

## EMPLOYMENT APPEALS BOARD DECISION

2015-EAB-0077

*Modified  
Overpayment Assessed*

**PROCEDURAL HISTORY:** On October 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision assessing an overpayment of \$1,205 in regular benefits. Claimant filed a timely request for hearing. On January 15, 2015, ALJ Holmes-Swanson conducted a hearing at which one of the employers, HJ Heinz, did not appear, and on January 21, 2015 issued Hearing Decision 15-UI-32088, assessing an overpayment of \$1,152. On January 26, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she presented new information about the hours that she worked for HJ Heinz, apparently to rebut the earnings information that HJ Heinz provided to the Department. Claimant failed to certify that she provided a copy of the written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant also did not explain why she did not offer the new information during the hearing and otherwise failed to show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) On November 27, 2013, claimant filed an initial claim for benefits and that claim was determined valid. Claimant claimed benefits for weeks 02-14 (January 5 through 11, 2014), 13-14 (March 23 through 29, 2014); 16-14 (April 13 through 19, 2014); 21-14 (May 18 through 24, 2014), 27-14 (June 29, through July 5, 2014), and 30-15 (July 20, through 26, 2014), the weeks at issue. The Department paid benefits to claimant for those weeks.

(2) During the weeks at issue, claimant was working at two jobs, one for Clarion Inn-Ontario and the other for HJ Heinz. When claimant filed her weekly claims, she reported the income she earned from both employers to allow a correct calculation of the benefits to which she was entitled during those weeks.

(3) The earnings that claimant reported to the Department she received during the weeks at issue, the amounts that both employers reported that she earned or was paid for those weeks, and the amount of the benefits that claimant was paid during those weeks are set out below:

<u>Week</u>	<u>Employer's Reported Earnings</u>	<u>Claimant's Reported Earnings</u>	<u>Benefits Paid</u>
<u>02-14</u>	Clarion \$129.35 Heinz: <u>\$426.70</u> \$556.05	\$55.56	\$485
<u>13-14</u>	Clarion \$157.78 Heinz <u>\$426.70</u> \$584.48	\$395.70	\$452
<u>16-14</u>	Clarion \$113.62 Heinz <u>\$615.56</u> \$729.18	\$444.48	\$202
<u>21-14</u>	Clarion \$169.74 Heinz <u>\$736.22</u> \$905.96	\$458.37	\$188
<u>27-14</u>	Clarion \$130.52 Heinz <u>\$307.78</u> \$438.30	\$222.24	\$424
<u>30-14</u>	Clarion \$291.08 Heinz <u>\$0</u> \$291.08	\$222.24	\$424

See Exhibit 1 at 10, 12-13, 18, 19-28, 29; Transcript at 7-9, 17.

(4) During the weeks at issue, claimant earned \$13.89 per hour when working for HJ Heinz. Exhibit 1 at 12. Claimant generally started her shifts for Heinz at approximately 11:30 p. m. on one calendar day and the shifts ended at 8:00 a.m. the next calendar day. Exhibit 1 at 23-28.

**CONCLUSIONS AND REASONS:** Claimant was overpaid \$1,554 in benefits and is liable to repay those benefits or to have them deducted from any future benefits otherwise payable to her.

ORS 657.310(1) states that if an individual receives any benefits to which the individual was not entitled because of a false statement that the individual made to the Department, regardless of the individual's knowledge or intent in making the false statement, the individual is liable to repay the amount of the benefits overpaid or to have the overpaid amounts deducted from any future unemployment benefits otherwise payable to the individual. During any period when an individual is receiving unemployment benefits, the individual is not considered "unemployed" during any week where the remuneration payable to the individual for work exceeds the individual's weekly benefit amount. ORS 657.100(1). During such weeks, the individual is not eligible to receive any weekly unemployment benefits. *Id.* An eligible individual who has employment in any week shall have the individual's weekly benefit amount reduced by the amount that the earnings paid or payable exceeds the greater of ten times the legally established minimum hourly wage or one-third of the individual's weekly benefit amount. ORS 657.150(6).

Applying ORS 657.100(1) and ORS 657.150(6), the amount of remuneration paid or payable to claimant during the weeks at issue clearly had an impact on the amount of benefits to which claimant was entitled. If claimant incorrectly reported the amount of the remuneration on which her benefit amounts for particular weeks were determined, then she is liable to repay any benefits overpaid to her, even if she did not know or intend to report incorrectly earnings amounts to the Department. Both employers, HJ Heinz and Clarion-Inn, reported earnings amounts for claimant during the weeks at issue that were significantly different from the amounts that claimant reported. Both employers provided written information to the Department about claimant's earnings that their respective payroll staffs certified was correct and accurate. *See* Exhibit 1 at 18, 29. With respect to the earnings reported by Clarion, claimant conceded that, although she did not recall "exactly" what her earnings and hours were, the earnings information that Clarion supplied to the Department was "pretty close" to correct. Transcript at 21. Because Clarion certified the correctness of its information, and claimant did not raise any specific objections to it, EAB considers that it was an accurate statement of claimant's earnings from Clarion during the weeks at issue.

With respect to the earnings that HJ Heinz reported for claimant, claimant contended that it was not accurate for the week of 02-14, January 5, 2014 through January 11, 2014, because the employer's worksite was closed during that week and the pay that Heinz reported was holiday pay for New Year's Day and four hours of training that she attended during that week. Transcript at 21, 22. From the earnings information that Heinz supplied, it is not clear whether the worksite was or was not closed through January 11, 2014. *See* Exhibit 1 at 22, 23. The earnings detail that Heinz provided did account for 8 hours of pay to claimant on January 10, 2014 as a "holiday credit," an additional 8 hours of pay on January 10, 2014 for unspecified reasons and another 4 hours of pay to claimant on January 10, 2014 for unspecified reasons, the latter of which might account for the training that claimant stated she had attended. Exhibit 1 at 23; Transcript at 21, 22. Since the earnings detail that Heinz provided also showed that claimant did not receive holiday pay for January 1, 2014 because of a "work history violation," it is not clear what "holiday" was referred to in Heinz's earnings detail for January 10, 2014 or, if it was for New Year's Day, the reason that claimant received it late or if claimant was credited with holiday pay on that day because she had requested to defer its receipt and to credit it against work that was otherwise scheduled for her on January 10, 2014. Exhibit 1 at 22, 23. Claimant was unable or unwilling to provide any clarifying information about the entry for holiday pay on January 10, 2014. Transcript at 21, 25, 26. In light of this uncertainty and the lack of information in the record, there is insufficient evidence to conclude that the January 10, 2014 entry for "holiday credit" was actually for the

New Year's Day holiday or that it was properly reported as earnings to claimant during week 01-14, which was the week encompassing January 1, 2014, and not for week 02-14. *See* ORS 657.150(7) (holiday pay should generally be considered as a claimant's earnings during the week in which the holiday falls). Because claimant did not assert that she received holiday pay during week 01-14 or explain why she received or might have received her New Year's Day holiday pay on January 10, 2014, we are left only with Heinz's certification as to the amount she earned during week 02-14 and accept it as accurate.

For the weeks at issue after week 02-14, claimant did not present any paycheck stubs or other specific evidence about her earnings from Heinz to rebut the earnings information that Heinz supplied to the Department. Transcript at 25, 26. Given the state of the record, unless we can discern a reason to discredit Heinz's certified earnings information for the weeks subsequent to week 02-14, we accept it as accurate. With respect to week 13-14, March 23, 2014 through March 29, 2014, claimant first contended at hearing that the employer's worksite was closed from March 24, 2014 through March 31, 2014 and then stated that she worked two days during that week. Transcript at 22. The earnings detail from Heinz accurately showed that claimant worked two full nights during this period, and claimant's contention appears to be that Heinz's entry for the night that began on March 22, 2014 should be totally excluded from her earnings for the week 13-14. Transcript at 22. While claimant's earnings for the period of 11:34 p.m. through 12:00 p.m. on March 22, 2014 are properly excludable from week 13-14, her earnings attributable to the period between 12:01 a.m. through 8:02 a.m. on March 23, 2014 are properly includable in week 13-14. Exhibit 1 at 25. As a result, the earnings figures that Heinz supplied to the Department must be adjusted to reflect that it over-reported claimant's earnings during week 13-14 by approximately one half hour or \$6.95 (0.5 hours x \$13.89). Claimant further contended that the earnings Heinz reported for week 27-14, June 29, 2014 through July 5, 2014 were incorrect because the worksite was closed from June 30, 2014 through July 4, 2014 and she earned only holiday pay on July 4, 2014. Transcript at 23. Again, the work detail that Heinz submitted to the Department for week 27-14 showed that claimant did receive holiday pay for July 4, 2014 but also showed an entry for the night of June 28, 2014 starting at 7:34 p.m. and ending at 8:06 a.m. on June 29, 2014. Exhibit 1 at 28. The time that claimant worked on June 28, 2014, between 7:34 p.m. and 12:00 p.m., should be excluded from claimant's earnings during week 27-14. As a result, the earnings figures that Heinz provided must be adjusted to reflect that it over-reported claimant's earnings during week 27-14 by approximately 4.25 hours or \$59.03 (4.25 hours x \$13.89). Although claimant did not voice an objection to the earnings that Heinz reported for her during week 16-14, April 13, 2014 through April 16, 2014, Heinz also reported earnings during that week for work that she performed on April 12, 2014, from 11:34 p.m. through 12:00 p.m. Exhibit 1 at 26. To maintain consistency, the earnings figures that Heinz reported for week 16-14 must therefore also be adjusted to exclude the \$6.95 she earned on April 12, 2014 (0.5 hours x \$13.89). The earnings figures that Heinz reported for claimant during week 13-14, March 23, 2014 through March 29, 2014 also must be adjusted to exclude the time from 11:34 p.m. through 12:00 p.m. that claimant worked on March 22, 2014. Exhibit 1 at 25. This correction requires eliminating \$6.95 from the earnings that Heinz reported for claimant during week 13-14 (0.5 hours x \$13.95). Since claimant had no other specific objections to the amounts that Heinz reported for her, and none are apparent to us, we accept the other earnings figures that Heinz reported that claimant earned.

As corrected, the earnings reported from Heinz and from Clarion are set out below, along with the benefits the Department paid to claimant, the benefit amount that claimant should have been paid and the amount of the benefits that were overpaid to claimant:

<u>Week</u>	<u>Employer's Reported Earnings</u>	<u>Claimant's Reported Earnings</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Benefits Over or Underpaid</u>
<u>02-14</u>	Clarion \$129.35 Heinz: <u>\$426.70</u> \$556.05	\$55.56	\$485	\$0	+\$485 <sup>1</sup>
<u>13-14</u>	Clarion \$157.78 Heinz <u>\$419.75</u> \$577.53	\$395.70	\$452	\$0	+\$452
<u>16-14</u>	Clarion \$113.62 Heinz <u>\$608.61</u> \$722.23	\$444.48	\$202	\$0	+\$202
<u>21-14</u>	Clarion \$169.74 Heinz <u>\$729.27</u> \$899.01	\$458.37	\$188	\$0	+\$188
<u>27-14</u>	Clarion \$130.52 Heinz <u>\$248.75</u> \$379.27	\$222.24	\$424	\$266	+\$158 <sup>2</sup>
<u>30-14</u>	Clarion <u>\$291.08</u>	<u>\$222.24</u>	<u>\$424</u>	<u>\$355</u>	<u>\$69</u> <sup>3</sup>
<b>TOTALS</b>	<b>\$3,425.17</b>	<b>\$1,798.59</b>	<b>\$2,175</b>	<b>\$613</b>	<b>+\$1,554</b>

See Exhibit 1 at 10, 12-13, 18, 19-28, 29; Transcript at 7-9, 17.

Because claimant received \$1,554 in benefits to which she was not entitled, based on a correct statement of her earnings, she was overpaid those benefits regardless of whether or not she was aware

<sup>1</sup> For all weeks in which claimant had total income from both employers that exceeded her weekly benefit amount of \$485, claimant was not entitled to receive any benefits and, hence, any benefits paid to her were overpaid. See ORS 657.100(1).

<sup>2</sup> Because claimant's total income from both employers was less than her weekly benefit amount, the benefits to which claimant was entitled during this week were controlled by ORS 657.150(6). During the weeks at issue, the state minimum wage was \$9.10, and ten times that amount was \$91. [http://www.oregon.gov/boli/whd/oregonminimumwage\\_eng\\_2014.pdf](http://www.oregon.gov/boli/whd/oregonminimumwage_eng_2014.pdf). We have used one-third of claimant's weekly benefit amount, or \$161 to determine the extent to which she was entitled to receive benefits because it exceeded the minimum wage calculation. For week 27-14, claimant's benefit amount was calculated as follows: \$379.27 earned less \$161 = \$218.27; \$485 less \$218.27 = \$266 in benefits to which claimant was entitled; \$424 in benefits paid less correct benefit amount of \$266 = \$158 in benefits overpaid.

<sup>3</sup> For week 30-14, claimant's correct benefit amount was calculated as follows under ORS 657.150(6): \$291.08 earned less \$161 = \$130.08; \$485 less \$130.08 = \$354.92 in benefits to which claimant was entitled; \$424 in benefits paid less correct benefit amount of \$354.92 = \$69 in benefits overpaid.

she was providing incorrect earnings information to the Department. Claimant is liable to repay \$1,554 benefits to the Department or to have them deducted from any future employment benefits otherwise payable to her.

**DECISION:** Hearing Decision 15-UI-32088 is modified, as outlined above.

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

**DATE of Service:** March 12, 2015

**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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