

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0002

Affirmed
Overpayment and Penalties

PROCEDURAL HISTORY: On October 21, 2013, the Oregon Employment Department (the Department) served a notice concerning an administrative decision assessing a \$2,611.00 overpayment, a \$391.65 monetary penalty and 21 penalty weeks (decision # 195268). Claimant filed a timely request for hearing. On December 17, 2013, ALJ Holmes-Swanson conducted a hearing, and on December 19, 2013, issued Hearing Decision 13-UI-06904, affirming the Department's decision. On December 31, 2013, claimant filed an application for review of Hearing Decision 13-UI-06904 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On June 8, 2012, claimant filed an initial claim for unemployment insurance benefits that had a weekly benefit amount of \$210 (BYE 22-13). The maximum benefit amount in effect at the time was \$507. On June 8, 2013, claimant filed another initial claim for unemployment insurance benefits that had a weekly benefit amount of \$246 (BYE 22-14).

(2) Claimant claimed and received regular benefits for weeks in 2013 from May 19 through June 1 and June 9 through August 17, 2013 (weeks 21-13 through 22-13 and 24-13 through 33-13). These are the weeks at issue.

(3) In August 2013, the Department began an investigation regarding the above claims. During its investigation, it received hours and earnings information from claimant's employer during the weeks at issue. The Department determined that claimant failed to report his earnings for those weeks and had obtained benefits to which he was not entitled. When the investigations unit contacted claimant about the results of its investigation, he confirmed that he had received the earnings reported by the employer. Exhibit 1.

(4) When filing his claims for benefits, claimant reported that he had not worked, did not have any earnings and certified that his reports were accurate. After filing his claims, claimant never contacted to Department to correct his earlier inaccurate hours and earnings reports. Claimant knew that his hours

and earnings reports were not accurate when he filed his benefit claims or shortly thereafter when he received his earnings. His false reports of his hours and earnings were willful and made to obtain benefits. As a result of claimant's failure to report all the hours he worked and earnings he received, claimant received \$2,611 in regular benefits to which he was not entitled.

CONCLUSIONS AND REASONS: Claimant was overpaid and must repay \$2,611 in regular benefits, is liable for a \$391.65 monetary penalty, and as an additional penalty, is disqualified from receiving future benefits for a period of 21 weeks.

As a preliminary matter, only "unemployed" individuals are eligible for benefits. ORS 657.150(1). An individual is not "unemployed," and, therefore, ineligible for benefits, in any week in which his earnings exceed his weekly benefit amount. *See* ORS 657.100(1). A claimant is responsible for furnishing the Department with the information required for correctly processing the claim, including "current work activity and earnings." OAR 471-030-0025 (December 16, 1985). The information required may include the amount of time devoted to the work activity and the gross amount of remuneration or wages, including tips, received or expected to be received. *Id.*; OAR 471-030-0017 (1)(c) (July 12, 2007). Remuneration for services provided to an employer shall be allocated to the week in which the services were performed. OAR 471-030-0017 (3). An eligible individual who has employment in any week claimed shall have his (or her) weekly benefit amount reduced by the amount of earnings paid or payable that exceeds the greater of ten times the Oregon minimum hourly wage or one-third of her weekly benefit amount. ORS 657.150(1).

ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.* An individual who willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. ORS 657.215. In addition, an individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is liable for a penalty in an amount equal to 15 percent of the amount of the overpayment. ORS 657.310(2).

Here, because the Department originally paid claimant benefits it subsequently denied, the Department had the burden to establish that claimant received benefits to which he was not entitled, and that he willfully made false statements or misrepresentations to obtain those benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

At hearing, claimant asserted that he failed to report his hours and earnings for the weeks at issue because when he reported his earnings for past claims, sometimes he did not receive "[his] check", and believed the Department would eventually determine his actual earnings from his employer and then decide if he should get benefits. Transcript at 17-19. By testifying as he did, claimant admitted that he willfully failed to report material facts, his weekly hours and earnings, to obtain benefits.

The Department established that claimant received \$2, 611 in regular benefits to which he was not entitled based upon his false, material statements regarding his hours and earnings during the weeks at

issue. Exhibit 1. Consequently, claimant is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to him under ORS chapter 657. Given claimant's explanation for his actions, he willfully underreported his earnings to the Department to obtain benefits and also is liable for penalties under ORS 657.215.

The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052 (July 1, 2008). When the disqualification is because claimant failed to accurately report his work and/or earnings, the number of weeks of disqualification is determined by dividing the total overpayment by the maximum weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the individual's disqualifying act(s), rounding the result to two decimal places, multiplying by four, and rounding the result up to the nearest whole number. OAR 471-030-0052(1)(a). Claimant's total overpayment is \$2,611, divided by \$507 equals 5.14, multiplied by 4 equals 20.56, rounded up to the nearest whole number equals 21. Claimant's penalty disqualification period is 21 weeks. Claimant is also liable for a penalty in an amount equal to 15 percent of the amount of the overpayment. ORS 657.310(2). 15% of claimant's overpayment of \$2,611 is \$391.65.

In summary, claimant is required to repay to the Department, by deduction from future benefits or otherwise, \$2,611.00. Claimant is also subject to a \$391.65 monetary penalty and 21 penalty weeks.

DECISION: Hearing Decision 13-UI-06904 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: February 10, 2014

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310, or visit the website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.