

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1402

*Modified*  
*Overpayment Reduced, No Penalties*

**PROCEDURAL HISTORY:** On June 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for Dental Medical Staffing Inc. on February 25, 2014 without good cause (decision # 80504). On June 11, 2014, the Department served notice of an administrative decision concluding that claimant was overpaid \$1,988 in benefits that she is liable to repay, disqualified for 19 weeks of future benefits, and liable to pay a \$298.20 monetary penalty (decision # 194325). On July 1, 2014, claimant filed a timely request for hearing on decision # 194325, which also was construed as a late request for hearing on decision # 80504. On July 16, 2014, ALJ Lohr conducted a hearing on decision # 80504, and on July 17, 2014 issued Hearing Decision 14-UI-21680, dismissing claimant's late request for hearing on that decision. On July 31, 2014, ALJ Lohr conducted a hearing on decision # 194325, and on August 6, 2014 issued Hearing Decision 14-UI-22856, affirming that decision. On August 6, 2014, Hearing Decision 14-UI-21680 became final without an application for review having been filed with the Employment Appeals Board (EAB). On August 26, 2014, claimant filed an application for review of Hearing Decision 14-UI-22856 with EAB.

**FINDINGS OF FACT:** (1) On December 9, 2013, claimant filed an initial claim for benefits. Her weekly benefit amount was \$321.

(2) During the week of February 9 through 15, 2014 (week 07-14), claimant earned \$113.75 working for Bradley Sievert DMD PC (Sievert), and \$86.25 working on assignment for Dental Medical Staffing, Inc.

(DMS), a temporary agency. When claimant claimed benefits for week 07-14, she reported earning \$275 working for Sievert, and did not report any earnings from DMS. Because claimant over-reported her total earnings for week 07-14, the Department underpaid her \$21 in benefits for that week.

(3) During the week of February 16 through 22, 2014 (week 08-14), claimant earned \$301.50 working for DMS. Her work assignment for DMS ended on February 20, 2014. When claimant claimed benefits for week 08-14, claimant reported that she did not quit a job that week, and that she earned \$270 working for DMS. Because claimant underreported her earnings for week 08-14, the Department overpaid her \$32 in benefits.

(4) On February 25, 2014, claimant notified DMS that she no longer was available for work assignments. When claiming benefits for the week of February 23 through March 1, 2014 (09-14), claimant reported that she did not quit a job that week. The Department paid claimant \$321 in benefits for week 09-14.

(5) Claimant claimed benefits for the week of March 2 through 8, 2014 (week 10-14). The Department paid claimant \$321 in benefits for that week.

(6) When claiming benefits for the week of March 9 through 15, 2014 (week 11-14), claimant reported earning \$182 for work performed that week. The Department paid claimant \$246 in benefits for week 11-14.

(7) Claimant claimed benefits for the week of March 16 through 22, 2014 (week 12-14). The Department paid claimant \$321 in benefits for that week.

(8) When claiming benefits for the week of March 23 through 29, 2014 (week 13-14), claimant reported earning \$58 for work performed that week. The Department paid claimant \$321 in benefits for week 13-14.

(9) Claimant claimed benefits for the week of March 30 through April 5, 2014 (week 14-14). The Department paid claimant \$321 in benefits for that week.

(10) During the week of April 6 through 12, 2014 (week 15-14), claimant earned \$740 working for Willamette Dental Group PC (WDG). When claiming benefits for week 15-14, claimant reported earning \$740 working for WDG.

**CONCLUSIONS AND REASONS:** Hearing Decision 14-UI-22856 is modified. The Department overpaid claimant \$1,862 in benefits. Claimant is liable under ORS 657.315(1) to have \$1,830 deducted from any future benefits otherwise payable. Claimant is liable under ORS 657.310(1) to either repay \$32 or have the amount of the benefits deducted from any future benefits otherwise payable. Claimant is not disqualified from future benefits under ORS 657.215, or liable for a monetary penalty under ORS 657.310(2).

ORS 657.100(1) provides, in relevant part, that an individual is deemed “unemployed” in any week 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).

ORS 657.176(2) provides, in relevant part, that an individual shall be disqualified from the receipt of benefits if the individual has been discharged for misconduct, or quit work without good cause. OAR 471-030-0038(2)(b) (August 3, 2011) provides that if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a quit. OAR 471-030-0038(2)(a). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.* In the case of individuals working for temporary agencies or employee leasing companies, the employment relationship shall be deemed severed at the time that a work assignment ends. *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 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).

ORS 657.315(1) provides, in relevant part, that an individual who has been overpaid benefits because of an error not caused by the individual's false statement, misrepresentation of a material fact or failure to disclose a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding the individual is not eligible for the benefits, is liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter for any week or weeks within 52 weeks following the week in which the decision establishing the erroneous payment became final.

In Hearing Decision 14-UI-22856, the ALJ concluded that claimant was overpaid \$1,988 in benefits for weeks 07-14 through 14-14, in part, because she misrepresented or failed to disclose the fact that she quit working for DMS in week 08-14 when claiming benefits for that week, and that claimant therefore is liable to repay the benefits under ORS 657.310(1).<sup>1</sup> However, the record shows only that claimant's work assignment for DMS, a temporary agency, ended in week 08-14, and not that claimant could have continued the assignment for an additional period of time. The record therefore fails to show claimant made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, when she reported to the Department that she did not quit a job during week 08-13.

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<sup>1</sup> Hearing Decision 14-UI-22856 at 3.

In week 09-14, claimant notified DMS that she no longer was available for work assignments. When claiming benefits for week 09-14, claimant reported that she did not quit a job that week. Decision # 80504 concluded that claimant quit working for DMS during week 09-13 without good cause. However, whether claimant quit work is a question of law, and not fact, governed under OAR 471-030-0038(2). Absent findings of fact in decision # 80504 or evidence in the hearing record showing claimant ended a work assignment during week 09-14 that she could have continued for an additional period of time, claimant's report that she did not quit a job that week was not a false statement or misrepresentation of a material *fact*, or failure to disclose a material *fact*, as required under ORS 657.310(1).

In Hearing Decision 14-UI-22856, the ALJ also concluded that claimant was not entitled to the \$158 in benefits she received for week 08-14 because she underreported her earnings for that week, and that claimant therefore is liable to repay the benefits under ORS 657.310(1).<sup>2</sup> The ALJ then implicitly concluded that claimant willfully underreported her earnings to obtain benefits.<sup>3</sup> We agree that claimant received benefits to which she was not entitled for week 08-13 because she underreported her earnings for that week, and that claimant therefore is liable to repay the benefits under ORS 657.310(1). Under ORS 657.150(6), however, claimant's weekly benefit amount is subject to reduction by the amount of earnings paid or payable that exceeds one-third her weekly benefit amount. Claimant therefore was entitled to \$126 in benefits for week 08-13, and overpaid only \$32 in benefits for that week. The record fails to show that claimant willfully underreported her earnings for week 08-14, given that she over-reported her earnings for week 07-14, over-reported her earnings for the two weeks combined, and the Department failed to show she underreported her earnings for any of the remaining weeks at issue.

In sum, the Department overpaid claimant \$32 in benefits for week 08-13 that claimant is liable under ORS 657.310(1) to either repay \$32 or have deducted from any future benefits otherwise payable. The Department overpaid claimant \$1,830 in benefits for weeks 09-14 through 14-14 because its initial decisions to pay claimant benefits for those weeks were reversed by decision # 80504, which became final on August 6, 2014 without an application for review of Hearing Decision 14-UI-21680 having been filed. Claimant is liable under ORS 657.315(1) to have the \$1,830 deducted from any future benefits otherwise payable. Claimant is not disqualified from future benefits under ORS 657.215, or liable for a monetary penalty under ORS 657.310(2).

**DECISION:** Hearing Decision 14-UI-22856 is modified, as outlined above.

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

**DATE of Service:** September 30, 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

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 4.

“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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