

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0423

*Modified  
Overpayment, No Penalties*

**PROCEDURAL HISTORY:** On November 15, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant willfully underreported earnings to receive benefits and assessing an overpayment of \$4,649, a monetary penalty of \$697.35 and 36 penalty weeks. Claimant filed a timely request for hearing. On February 3, 2014, ALJ Hoyer conducted a hearing at which neither employer appeared, and on February 25, 2014 issued Hearing Decision 14-UI-11104, modifying the Department's decision and assessing an overpayment of \$4,158, a monetary penalty of \$623.70 and 32 penalty weeks. On March 17, 2013, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Before July 2012, claimant had filed five previous claims for unemployment insurance benefits.

(2) On approximately July 20, 2012, claimant lost her job as a manager of Quiznos restaurant #1744. As a manager, claimant had earned \$580.77 per week in salary. On July 25, 2012, claimant received her last paycheck from Quiznos #1744 in the amount of \$580.77 for the pay period ending July 29, 2012.

(3) On July 26, 2012, claimant filed an initial claima for unemployment insurance benefits. Claimant's claim was valid with a weekly benefit amount of \$392. The maximum weekly benefit amount in effect at the time claimant filed her claim was \$524.

(4) Claimant claimed benefits for the weeks of July 29, 2012 through September 22, 2012 (weeks 31-12 through 38-12), November 11, 2012 through November 24, 2012 (weeks 46-12 through 47-12), December 9, 2012 through December 15, 2012 (week 50-12), December 23, 2012 through December 29, 2012 (week 52-12) and December 30, 2012 through July 20, 2012 (weeks 01-13 through 29-13), the weeks at issue.

(5) Beginning during week 30-12, claimant started working as a crew member at Quiznos restaurant #1289. While working at Quiznos #1289, claimant received paychecks showing the following amounts of gross earnings: \$96.29 for the pay period ending July 29, 2012 (week 30-12); \$355.95 for the pay period ending on August 12, 2012 (week 32-12); \$307.44 for the pay period ending August 26, 2012 (week 34-12); \$453.60 for the pay period ending September 23, 2012 (week 38-12); \$850.30 for the pay period ending October 7, 2012 (week 40-12); \$432.39 for the pay period ending October 21, 2012 (week 42-12). Exhibit 2 at 2-9. Claimant stopped working for Quiznos #1289 sometime during approximately week 42-12. Sometime before week 46-12, claimant started working for The Howling Coyote. During all of the weeks at issue, she certified to the Department in her weekly claims reports that she was providing accurate information about her gross earnings during that week from both employers.

(6) In 2013, the Department contacted Quiznos restaurant and The Howling Coyote to compare the earnings from employment claimant had reported when claimant filed her weekly claims with the records of those employers showing the amounts each had paid to claimant during those weeks. The Howling Coyote responded to the Department's inquiry and supplied information about what it had paid to claimant every week for weeks 46-12, 47-12, 50-12, 52-12 through 13-13 and what it paid to claimant every two weeks for weeks 15-13 through 28-13. Exhibit 1 at 16, 19. Quiznos did not respond to the Department's inquiry about what it had paid to claimant in 2012. However, Quiznos had reported to taxing authorities that it had paid claimant \$4,580.39 in earnings during the third quarter of 2012 and \$1,282.69 during the fourth quarter of 2012. Transcript at 18, 19; Exhibit 1 at 12. Based on the earnings reported for claimant by The Howling Coyote and a proration of the earnings reported to taxing authorities by Quiznos, the Department determined that claimant was overpaid benefits in the amount of \$4,649 during the weeks at issue. Exhibit 1 at 6-7.

(7) Based on the earnings that claimant reported, the earnings that claimant actually received from Quiznos or that The Howling Coyote reported for claimant and the benefits paid to claimant, claimant was overpaid benefits during the weeks at issue as set out below:

Week	Employer	Claimant Reported Earnings	Claimant Paid/Employer Reported	Benefits Paid	Correct Benefit Amount	Benefits Over/Under Paid
31-12	Quiznos	\$183.75	\$177.75	\$338	\$345	-\$7
32-12	Quiznos	\$172.52	\$177.75	\$350	\$345	+\$5
33-12	Quiznos	\$122.54	\$153.72	\$392	\$369	+\$23
34-12	Quiznos	\$186.60	\$153.72	\$335	\$369	-\$34
35-12	Quiznos	\$294.95	\$231.63	\$227	\$292	-\$65
36-12	Quiznos	\$169.26	\$231.63	\$353	\$292	+61
37-12	Quiznos	\$194.04	\$226.80	\$328	\$296	+32
38-12	Quiznos	\$333.19	\$226.80	\$189	\$296	-\$107
46-12	H.C.	\$385.60	\$330.80	\$137	\$192	-\$55

Week	Employer	Claimant Reported Earnings	Claimant Paid/Employer Reported	Benefits Paid	Correct Benefit Amount	Benefits Over/Under Paid
47-12	H.C.	\$398.90	\$434.00	\$0	\$0	\$0
50-12	H.C.	\$310.27	\$320.40	\$212	\$203	+\$9
52-12	H.C.	\$379.80	\$385.00	\$142	\$138	+\$4
01-13	H.C.	\$343.80	\$430.90	\$178	\$0	+\$178
02-13	H.C.	\$346.90	\$375.90	\$175	\$146	+\$29
03-13	H.C.	\$375.30	\$557.50	\$147	\$0	+\$147
04-13	H.C.	\$348.90	\$485.10	\$173	\$0	+\$173
05-13	H.C.	\$309.10	\$449.10	\$213	\$0	+\$213
06-13	H.C.	\$347.80	\$359.10	\$174	\$163	+\$11
07-13	H.C.	\$384.00	\$356.50	\$138	\$166	-\$28
08-13	H.C.	\$374.10	\$350.00	\$148	\$172	-\$24
09-13	H.C.	\$386.20	\$356.20	\$136	\$166	-\$30
10-13	H.C.	\$338.00	\$371.70	\$184	\$150	+\$34
11-13	H.C.	\$354.20	\$362.10	\$168	\$160	+\$8
12-13	H.C.	\$343.60	\$338.10	\$179	\$184	-\$5
13-13	H.C.	\$354.70	\$338.10	\$167	\$184	-\$17
14-13	H.C.	\$374.70	\$443.58	\$147	\$0	+\$147
15-13	H.C.	\$387.10	\$443.57	\$135	\$0	+135
16-13	H.C.	\$388.50	\$485.48	\$134	\$0	+\$134
17-13	H.C.	\$385.25	\$485.47	\$136	\$0	+\$136
18-13	H.C.	\$379.50	\$377.40	\$143	\$145	-\$2
19-13	H.C.	\$370.80	\$377.40	\$151	\$145	+\$6
20-13	H.C.	\$356.30	\$448.60	\$166	\$0	+\$166
21-13	H.C.	\$369.90	\$448.60	\$152	\$0	+\$152
22-13	H.C.	\$349.80	\$252.83	\$172	\$269	-\$97
23-13	H.C.	\$349.40	\$252.83	\$173	\$269	-\$96
24-13	H.C.	\$369.10	\$252.83	\$153	\$269	-\$116
25-13	H.C.	\$254.40	\$365.95	\$268	\$156	+\$112
26-13	H.C.	\$316.10	\$365.95	\$206	\$156	+\$50
27-13	H.C.	\$335.90	\$430.30	\$186	\$0	+\$186
28-13	H.C.	\$344.20	\$430.30	\$178	\$0	+\$178
29-13	H.C.	\$264.50	\$0	\$258	\$392	<u>-\$134</u>

**Total Benefits Overpaid:****\$1,512**

**CONCLUSIONS AND REASONS:** Claimant was overpaid \$1,512 in benefits which she is liable to repay to the Department or to have deducted from any future benefits otherwise payable to her. The Department did not meet its burden to establish that claimant made willful misrepresentations or false statements to obtain benefits during the weeks at issue. Claimant therefore is not assessed a monetary penalty or a period of disqualification.

ORS 657.310(1) states that an individual who has received any benefits to which the individual was not entitled because the individual made a false statement to the Department, regardless of the individual knowledge or intent in making that statement, is liable to repay the amount of the overpaid benefits or to have the benefits deducted from any future benefits otherwise payable to the individual. ORS 657.150

provides that eligible individuals are entitled to receive unemployment benefits during any week in which the individual is unemployed. ORS 657.100 states that an individual is deemed "unemployed" in any week in which the remuneration that the individual receives from employment is less than the individual's weekly benefit amount. ORS 657.150(6) states that an eligible unemployed individual who has employment in any week shall have the individual's weekly benefit amount reduced by the amount of earnings paid or payable that exceeds either ten times the applicable minimum wage or one-third of the individual's weekly benefit amount, whichever is greater.

At hearing, the principal issue was the amount of claimant's earnings from Quiznos during some of the first weeks at issue, and the extent to which claimant was overpaid benefits as a result of failing to accurately report those earnings. Claimant presented persuasive evidence at hearing in the form of paystubs and 2012 W-2 forms issued to her by Quiznos to show she had stopped working for Quiznos sometime after week 38-12. Exhibit 2 at 2-9; Transcript at 13, 14, 15, 22, 28. At hearing, the Department's representative withdrew the Department's claim that claimant had inaccurately reported earnings from Quiznos during weeks 46-12, 47-12, 50-12 and 52-12, when the evidence showed more likely than not that claimant was not working for Quiznos during those weeks. Transcript at 22, 23, 24. In light of the Department's concession and claimant's evidence, we agree with the ALJ's conclusion that those weeks should not be considered in determining the benefits that claimant was overpaid. Hearing Decision 14-UI-11104 at 3.

Despite the paystubs claimant submitted to show her actual earnings from Quiznos during weeks 31-12 through 38-12, the ALJ relied on the Department's proration of earnings information that Quiznos had supplied to taxing authorities for the third quarter of 2012 to impute claimant's earnings from Quiznos during those weeks. Hearing Decision 14-UI-11104 at 3; Transcript at 8, 18, 21, 22, 24, 26, 27. Although the ALJ supported his decision to accept the Department's proration on the ground that "claimant acknowledged that her documentary evidence establishing her true reported earnings [from Quiznos] was fragmentary," claimant in fact submitted all of the relevant paystubs for weeks 31-12 through 38-12, except one paystub for the week of 36-12. Hearing Decision 14-UI-11104 at 3. It is a simple matter to determine claimant's earnings for week 36-12 by subtracting the year to date earnings from the paystub for week 34-12 from the year to date earnings total for week 38-12 less the earnings during that pay period. Because each of claimant's paystubs covered two week periods, it is also a simple matter to determine claimant's weekly earnings by prorating the earnings shown on each paystub over two weeks. While the Department's representative refused to make such a calculation at hearing, the representative did not argue that the paystubs were not a more accurate reflection of claimant's actual earnings from Quiznos during weeks 31-12 through 38-12 than the proration method used by the Department to determine claimant's earnings. Transcript at 20, 22, 23, 24. Although there is some discrepancy between the weekly earnings we determined for claimant based on the paystubs claimant submitted and the Department's weekly proration of the amounts Quiznos reported it paid to claimant during the third quarter of 2012, this discrepancy may result from claimant's earnings from Quiznos during weeks 27-12 through 29-12, which were in the third quarter of 2012 but not within the weeks at issue. Regardless, it appears that the most reliable evidence of claimant's actual earnings from Quiznos is her bi-weekly paystubs and not a proration of claimant's earnings over the fourteen week period that comprised the third quarter. Using the paystubs that claimant submitted, our calculation of claimant's weekly earnings from Quiznos is set out in Finding of Fact No. 7, as is our calculation of the correct

benefit amount that claimant should have received applying the formula set out in ORS 657.150(6).<sup>1</sup> While claimant generally contended she disagreed with the earnings that The Howling Coyote reported to the Department, claimant did not introduce any evidence to rebut the accuracy of its reports. Transcript at 25. Without rebutting evidence, we assume the accuracy of an employer's report of earnings made to the Department. More likely than not, the Howling Coyote's report of claimant's earnings during the weeks at issue was accurate. The total amount of benefits overpaid to claimant during the weeks at issue, from both Quiznos and The Howling Coyote, was \$1,512 as set out in Finding of Fact No. 7.

The benefits that claimant was paid during the weeks at issue were calculated based on claimant's reports of her earnings from Quiznos and The Howling Coyote. Because claimant's reports of those earnings were inaccurate, she received benefits to which she was not entitled under ORS 657.150(6). Regardless of claimant's knowledge or intent in making inaccurate reports of her earnings, she is liable to repay to the Department \$1,512 in overpaid benefits or to have \$1,512 deducted from any future benefits otherwise payable to her. *See* ORS 657.310(1).

ORS 657.215 and ORS 657.310(2), read together, allow for the imposition of a monetary penalty and a disqualification from future benefits if claimant willfully made false statements or misrepresentations in order to receive unemployment insurance benefits. In Hearing Decision 14-UI-11104, the ALJ concluded claimant was subject to these penalties based principally on her history of filing previous claims, and that she allegedly admitted to underreporting her earnings from The Howling Coyote. Hearing Decision 14-UI-11104 at 4. Claimant did not make such an admission at hearing, and her decision not to dispute the earnings reported by The Howling Coyote was not tantamount to stipulating that she had intentionally underreported her earnings. The principal additional evidence the Department's representative relied on to demonstrate that claimant willfully underreported her income was that claimant should have known from the Claimant Handbook that she was not entitled to receive benefits if she reported earnings in a week that exceeded her weekly benefit amount and that, after week 47-12, claimant should have been aware of the impacts of her reported earnings on reducing the benefits that she received. Transcript at 8, 9. From these inferences, the Department drew the further inference that claimant willfully underreported her earnings during certain weeks because, if accurately reported, the earnings would have exceeded her weekly benefit amount and would have resulted in her not receiving benefits during a particular week. Although these inferences may be drawn from claimant's history of filing claims or making weekly claims, other more innocent inferences may also be drawn, such as claimant was careless in the earnings that she reported to the Department. The evidence the Department presented about claimant's reporting of her earnings during the weeks at issue does not show a clear pattern of underreporting of earnings, but shows that claimant sometimes reported earnings greater than the employers reported and sometimes less. *See* Exhibit 1 at 6-7. Moreover, some consecutive weeks do not appear in the Department's evidence and we can only surmise that claimant

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<sup>1</sup> In making the calculation under ORS 657.150(6), the minimum wage in 2012 was \$8.80 per hour and ten times the minimum wage was \$88. *See* [http://www.oregon.gov/boli/WHD/docs/oregonminimum\\_wage\\_eng\\_2012.pdf](http://www.oregon.gov/boli/WHD/docs/oregonminimum_wage_eng_2012.pdf). Claimant's weekly benefit amount was \$392 and one-third of that amount was \$130.66. Because ORS 657.150(6) requires a reduction to claimant's benefits in whichever amount is greater, we used \$130.66 as the appropriate reduction. The balance of the calculation we employed to determine the correct benefit amount was: [claimant's actual earnings]-[\$130.66]=[benefit reduction] and [weekly benefit amount or \$392]-[benefit reduction]=[correct benefit amount]. When claimant's weekly earnings exceeded claimant's weekly benefit amount, claimant's correct benefit amount was \$0, as determined under ORS 657.100.

either did not claim benefits during those weeks or reported earnings that exceeded her weekly benefit amount and therefore did not receive any benefits. *See* Exhibit 1 at 6-7. Absent some direct evidence of claimant's willful misrepresentations, or a clear pattern of underreporting from which the inference of willfulness is inescapable, the Department has not met its burden to show claimant is subject to penalties for willfully reporting inaccurate earnings amounts. *See Pruett v. Employment Division*, 86 Or App 516, 740 P2d 196 (1986) (Department has the burden to show that claimant willfully or intentionally supplied false information to receive benefits). Because the evidence in the record does not show, more likely than not, that claimant willfully underreported her earnings, we disagree with the ALJ that claimant was subject to a penalty of \$632.70 and 32 penalty weeks.

Claimant was overpaid \$1,512 in benefits which claimant is required to repay to the Department or to have that amount deducted from any future benefits otherwise payable to her. Claimant is not liable for a monetary penalty or subject to a penalty disqualification from benefits.

**DECISION:** Hearing Decision 14-UI-11104 is modified, as outlined above.

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

**DATE of Service:** April 9, 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>.

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