

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1397

### *Reversed & Remanded*

**PROCEDURAL HISTORY:** On April 30, 2014, the Oregon Employment Department (the Department) served notice of an administrative concluding claimant was overpaid \$2,340 in benefits, and assessing 18 penalty weeks and a 30% monetary penalty (decision # 195803). Claimant filed a timely request for hearing. On June 10, 2014, ALJ Seideman conducted a hearing, and on August 4, 2014 issued Hearing Decision 14-UI-22722, concluding that claimant was overpaid \$2,894 in benefits, and assessing 23 penalty weeks and a 30% monetary penalty. On August 22, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 14-UI-22722 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings.

ORS 657.100(1) provides, in relevant part, that an individual is deemed “unemployed” in any week of less than full-time work if the remuneration paid or payable to the individual for services performed during the week is less than the individual’s weekly benefit amount. An eligible unemployed individual’s weekly benefit amount is subject to reduction by the amount of earnings paid or payable that exceeds the greater of ten times the minimum hourly wage, or one-third the individual’s weekly benefit amount. ORS 657.150(6). For purposes of ORS 657.100 and 657.150(6), remuneration for services shall be allocated to the week in which the service was performed. OAR 471-030-0017(3)(a) (July 12, 2007). However, 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, the remuneration shall be allocated equally over the period during which the 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.* 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 also is liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2).

The length of the penalty disqualification period and monetary penalty are determined by applying the provisions of OAR 471-030-0052 (February 23, 2014). 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. OAR 471-030-0052(1)(a). For an individual subject to disqualification by administrative action under 657.215, the monetary penalty will be, for the seventh or greater occurrence within 5 years of the occurrence for which a penalty is being assessed, 30 percent of the total amount of benefits the individual received but to which the individual was not entitled. OAR 471-030-0052(7)(d).

At hearing in this case, it became evident that the Department misallocated claimant's earnings for the week of December 1 through 7, 2013 (week 49-13) and the weeks from December 22, 2013 through January 18, 2014 (weeks 52-13 through 03-14), in part, because it misinterpreted the payroll history documents provided by one of the employers, Saltys on the Columbia Inc. (Saltys). Audio Record at 19:00; Exhibit 2. The record also shows the Department separately erred in entering the amount of earnings it mistakenly believed Saltys reported earnings for weeks 49-13 and 01-14. *See* Exhibit 2; decision # 195803. The record also shows that the Department apparently erred in determining that claimant underreported his earnings from Saltys for the week from January 12 through 18, 2014 (week 03-14), but that he was underpaid benefits for that week. *See* decision # 195803. At hearing, Saltys partially corrected the Department's errors by providing claimant's weekly earnings for services performed from December 2, 2013 through January 19, 2014. Audio Record at 19:00. However, Saltys made clear that it was providing claimant's weekly earnings for services performed Monday through Sunday, and not Sunday through Saturday. Audio Record at 21:00. Saltys therefore did not provide accurate weekly earnings for week 49-13 or weeks 52-13 through 03-14.

The ALJ did not ask Saltys if it could establish claimant's weekly earnings for week 49-13 or weeks 52-13 through 03-14. Nor did the ALJ ask claimant if, based on the new information provided by Saltys, he could provide a reasonable estimate of his weekly earnings for those weeks. Instead, the ALJ accepted the Department's redetermination of claimant's overpayment without inquiry into the Department's apparent failure to take into account the fact that Saltys did not provide accurate weekly earnings for

week 49-13 and weeks 52-13 through 03-14. Audio Record at 29:30. Nor did the ALJ conduct any inquiry into the Department's determination of earnings reported by one of the other employers, Paragon Restaurant Ventures LP (Paragon), for the weeks from September 29 through October 19, 2013 (weeks 40-13 through 42-13), November 3 through 23, 2013 (weeks 45-13 through 47-13), week 49-13 and weeks 52-13 through 02-14. The documentary record fails to show how the Department determined claimant's weekly earnings for those weeks from the earnings statements provided by Paragon. *See* Exhibit 4; decision # 195803. Given the Department's multiple errors in determining the weekly earnings reported by Saltys, further inquiry into the Department's determination of the weekly earnings reported by Paragon is necessary.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant was overpaid benefits, and is subject to penalty weeks and a monetary penalty, Hearing Decision 14-UI-22722 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 14-UI-22722 is set aside, and this matter remanded for further proceedings consistent with this order.<sup>1</sup>

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

**DATE of Service:** September 25, 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](http://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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<sup>1</sup> **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 14-UI-22722 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.