 to be applied to the week ending February 8, 2014.

We are not persuaded otherwise by the arguments in the claimant's response brief. Insofar as our decision results in an overpayment of benefits, the claimant may request a waiver of the overpayment from the Division. Alternatively the claimant may contact the Benefit Payment Control Unit to request a payment plan.

IT IS THEREFORE ORDERED that the hearing officer's decision dated May 3, 2013, is modified to provide that the claimant is ineligible to receive unemployment benefits for 48.16 weeks, from March 3, 2013 through February 1, 2014 with the remaining $110 to be applied to the week ending February 8, 2014. The decision is otherwise affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Signature in original

Brandee DeFalco-Galvin

Signature in original

Lisa A. Klein

Signature in original

David G. Kroll

Signature in original

Kris Sanko

Signature in original

Robert M. Socolofsky

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.

- A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide five (5) copies of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

- You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

- In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

- An appeal to the Colorado Court of Appeals is based on the existing record before the hearing officer and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

- Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, www.colorado.gov/cdle/CTAPPFORM or in person, or from the Industrial Claim Appeals Office.

- The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, contact the Court of Appeals directly at 720-625-5150.**

Colorado Court of Appeals
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1300 Broadway 6th Floor
Denver, CO 80203

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P.O. Box 18291
Denver, CO 80218-0291

CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on

10/25/2013 by [Omitted].

[Omitted] [Omitted]

[Omitted] [Omitted]