

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0185**

*Affirmed*  
*Overpayment and Penalties*

**PROCEDURAL HISTORY:** On January 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant made willful misrepresentations to obtain benefits and assessing a \$1,987 overpayment, a \$596.10 monetary penalty and 15 penalty weeks. On January 8, 2015, claimant filed a timely request for hearing. On January 12, 2015, the Department issued notice of an amended administrative decision concluding claimant made willful misrepresentations to obtain benefits and assessing a \$2,341 overpayment, a \$702.30 monetary penalty and 18 penalty weeks. On February 3, 2015, ALJ Triana conducted a hearing at which the employer did not appear, and on February 6, 2014 issued Hearing Decision 15-UI-33110, affirming the Department's amended overpayment decision. On February 20, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Claimant filed his first claim for unemployment benefits on December 20, 2012 and received benefits under this claim from week 51-12 through week 08-13. During those weeks, claimant accurately reported his earnings from employment and the weekly benefit amounts that he was paid were reduced to reflect his earnings.

(2) On August 6, 2014, claimant filed another claim for unemployment benefits. This claim was determined valid with a weekly benefit amount of \$295. The maximum benefit amount in effect when claimant filed his claim was \$549. Claimant claimed and was paid benefits during the weeks of August 17, 2014 through November 15, 2014 and December 14, 2014 through December 27, 2014 (weeks 34-14 through 46-14 and weeks 51-14 through 52-14), the weeks at issue.

(3) On August 14, 2014, Trinity Baptist Church hired claimant as a maintenance technician. From August 14, 2014 through October 31, 2014 (including weeks at issue 34-14 through 44-14), claimant worked 25 hours per week for the employer and earned \$10 per hour, for weekly gross earnings of \$250. From November 1, 2014 through December 27, 2014 (including weeks at issue 45-14 through 46-14 and weeks 51-14 and 52-14), claimant continued to work 25 hours per week for the employer, but earned \$11 per hour for gross weekly earnings of \$275 per week.

(4) During the weeks at issue, claimant filed his weekly claims using his cell phone and the Department's automated voice recognition system. For weeks 34-14 through 43-14, the automated claimant system asked claimant to report whether he received vacation or holiday pay and, if so, to state the number of hours that he worked and his gross earnings before deductions. Exhibit 1 at 10. Claimant answered "no" that he had not worked during any of those weeks and that he had no earnings. He did not supply information about his earnings from the employer. *Id.* During each of the weeks of 34-14 through 43-14, the Department paid to claimant weekly benefits in the amount \$295. For week 44-14, when he made his weekly claim, claimant reported earnings in the amount of \$80, although he had gross earnings of \$250. On November 6, 2014, claimant called the Department and told a representative that he had not reported correct earnings during week 44-14, and his reported earnings should be adjusted to reflect that he received \$136.50 in pay. Since the Department had already paid claimant full benefits for that week, on November 10, 2014, it issued an overpayment decision to claimant assessing a \$39 overpayment for week 44-14.<sup>1</sup>

(5) When claimant made his claim for week 45-14, claimant reported earnings in the amount of \$50, although he had gross earnings of \$275. For week 46-14, claimant reported earnings of \$90, when he had gross earnings of \$275. For week 51-14, claimant reported earnings of \$98 and for week 52-14 reported earnings of \$98.02, although he had gross earnings in each of these weeks of \$275. During each of those weeks, the Department paid weekly benefits to claimant in the amount of \$295. For all of the weeks at issue, the Department paid to claimant total benefits in the amount of \$2,341.

(6) During each of the weeks at issue, the Department would not have paid claimant \$295 in benefits if claimant had provided accurate information about his earnings.

**CONCLUSIONS AND REASONS:** Claimant willfully failed to report earnings to receive benefits to which he was not entitled. Claimant was overpaid \$2,341 in benefits and is liable for a monetary penalty of \$702.30 and is disqualified from future benefits otherwise payable to him for a period of 18 weeks. Claimant is liable to pay to the Department the amounts of the overpayment and the monetary penalty or to have those amounts deducted from any future unemployment benefits otherwise payable to him.

**The Overpayment.** ORS 657.150(6) states that an individual who has employment in any week shall have that individual's weekly benefits amount reduced by the amount of the earnings paid or payable to him exceeds ten times the state hourly minimum wage or one-third of the individual's weekly benefit amount. ORS 657.310(1) states that an individual who receives any benefits to which the individual is not entitled because the individual, regardless of the individual's knowledge or intent, made or caused to be made a false statement of a material fact, is liable to repay the amount of the benefits overpaid or to have the amount of those overpaid benefits deducted from any future benefits otherwise payable to the individual.

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<sup>1</sup> We take notice of this fact, which is contained in Employment Department records. Any party who objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record at EAB.

Although claimant's testimony was, at times, confusing and difficult to follow, he did not appear to dispute the accuracy of the earnings that the employer stated to the Department that he actually earned during the weeks at issue. Audio at ~12:00, ~13:49, ~14:54, ~16:50, ~26:43, ~27:08. Nor did he dispute that, if he earned the amount that the employer stated, and if he incorrectly reported that amount to the Department, he received an overpayment of benefits. Although claimant asserted that he only received weekly benefit payments in the net amount of somewhere between \$100 and \$160, it is significant he did not dispute that the benefit amounts directly paid to him were reduced by federal and state tax withholdings as well as a withholding to satisfy a child support obligation. Audio at ~42:50. Given the lack of specificity with which claimant challenged the Department's evidence that the gross amount of the taxable benefits paid to claimant was actually \$295 per week, it appears most likely that claimant was paid gross benefits of \$295 per week, which were appropriately reduced by the amounts of the withholdings to reflect a lesser net amounts directly paid to him. Based on the testimony at hearing, the information that the Department had about the earnings that claimant reported during the weeks at issue, the information that the employer provided to the Department about claimant's earnings, the correct benefit amounts that claimant should have been paid and the amount of the benefits overpaid to claimant are set out below:

| <u>Week</u> | <u>Claimant Earnings Reported</u> | <u>Employer Earnings Reported</u> | <u>Benefit s Paid</u> | <u>Correct Benefit Amount</u> | <u>Benefits Overpaid</u> |
|-------------|-----------------------------------|-----------------------------------|-----------------------|-------------------------------|--------------------------|
| 34-14       | \$0                               | \$250                             | \$295                 | \$143 <sup>2</sup>            | \$152                    |
| 35-14       | \$0                               | \$250                             | \$295                 | \$143                         | \$152                    |
| 36-14       | \$0                               | \$250                             | \$295                 | \$143                         | \$152                    |
| 37-14       | \$0                               | \$250                             | \$295                 | \$143                         | \$152                    |
| 38-14       | \$0                               | \$250                             | \$295                 | \$143                         | \$152                    |
| 39-14       | \$0                               | \$250                             | \$295                 | \$143                         | \$152                    |
| 40-14       | \$0                               | \$250                             | \$295                 | \$143                         | \$152                    |
| 41-14       | \$0                               | \$250                             | \$295                 | \$143                         | \$152                    |
| 42-14       | \$0                               | \$250                             | \$295                 | \$143                         | \$152                    |
| 43-14       | \$0                               | \$250                             | \$295                 | \$143                         | \$152                    |
| 44-14       | \$80                              | \$250                             | \$295                 | \$143                         | \$113 <sup>3</sup>       |
| 45-14       | \$50                              | \$275                             | \$295                 | \$118                         | \$177 <sup>4</sup>       |
| 46-14       | \$90                              | \$275                             | \$295                 | \$118                         | \$177                    |

<sup>2</sup> Applying ORS 657.150(6), ten times the state weekly minimum wage was \$91 (10 x \$9.10) and one-third of claimant's weekly benefit amount was \$98 (295÷3), so \$98 is the greater amount. [http://www.oregon.gov/boli/whd/docs/oregonminimumwage\\_eng\\_2014.pdf](http://www.oregon.gov/boli/whd/docs/oregonminimumwage_eng_2014.pdf). \$250 in earnings less \$98=\$152 in earnings exceeding one-third of the weekly benefit amount; \$295 less \$152=\$143, the correct benefit amount. \$295 in benefits paid less \$143=\$152 in overpaid benefits.

<sup>3</sup> After benefits to claimant were paid for week 44-14, claimant adjusted his reported earnings upward to \$136.50 and the Department issued an overpayment decision of \$39 based on his failure to report \$56.50 in earnings to this week (\$136.50-\$80 = \$56.50). Performing the calculation set out in ORS 657.150(6), claimant should have been paid \$152 for this week; \$152 less the assessed overpayment of \$39=\$113 remaining overpaid.

<sup>4</sup> Applying ORS 657.150(6), \$275 in earnings less \$98=\$177; \$295 less \$152=\$143, the correct benefit amount. \$295 in benefits paid less \$118=\$177 in overpaid benefits.

| <u>Week</u>   | <u>Claimant Earnings Reported</u> | <u>Employer Earnings Reported</u> | <u>Benefit s Paid</u> | <u>Correct Benefit Amount</u> | <u>Benefits Overpaid</u> |
|---------------|-----------------------------------|-----------------------------------|-----------------------|-------------------------------|--------------------------|
| 51-14         | \$98                              | \$275                             | \$295                 | \$118                         | \$177                    |
| 52-14         | <u>\$98.05</u>                    | <u>\$275</u>                      | <u>\$295</u>          | <u>\$118</u>                  | <u>\$177</u>             |
| <b>Totals</b> | <b>\$416.05</b>                   | <b>\$3,850</b>                    | <b>\$4,425</b>        | <b>\$2,070</b>                | <b>\$2,341</b>           |

Because claimant did not provide the Department correct information about his earnings, claimant was overpaid \$2,341 in benefits. Regardless of claimant's knowledge or intent in providing incorrect information to the Department, and despite the fact that claimant might not have known that he was providing incorrect information, claimant is liable to repay those overpaid benefits to the Department or to have the amount of those benefits deducted from any future benefits otherwise payable to him.

**Misrepresentation.** ORS 657.215 and ORS 657.310(2), read together, state that an individual who has willfully made false statements or willfully omitted to report a material fact to obtain any benefits is subject to a monetary penalty as well as a period of disqualification from future benefits otherwise payable to him. OAR 471-030-0052(7) (February 23, 2014) states that where the misrepresentations or omissions relate to an individual's failure to accurately report work or earnings, the monetary penalty assessed is based on the number of occurrences of misrepresentation, and each misrepresentation constitutes a separate occurrence.

In this case, it can be logically inferred from claimant's failure to report any earnings for the first ten of the weeks at issue that he was intentionally failing to report these earnings to avoid a reduction in the weekly benefits that were paid to him. This inference is strengthened by the fact that claimant had a prior unemployment claim during which time he had accurately reported his earnings and, presumably, had his weekly benefit payments reduced. While claimant denied that he had prior claims, when the ALJ asked claimant pointedly about the testimony of the Department's witness that he had such a prior claim, claimant first stated that he did not consider any prior claims he might have had "really relevant" to the issues at hearing and then, after the ALJ questioned him further, he stated over and over that he "did not know" whether he had such a prior claim before flatly and finally denying that he had any prior claims where he accurately reported his earnings. Audio at ~39:23, ~39:40, ~40:40, ~41:26, ~41:32, ~41:46. By the sequence of claimant's responses, first evading the ALJ's questions, then pleading a lack of recollection and then, when pinned down, baldly denying that such a prior claim had ever existed, claimant's denial did not appear credible or persuasive. Moreover, claimant's repeated contentions that he reported his earnings to the Department during each of the weeks at issue and that the cell phone on which he made his weekly claims must have persistently malfunctioned for the fifteen weeks at issue when he tried to enter his earnings, was not plausible. Audio at ~37:14. It is highly unlikely that for the first ten weeks of his reporting the Department's automated system would register that an unbroken string of affirmative reports that he had no earnings and then, for inexplicable reasons, would suddenly and spontaneously report varying amounts of earnings that were far below those that the employer reported. Exhibit 1 at 10, Exhibit 2 at 4. Finally, claimant's testimony about reporting his earnings was rambling and confused, first stating that he accurately reported his earnings, then stating that he tried to correct the earnings that reported to the Department at least ten times, then stating that he did not understand the operation of the Department's reporting system and then making the incredible statement

that he made his weekly claims reports in accordance with the advice of an unknown Department representative, which was that, to calculate the correct amount of his earnings, claimant should multiply his hourly wage "by 50 or something." Audio at ~28:02, ~31:51, ~34:00. Claimant's testimony was so far beyond any logical explanation for the earnings that he reported or did not report, it cannot be given credence. Weighing the reliable evidence in the record and drawing the most likely inferences from it, it appears that claimant knew from reporting earnings under his prior claim in 2012 that if he accurately reported earnings during the weeks at issue his weekly benefit amount would be markedly reduced, and he knowingly and willfully did not report any income for the first ten of the weeks at issue, and then beginning during week 44-14, he began reporting some earnings, but in amounts that he knew were far less than his actual earnings in order to continue to receive inflated amounts of weekly benefits. The preponderance of the evidence is that claimant willfully under-reported his actual earnings during the weeks at issue for the purpose of obtaining a greater amount of benefits than he was entitled to receive.

Claimant willfully misrepresented his earnings during each of the fifteen weeks at issue. Each week that he made misrepresentations is counted as a separate occurrence. OAR 471-020-0152(7). OAR 471-030-0052(7)(d) provides that for seven or more occurrences of misrepresentation within five years of the occurrence for which a penalty is being assessed, the appropriate penalty is 30 percent of the total amount of the benefits the individual received to which the individual was not entitled. 30 percent of the \$2,341 that claimant was overpaid is \$702.30. Claimant is liable to repay this monetary penalty or to have the amount of this penalty deducted from any future benefits otherwise payable to him.

Because claimant made willful misrepresentations about his earnings to obtain benefits, claimant is also subject to a penalty disqualification from future benefits that he would otherwise be entitled to receive. ORS 657.215. The formula to determine the length of the penalty period is set out in OAR 471-030-0052(1)(a). Applying that formula to claimant's circumstances, the total amount of the overpaid benefits (\$2,341) is divided by the maximum weekly benefit amount in effect during the first effective week of the initial claim in effect when claimant made his misrepresentations (\$549), rounding up to the nearest two decimal places (4.26), multiplying that result by four (17.04) and rounding up to the nearest whole number (18). As a penalty, claimant is disqualified from 18 weeks of future benefits otherwise payable to him.

In sum, claimant was overpaid \$2,341 in benefits and he is liable to repay that amount to the Department or to have that amount deducted from future benefits otherwise payable to him. Claimant is also assessed a monetary penalty in the amount of \$702.30, which he is liable to pay to the Department or to have that amount deducted from any future benefits otherwise payable to him. Claimant is further assessed as a penalty a disqualification from 18 weeks of future benefits.

**DECISION:** Hearing Decision 15-UI-33110 is affirmed.

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

**DATE of Service:** April 8, 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 Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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