

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0048

Affirmed
Overpayment and Penalties

PROCEDURAL HISTORY: On September 9, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$6,591 overpayment, \$988.65 in monetary penalties, and 52 penalty weeks (decision #193788). Claimant filed a timely request for hearing. On December 2, 2013, ALJ R. Davis conducted a hearing, and on December 18, 2013 issued Hearing Decision 13-UI-06810, affirming the Department's decision. On January 7, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) On July 26, 2011, claimant filed an initial claim for unemployment insurance benefits. His weekly benefit amount was \$507, the maximum weekly benefit amount in effect at the time claimant filed his initial claim.

(2) Claimant claimed benefits for the weeks April 29, 2012 to June 9, 2012 (weeks 18-12 through 23-12), July 22, 2012 to August 4, 2012 (weeks 30-12 through 31-12), August 19, 2012 to September 1, 2012 (weeks 34-12 through 35-12), September 16, 2012 to September 29, 2012 (weeks 38-12 through 39-12), and December 16, 2012 to December 22, 2012 (week 51-12). These are the weeks at issue.

(3) When claiming benefits for each week at issue, claimant certified that he provided accurate information. Claimant understood the Department expected him to answer honestly to the questions when he claimed benefits each week.

(4) During the weeks at issue, claimant worked as a loan officer and was paid on a commission-only basis. On September 2, 2011 and on April 30, 2012, the Department sent claimant "commission sales"

letters. Both letters informed claimant he was required to report his actual earnings and work performed for each week he claimed benefits. The letter also informed claimant to document weekly how many hours he spent on each project and report the total number of hour worked and estimated earnings when he claimed each week. The letter said a claimant could report \$1 in weekly earnings if unable to estimate weekly earnings, but must then call the Department after receiving a commission to report the project hours and total commission for that project. The letter warned claimant that he could incur overpayments and penalties if he failed to report his earnings. Claimant received the letters.

(5) Full-time work for a loan officer is forty hours per week. Although claimant sometimes worked more than forty hours per week, he reported that he worked 39 hours per week for all the weeks at issue because he understood the Department would deny benefits for any week for which he reported having worked forty or more hours.

(6) Claimant reported he earned \$1 for all the weeks at issue, except for weeks 19-12 and 20-12, when he reported earnings of \$110.43, and week 30-12, when he reported earnings of one cent. Claimant did not report his commissions to the Department during the weeks at issue. Claimant contacted the Department on July 26, 2012 and August 1, 2012, but did not report corrected earnings.

(7) Claimant's actual earnings for the weeks at issue totaled \$22,874.62, and were prorated for the weeks at issue as shown on the attached schedule of adjustments. He earned more than his weekly benefit amount for each week at issue.

(8) Because claimant reported that he worked less than forty hours per week, and that he earned less than one-third of his weekly benefit amount for each week at issue, the Department paid claimant his full benefit amount of \$507 for each of the weeks. The Department overpaid claimant \$6,591.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant received remuneration during the weeks at issue that eliminated his weekly benefit amount. Claimant was overpaid benefits in the amount of \$6,591, and is liable to repay that amount to the Department. Claimant willfully made false statements or misrepresentations, or willfully failed to report material facts to obtain benefits to which he was not entitled. Claimant is subject to a 52-week disqualification from the receipt of future benefits.

Remuneration and Overpayment. Only "unemployed" individuals are eligible for unemployment insurance benefits. ORS 657.155(1). An individual is considered "unemployed" in any week of less than full-time work if the remuneration paid or payable to the individual is less than the individual's weekly benefit amount. ORS 657.100(1). For purposes of ORS 657.150(6) and ORS 657.100, earnings shall be allocated to the week in which the service was performed. OAR 471-030-0017(3)(a) (July 12, 2007). If the dates of service are not clearly established, allocation shall be made upon a reasonable estimate provided by the claimant. OAR 471-030-0017(3)(d). If the claimant cannot or will not provide a reasonable estimate, earnings shall be allocated equally over the period during which services were rendered. *Id.*

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.* 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. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Claimant underreported his earnings each week, and did not correct his earnings when he received commission payments. Additionally, he reported having worked 39 hours per week, regardless of the number of hours he actually worked. Both claimant's earnings and his hours worked were material to whether he was entitled to receive unemployment benefits. It was undisputed at hearing that claimant's earnings for the weeks at issue totaled \$22,874.62, and were prorated correctly for the weeks at issue as shown on the attached schedule of adjustments. For all the weeks at issue, claimant's weekly earnings exceeded his weekly benefit amount of \$507. He was, therefore, not unemployed during the weeks at issue. As a result of claimant's misrepresentations, the Department paid claimant \$6,591 in unemployment insurance benefits during weeks claimant was not unemployed, and was not eligible to receive benefits.

Misrepresentation. 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. The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052(1) (July 1, 2008), which provides, in pertinent part, that when the disqualification is imposed because the individual failed to accurately report work and/or earnings, the number of weeks of disqualification shall be determined by dividing the total amount of benefits overpaid to the individual for the disqualifying act(s), by the maximum Oregon 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 off to the nearest two decimal places, multiplying the result by four rounding it up to the nearest whole number.

Claimant reported to the Department for all the weeks at issue that he was earning \$1, or at most, \$110.43. In fact, claimant earned two to six times more than his weekly benefit amount for all the weeks at issue. Claimant's assertions that he did inform the Department of his commission payments were not credible. First, the Department provided credible evidence that claimant did not contact the Department to report earnings during the weeks at issue. Based on the employer's response to the Department's benefit earnings audit, claimant received approximately five commission payments during the weeks at issue. Exhibit 1. It is implausible that the Department would have no record of five different contacts from claimant when he allegedly reported earnings. Secondly, claimant asserted that his telephone records corroborated his testimony that he contacted the Department to provide corrected earnings. The telephone records corresponding to the weeks at issue do not corroborate claimant's testimony because the dates claimant made telephone calls to the Department do not correspond with the dates the employer paid claimant. Exhibit 2. Moreover, one of the calls was at 6:05 p.m., after business hours, and others were one or three minutes long, likely too short to report corrected earnings. Exhibit 2. Moreover, the Department testified that claimant did not report earnings when he contacted the Department on July 26 and August 1, 2012, two of the telephone calls that appear on claimant's records. Finally, it is implausible that, had claimant reported corrected earnings, he would not have noticed there was no correction issued and overpayment assessed for the weeks he had reported \$1 of earnings.

The preponderance of the evidence shows claimant willfully misrepresented his hours and earnings when claiming benefits, and intentionally failed to correct his earnings when he received commission payments to receive benefits. Claimant's assertions to the contrary are not credible. Claimant testified that the number of hours he worked per week "varied greatly," and that he sometimes worked more than forty hours. Transcript at 21. However, he reported having worked less than forty hours each week because, when he had reported working forty hours in the past, the Department denied claimant benefits. *Id.* It is more likely than not that claimant failed to report his commission earnings for the same reason he failed to report his hours accurately, which was to receive unemployment insurance benefits. Because claimant willfully misrepresented or failed to disclose material information, a penalty is appropriate.

The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052(1) (July 1, 2008). The penalty is calculated by dividing the total amount of benefits overpaid to the individual for the disqualifying acts (\$6,591), by the maximum Oregon weekly benefit amount in effect during the first week of the initial claim in effect at the time of the individual's disqualifying acts (\$507), rounding off to the nearest two decimal places (13), multiplying the result by four (52), rounding it up to the nearest whole number (52). Here, \$6,591 divided by \$507 is thirteen. Thirteen multiplied by four is 52.

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). Claimant's misrepresentations to the Department about his earnings were willful, made for the purpose of obtaining benefits claimant knew he might not be entitled to receive. Claimant is liable to pay the Department the 15 percent penalty, which is \$988.65.

Claimant is liable to repay the \$6,591 overpayment and \$988.65 monetary penalty, and is disqualified from 52 weeks of benefits that would otherwise be payable.

DECISION: Hearing Decision 13-UI-06810 is affirmed.

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

DATE of Service: February 5, 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.