

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0855

Affirmed
Disqualification
Overpayment and Penalties

PROCEDURAL HISTORY: On December 23, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant failed without good cause to accept suitable work when offered (decision # 110225). On February 5, 2014, the Department served notice of an administrative decision assessing a \$629 overpayment, a \$94.35 monetary penalty, and 5 penalty weeks (decision # 201040). Claimant filed timely requests for hearing on decisions # 110225 and # 201040. On February 12, 2014, the Office of Administrative Hearings (OAH) issued a notice of hearing on decision # 110225 scheduled for February 24, 2014. On February 24, 2014, ALJ Bear issued Hearing Decision 14-UI-11029 dismissing claimant's request for hearing for failure to appear. On February 24, 2014, claimant requested that the hearing on decision # 110225 be reopened. On April 17, 2014, OAH issued two notices of two hearings scheduled for May 2, 2014, one for decision # 110225 at 9:30 a.m., and the other for decision # 201040 at 10:45 a.m. On May 2, 2014, ALJ Holmes-Swanson conducted two hearings, and on May 9, 2014 issued Hearing Decision 14-UI-17202, allowing claimant's request to reopen the February 24, 2014 hearing, and affirming decision # 110225. The ALJ also issued Hearing Decision 14-UI-17203, modifying decision # 201040, and assessing an overpayment of \$2 in EUC and \$627 in regular benefits, a \$94.05 monetary penalty, and 5 penalty weeks. On May 16, 2014, claimant filed an application for review of Hearing Decisions 14-UI-17202 and 14-UI-17203 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-17202 and 14-UI-17203. No adversely affected party requested review of the portion of Hearing Decision 14-UI-17202 allowing claimant's requests to reopen. We therefore did not review that determination. For case-tracking purposes, this decision is being issued in duplicate (Appeals Board Decisions 2014-EAB-0855 and 2014-EAB-0856).

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 September 15, 2008, claimant filed an initial claim for unemployment insurance benefits, with a weekly benefit amount of \$113. Claimant filed another initial claim on October 28, 2013, with a weekly benefit amount of \$196. The maximum weekly benefit amount in effect was \$507.

(2) Claimant claimed benefits for the week of May 27, 2012 through June 2, 2012 (week 22-12) on her first claim, and for the weeks from November 3, 2013 through November 23, 2013 (weeks 45-13 through 47-13) and December 1, 2013 through December 14, 2013 (weeks 49-13 and 50-13) on her second claim. Those are the weeks at issue.

(3) Claimant worked for Boly/Welch, Inc. during week 22-12. She earned \$104. Claimant reported earnings of \$102 for that week because she miscalculated her earnings when she multiplied her hourly wage by her hours of work. Based on claimant's certification that she earned \$104 during week 22-12, the Department paid claimant \$99 in unemployment insurance benefits for that week.

(4) During the weeks at issue, claimant's labor market included the Portland, Oregon area. She was employed by Express Services, Inc. (employer), a temporary agency.

(5) On October 30, 2013, a different employer, Build a Bear, hired claimant for a part time position to begin in November 2013. The manager from Build a Bear did not tell claimant when she would begin work in November.

(6) On November 5, 2013, claimant still did not know when she would begin working for Build a Bear. The employer offered claimant a mock jurist job from 8:00 a.m. to 5:00 p.m. on November 13, 2013 with one of its client companies in Portland, Oregon. The work paid \$9.00 per hour and did not require special skills or experience. Claimant refused the offer of work because she did not want to accept work that might conflict with potential work at Build a Bear.

(7) When claimant claimed benefits for week 45-13, claimant did not report that she refused an offer of work during that week.

(8) Relying on claimant's report that she did not refuse an offer of work during week 45-13, the Department determined claimant was eligible for benefits, and paid claimant \$627 in benefits for weeks 45-13 through 47-13, 49-13 and 50-13.

CONCLUSIONS AND REASONS: Claimant failed without good cause to accept suitable work when offered. We also agree that claimant received remuneration during week 22-12 that reduced her weekly benefit amount. Claimant received \$629 in unemployment insurance benefits to which she was not entitled. She is liable to repay those benefits or have them withheld from future benefits otherwise

payable. Claimant willfully failed to report a material fact to the Department to obtain unemployment benefits, and is liable for a \$94.05 monetary penalty and 5 penalty weeks.

Job Refusal. ORS 657.176(2)(e) requires a disqualification from unemployment insurance benefits if claimant failed without good cause to accept suitable work when offered. “Good cause” is such that a reasonable and prudent person, exercising ordinary common sense, would refuse to accept suitable work when offered by the employer. OAR 471-030-0038(6) (August 3, 2011). Factors to consider when determining whether work is “suitable” include, among other factors, the degree of risk to the individual’s health, safety and morals, the prior training and experience of the individual, and the distance of the work from the individual’s residence. ORS 657.190; 657.195.

The employer extended claimant a *bona fide* offer of work that included information about the type of work, its location, the wage, the starting date, and the expected duration of the work. Claimant refused the offer of work. The work was suitable because it required no special skills or experience, and was in claimant’s labor market area. Claimant did not assert or show that the work paid less than she customarily earned for similar work in the same area, or that it posed a threat to her health, safety or morals. Claimant refused the offer of suitable work, and, absent a showing that she had good cause for doing so, must be disqualified from receiving unemployment insurance benefits.

Claimant testified at hearing that she had good cause to refuse the employer’s offer of work because it would not have been professional to accept work for one day that could potentially conflict with a longer, seasonal position with Build a Bear. Transcript at 30 to 31. However, a claimant who refuses work must show that no reasonable and prudent person would have accepted the work when offered. *Vail v. Employment Department*, 30 Or App 365, 567 P2d 129 (1977). As of November 5, 2013, when the employer offered claimant work, Build a Bear had not given claimant a start date or a work schedule. Claimant was not scheduled to work for Build a Bear on November 13, 2013 when the employer offered her work for that day. Thus, when the employer offered claimant work for November 13, 2013, claimant did not have to choose between two competing offers of work. Claimant failed to show that no reasonable and prudent person would have accepted the employer’s offer of work and, if necessary, canceled the work assignment with the employer on or before November 13, 2013 if required to work for Build a Bear that day. Claimant failed to establish that she had good cause to refuse the employer’s offer. Claimant therefore is disqualified from the receipt of benefits.

Remuneration, Overpayment and Misrepresentation. ORS 657.150(6) provides that an eligible unemployed individual who has employment in any week shall have 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. An individual is not entitled to benefits for any week in which her earnings exceeded her weekly benefit amount. *See* ORS 657.100.

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. ORS 657.310(1) applies if the benefits were received because the individual made a false statement, or failed to disclose a material fact, regardless of the individual’s knowledge or intent. Pursuant to Pub. L. 110-252, § 4005(b), 122 Stat. 2356-2357, an individual who was overpaid EUC is liable to repay those benefits in accordance with state law. ORS 657.215 provides that an individual who willfully made a false statement, or

willfully failed to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. In addition, an individual who has been disqualified for benefits under ORS 657.215 is also liable for a penalty at a rate of at least 15 but not greater than 30 percent of the amount of the overpayment. ORS 657.310(2). The Department had the burden to establish that claimant received benefits to which she was not entitled, and that she willfully made a false statement, or willfully failed to report a material fact to obtain those benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544. P2d 1068 (1976).

Week 22-12. Claimant's earnings for week 22-12 were \$104. Claimant reported that her earnings were \$102 for week 22-12, and as a result, the Department overpaid claimant \$2 in benefits. Claimant testified that she miscalculated her earnings for that week. Transcript at 59. The Department did not establish that claimant willfully misrepresented her earnings for week 22-12 to obtain benefits. Claimant's miscalculation caused her to receive \$2 in benefits for week 22-12 to which she was not entitled. Claimant is therefore liable to either repay the \$2 or have it deducted from any future benefits.

Weeks 45-13 through 47-13, and 49-13 through 50-13. Claimant was paid \$627 in benefits for weeks 45-13 through 50-13 to which she was not entitled because she failed to report to the Department that she refused an offer of work during week 45-13. Claimant is liable to either repay the \$627 or have it deducted from any future benefits.

At issue is whether claimant willfully failed to report that she refused an offer of work to obtain benefits. At hearing, claimant testified that she was uncertain whether to report the job refusal during the week she refused the work, or during the week when the work would have occurred. Transcript at 60. However, claimant's argument fails because she did not report the job refusal during either week. Nor did claimant take steps to clarify her reporting obligations. Transcript at 61 to 62. Absent a credible explanation for why claimant failed to report the job refusal, and based on claimant's admission at hearing that she refused to accept the job offer because it potentially conflicted with another job, we conclude claimant willfully failed to report the job refusal so she would qualify for benefits.

Claimant's willful failure to report a material fact, that she refused an offer of work, subjects her to a penalty disqualification from future benefits in accordance with OAR 471-030-0052(1)(b). Under that provision, the number of penalty weeks imposed is the result reached by dividing the total overpayment (\$627) 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 (\$507), rounded to two decimal places (1.24), multiplying the result by four (4.96) and rounding the result up to the nearest whole number (5), or four weeks, whichever is greater. Under that calculation, claimant's penalty disqualification period is 5 weeks.

Under ORS 657.310(2), an individual who has been disqualified from benefits under ORS 657.215 for willfully failing to report a material fact is liable for a monetary penalty in an amount equal to between 15 and 30 percent of the overpayment amount depending on the number of occurrences of misrepresentation that occurred. OAR 471-030-0052(7). Claimant had one occurrence because she willfully failed to report a material fact one time. Under OAR 471-030-0052(7)(a), claimant is liable for a penalty equal to 15 percent of the total amount of benefits she received but was not entitled to receive. Claimant was overpaid \$627 in benefits due to her failure to report her job refusal, thus claimant is liable for a \$94.05 monetary penalty for weeks 45-13 through 47-13, and 49-13 through 50-13.

In sum, for all the weeks at issue, claimant was overpaid a total of \$629 in regular and EUC benefits that she is liable to repay or have deducted from future benefits. Claimant willfully failed to report a material fact to obtain benefits. She is disqualified from the receipt of benefits for 5 weeks, and is liable for a \$94.05 monetary penalty.

DECISION: Hearing Decisions 14-UI-17202 and 14-UI-17203 are affirmed.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: June 27, 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 court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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