

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0256

Affirmed
Overpayment and Penalties

PROCEDURAL HISTORY: On September 16, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during each of the weeks from July 6, 2014 through September 6, 2014 (weeks 28-14 through 36-14) (decision # 132236). Claimant filed a timely request for hearing. On November 6, 2014, ALJ R. Davis conducted a hearing at which claimant appeared and presented evidence, and on November 13, 2014, issued Hearing Decision 14-UI-28671, concluding claimant did not actively seek work during each of the weeks from July 6, 2014 through August 30, 2014 (weeks 28-14 through 35-14). On December 3, 2014, Hearing Decision 14-UI-28671 became final without an application for review having been filed.

On December 9, 2014, the Department served notice of another administrative decision assessing a \$1,260.00 overpayment, a \$378.00 monetary penalty and 17 penalty weeks based in part on Hearing Decision 14-UI-28671 (decision # 201622). Claimant filed a timely request for hearing. On February 13, 2015, ALJ Monroe conducted a hearing, and on February 20, 2015, issued Hearing Decision 15-UI-33796, affirming decision # 201622. On March 10, 2015, claimant filed an application for review of Hearing Decision 15-UI-33796 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) First Student Management LLC employed claimant as a bus driver from approximately 2009 through 2014. Claimant generally worked only during the school year.

(2) On June 23, 2014, claimant filed an initial claim for unemployment insurance benefits. When claimant filed her initial claim, a Department representative advised her that to be eligible for benefits, she had to actively seek work during each week claimed which meant she had to engage in “five work seeking activities with two of those being direct contacts with employers who may hire her.” Transcript at 5. Claimant’s weekly benefit amount was \$126. The maximum benefit amount in effect at the time was \$538.

(3) Claimant claimed and received regular benefits for the weeks including July 13 through September 20, 2014 (weeks 29-14 through 38-14). These are the weeks at issue.

(4) During each of the weeks including July 13 through August 30, 2014 (weeks 29-14 through 35-14), claimant contacted her employer about work but did not contact any other potential employers. Claimant returned to work for the employer on or about September 2, 2014. During each of the weeks including August 31 through September 20, 2014 (weeks 36-14 through 38-14), claimant worked for the employer approximately 20 to 25 hours and earned at least \$375 in wages.

(5) When filing each of her weekly claims for benefits, claimant reported that she had actively sought work, had not worked any hours for any employer, had not generated any earnings and certified that her reports were accurate. Exhibit 1. Claimant knew that her reports were not accurate when she filed her benefit claims. Her false reports of her work search efforts and hours and earnings were made for the purpose of obtaining benefits. Based upon claimant's weekly certifications that her reports were accurate, the Department paid claimant \$1260 in benefits to which she was not entitled.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant was overpaid and must repay the Department \$1,260 in regular benefits, is liable for a \$378 monetary penalty, and as an additional penalty, is disqualified from receiving future benefits for a period of 17 weeks.

Overpayment. 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.*

In Hearing Decision 14-UI-28671, issued prior to the overpayment decision, the ALJ concluded that claimant did not actively seek work during each of the weeks including July 13 through August 30, 2014 (weeks 29-14 through 35-14), and was ineligible to receive benefits for those weeks. On December 3, 2014, that decision became final without an application for review having been filed by claimant. Therefore, as a matter of law, claimant was not entitled to receive the \$882 (\$126 x 7) in regular benefits she received for those weeks. Claimant's reports to the Department when filing her benefit claims, that she actively sought work during those weeks, also were false as a matter of law, and caused her to receive the \$882 in regular benefits to which she was not entitled. Regardless of claimant's knowledge or intent, she is liable under ORS 657.310(1) to either repay the \$882 in regular benefits or have that amount deducted from any future benefits otherwise payable to her under ORS chapter 657.

Only "unemployed" individuals are eligible for benefits. ORS 657.150(1). An individual is not "unemployed," and, therefore, ineligible for benefits, in any week in which her (or his) earnings exceed her weekly benefit amount. *See* ORS 657.100(1). A claimant is responsible for furnishing the Department with the information required for correctly processing the claim, including "current work activity and earnings." OAR 471-030-0025 (December 16, 1985). The information required may include the amount of time devoted to the work activity and the gross amount of remuneration or wages, including tips, received or expected to be received. *Id.*; OAR 471-030-0017 (1)(c) (July 12, 2007). Remuneration for services provided to an employer shall be allocated to the week in which the services

were performed. OAR 471-030-0017 (3). An eligible individual who has employment in any week claimed shall have her (or his) 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. ORS 657.150(1).

With regard to her benefit claims for the weeks including August 31 through September 20, 2014 (weeks 36-14 through 38-14), claimant did not dispute that she worked for the employer and earned at least \$375 in wages during each of those weeks. Exhibit 1. Because, under ORS 657.150(1), claimant's weekly minimum earnings of at least \$375 exceeded her weekly benefit amount of \$126, claimant was not unemployed, and not eligible for benefits for any of those weeks. Based upon claimant's false weekly certifications to the Department that she had not worked or generated any earnings, claimant received \$378 (\$126 x 3) in regular benefits to which she was not entitled. Regardless of claimant's knowledge or intent, she is liable under ORS 657.310(1) to either repay the \$378 in regular benefits or have that amount also deducted from any future benefits otherwise payable to her under ORS chapter 657.

Misrepresentation and Penalties. An individual who willfully makes a false statement or misrepresentation, or willfully fails to report a material fact to obtain benefits, may be disqualified from benefits for a period not to exceed 52 weeks. ORS 657.215. The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052 (February 23, 2014). In addition, an individual who has been disqualified from benefits under ORS 657.215 for making a willful misrepresentation, and who has seven or more "occurrences" within five years, is liable for a penalty in an amount equal to 30 percent of the total amount of benefits the individual received but was not entitled to receive. ORS 657.310(2); OAR 471-030-0052(7). An occurrence shall be counted each time an individual willfully makes a false statement or representation, or willfully fails to report a material fact to obtain benefits. OAR 471-030-0052(7).

At hearing, claimant asserted that the reason she certified to the Department that she actively sought work during weeks 29-14 through 35-14 and had no work or earnings during weeks 36-14 through 38-14 was that she was inexperienced in claiming benefits and received bad advice from her union representative. Transcript at 16-20. However, claimant did not dispute that when she was interviewed by a Department representative on September 16, 2014, she told the representative that she had not yet returned to work for the employer although she was working for the employer that very week and had earned over \$400 from the employer during each of the two previous weeks. Exhibit 1. Because claimant misrepresented facts concerning her benefits eligibility to the Department at an earlier stage of this proceeding, we did not consider her a credible witness at hearing. Moreover, despite having been specifically advised by the Department on January 23, 2014 what it meant to "actively seek work," and knowing she had worked and generated earnings during some weeks, claimant repeatedly provided false answers to questions about those issues when she filed her benefit claims. More likely than not, claimant willfully made false statements about her work searches and failed to report material facts about her hours and earnings to the Department in order to obtain benefits, rather than because of inexperience or bad advice, and is liable for penalties under ORS 657.215.

When the disqualifying acts under 657.215 relate to both the provisions of ORS 657.155 (other than work or earnings) and a failure to accurately report work and/or earnings, the number of weeks of disqualification shall be the number of weeks calculated in the manner set forth in subsection (a) plus

the number of weeks in which a disqualifying act(s) occurred relating to the provisions of 657.155 (other than work and earnings). OAR 471-030-0052(1)(e). OAR 471-030-0052(1)(a) provides that the number of penalty weeks is calculated by dividing the total overpayment (\$1,260) 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 acts (\$538), rounding to the nearest two decimal places (2.34), multiplying the result by four (9.36), and rounding the result up to the nearest whole number (10). Claimant also falsely represented that she had actively sought work under ORS 657.155 during each of the seven weeks from July 13 through August 30, 2014. Accordingly, claimant is disqualified from future unemployment insurance benefits for a period of 17 weeks (10 + 7). Claimant is also liable for a monetary penalty equal to 30 percent of the overpaid benefits because, each time she falsely reported that she actively sought work or had not worked or generated earnings during the 10 weeks from week 29-14 to week 38-14, claimant made a false statement to the Department that counted as an "occurrence" for purposes of determining the penalty percentage for which she is liable. Because claimant had seven or more occurrences within five years, she is liable for a penalty of 30 percent of the total overpayment amount. Thirty percent of \$1,260 is \$378, making claimant's total repayment liability \$1,638.

In sum, claimant was overpaid and must repay the Department \$1,260 in regular benefits, is liable for a \$378 monetary penalty, and is disqualified from receiving future benefits for 17 weeks.

DECISION: Hearing Decision 15-UI-33796 is affirmed.

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

DATE of Service: April 30, 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. 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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