

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0620

Modified
Overpayment, No Penalties

PROCEDURAL HISTORY: On June 27, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant willfully made a misrepresentation and failed to disclose a material fact to obtain benefits, and assessing an overpayment of \$10,150, a penalty of \$1,522.50, and 52 penalty weeks (decision #193514). On October 24, 2013, claimant filed a request for hearing. On November 20, 2013, ALJ Kangas issued Hearing Decision 13-UI-04951, dismissing claimant's request for hearing as untimely, subject to claimant's "right to renew" the request by submitting a response to the "Appellant Questionnaire" attached to the hearing decision within 14 days of the date the decision was mailed. On December 2, 2013, the Office of Administrative Hearings (OAH) received claimant's response. On December 16, 2013, OAH issued a document entitled "Cancellation of Hearing Decision." On January 14, 2014, OAH issued a notice of hearing scheduled for January 28, 2014. On January 28, 2014 and February 21, 2014, ALJ Lohr conducted a hearing, and on April 11, 2014 issued Hearing Decision 14-UI-15010, granting claimant's request for late appeal, and affirming the Department's decision. On April 15, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party applied for review of that portion of Hearing Decision 14-UI-15010 allowing claimant's request for late appeal. We therefore confine our review of Hearing Decision 14-UI-15010 to the issues of whether claimant is liable for an overpayment, penalty weeks, and a monetary penalty.

The hearing record refers to Exhibit 3 and a seven-page bank statement from claimant, which the ALJ did not mark and did not refer to in Hearing Decision 14-UI-15010, but did identify and admit into evidence without objection at hearing. Audio Record ~ 22:20 to 26:32 (January 28, 2014); 15:14 to 16:30 (February 21, 2014). Accordingly, the 20-page packet of documents submitted by the Department

was marked as EAB Exhibit 3, and claimant's seven-page bank statement as EAB Exhibit 4. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the information will remain in the record as EAB Exhibits 3 and 4.

FINDINGS OF FACT: (1) On February 13, 2012, claimant filed an initial claim for unemployment insurance benefits. His weekly benefit amount was \$443.

(2) Wycliffe Bible Translators employed claimant as a missionary beginning on July 1, 2013. From July 1, 2012 to February 2013, claimant requested pledges from donors to pay travel and monthly expenses for a missionary trip to New Guinea that claimant planned to begin in January or February 2013. The funds received from donors for claimant's trip were deposited into the employer's account. Claimant's departure to New Guinea was contingent on claimant raising sufficient funding for the trip. Claimant was not guaranteed to receive the donated funds as earnings if he did not meet his fundraising goal. Claimant received the funds when he met his fundraising goal in February, 2013.

(3) In September 2012, claimant sought assistance from the Department regarding the proper reporting of the funds he secured for his trip to New Guinea. The Department representative told claimant he did not have to report the pledged funds if he had not received them.

(4) Claimant claimed benefits for the period July 1, 2012 to February 9, 2013 (weeks 27-12 through 6-13), and reported no earnings for those weeks. These are the weeks at issue. The Department paid claimant \$443 for all the weeks at issue, except for week 35-12, for which the Department paid claimant \$177.

(5) The employer subsequently reported earnings of \$809.12 for each of weeks 27-12 through 30-12, \$591.31 for each of weeks 36-12 through 39-12, \$1,337.31 for each of weeks 49-12 through 52-12, \$744.77 for each of weeks 1-13 through 5-13, and \$1,171.20 for week 6-13. The Department determined claimant was overpaid \$443 for each of those weeks. The employer reported earnings of \$330.72 for each of weeks 31-12 through 35-12. The Department determined claimant was overpaid \$184 for weeks 31-12 through 34-12, and that he was not overpaid for week 35-12. The employer reported earnings of \$289.62 for each of weeks 40-12 through 44-12. The Department determined claimant was overpaid \$60 for week 40-12, and \$142 for weeks 41-12 through 44-12. The employer reported earnings of \$350.31 for each of weeks 45-12 through 48-12. The Department determined claimant was overpaid \$203 for each of those weeks.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant received \$10,150 in benefits to which he was not entitled, and which he is liable to either repay or have deducted from any future benefits otherwise payable to him under ORS chapter 657. However, we disagree with the ALJ and conclude that claimant is not disqualified from future benefits or liable for a monetary penalty.

ORS 657.310(1) provides that if an individual received benefits to which the individual was not entitled because the individual, regardless of the individual's knowledge or intent, made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, the individual 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. An individual who willfully makes a false

statement or misrepresentation, or willfully fails 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 amount equal to 15 percent of the overpayment amount. ORS 657.310(2).

The ALJ concluded in Hearing Decision 14-UI-15010 that claimant received \$10,150 in benefits to which he was not entitled.¹ We agree that the preponderance of the evidence shows claimant failed to report all of his earnings for all the weeks at issue, weeks 27-12 through 6-13. Thus, claimant received \$7,974 in benefits to which he was not entitled for weeks 27-12 through 30-12, 36-12 through 39-12, 49-12 through 52-12, 01-13 through 05-13 and 06-13, because his earnings exceeded his weekly benefit amount for each of those weeks. See ORS 657.150(6). Additionally, claimant received \$2,116 in benefits to which he was not entitled for weeks 31-12 through 35-12, weeks 40-12 through 44-12, and 45-12 through 48-12, because his earnings for each of those weeks exceeded one-third of his weekly benefit amount. See ORS 657.150(6). For the week ending September 1, 2012, claimant was not overpaid. Thus, his total overpayment amount based on unreported earnings is \$10,150. Claimant therefore is liable to either repay the \$10,150 or have it deducted from any future benefits otherwise payable to him under ORS chapter 657.

However, we disagree with the ALJ's conclusion that claimant willfully failed to report his earnings for the purpose of obtaining benefits. The statute requires "that an intent to misrepresent for the purpose of obtaining benefits be found." *Pruett v. Employment Division*, 86 Or App 516, 521, 740 P 2d 196 (1987). In Hearing Decision 14-UI-15010, the ALJ found such intent based on claimant's history of filing previous claims and having reported earnings during those claims.² At hearing, however, claimant testified that he did not report his earnings because he did not understand that the funds he secured to fund his future trip to New Guinea were earnings or that he was required to report them. Transcript (February 21, 2014) at 18. Claimant concluded he was not required to report the pledged funds as earnings because the earnings were contingent on his reaching his fundraising goal, and he would not receive the funds until he began his trip to New Guinea. Transcript (February 21, 2014) at 18, 20 to 22, 26, 28. Moreover, claimant testified that the Department told him he did not have to report the pledged funds as earnings because he had not received them. Transcript (February 21, 2014) at 41 to 43. Although the Department witness argued at hearing that the Department's records did not show claimant discussed his earnings with the Department, and asserted that the Department would never have advised claimant not to report his earnings, absent a reason to disbelieve claimant's firsthand testimony, we gave claimant's testimony greater weight than hearsay or speculative testimony from the Department. See Transcript (February 21, 2014) at 16, 31, 49 to 50. The preponderance of the evidence fails to support the ALJ's conclusion that claimant's failure to report his earnings during the weeks at issue was for the purpose of obtaining benefits, rather than for the plausible reasons he provided.

Because the record does not establish claimant willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, we conclude claimant did not violate ORS 657.215 and is not subject to penalty weeks and a monetary penalty.

¹ Hearing Decision 14-UI-15010 at 4 to 6.

² *Id.* at 6.

DECISION: Hearing Decision 14-UI-15010 is modified, as outlined above.

Susan Rossiter and J.S. Cromwell, *pro tempore*;
Tony Corcoran and D. E. Larson, not participating.

DATE of Service: May 19, 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.