

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0436**

*Affirmed*  
*Overpayment and Penalties*

**PROCEDURAL HISTORY:** On February 19, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision (#194359) assessing a \$3,472 overpayment, a \$1041.60 monetary penalty and 26 penalty weeks. Claimant filed a timely request for a hearing. On April 2, 2015, ALJ Frank conducted a hearing, and on April 9, 2015, issued Hearing Decision 15-UI-26625, affirming the administrative decision. On April 17, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

At the April 2, 2015 hearing, ALJ Frank admitted documents submitted by the Department into the record as Exhibit 1. Audio at 7:24. However, the ALJ did not mark the exhibit. Accordingly, we have marked Exhibit 1 based on the ALJ's description. Exhibit 1 consists of 40 pages and contains the following materials: administrative decision #194359, the schedule of adjustments attached to and made a part of that decision, a January 30, 2015 letter and schedule of adjustments the Department sent to claimant, claimant's response to the January 30 letter, a "BPC1 Prorate Worksheet," a Department Benefit Earnings Audit filled out by O'Reilly Auto Parts, a February 4, 2015 memorandum regarding claimant's earnings addressed to the Department, paystubs for claimant's paychecks from O'Reilly Auto Parts for the period April 1 through October 25 2014, documents entitled "Paystub Detail" for claimant's paychecks from O'Reilly Auto Parts for the period October 26, 2014 through January 17, 2015, a February 14, 2013 "Notice to Obligor of Order to Withhold Income from Unemployment Compensation Benefits" sent to claimant by the Oregon Department of Justice, and a "Proposed Order" from Jefferson County Circuit Court regarding claimant's child support obligation, copy of an envelope addressed to the Oregon Employment Department (the return address is illegible), a list of "Weekly Claim Certification Questions" from the Department, a list of claimant's responses to claim certification questions for weeks 16/14 through 43/14.

**FINDINGS OF FACT:** (1) On February 20, 2014, claimant filed an initial claim for unemployment insurance benefits, with a weekly benefit amount of \$246. The maximum weekly benefit amount in effect at the time claimant filed was \$538.

(2) Claimant filed weekly online claims for benefits for the period April 12 through October 25, 2014 (weeks 15/14 through 43/14), the weeks at issue. Each week he filed his claim, claimant was asked to report any hours worked and his gross earnings for the week claimed. Based on the instructions he received for filing his claim, and his experience in filing six prior unemployment insurance claims, claimant knew he needed to accurately report any hours worked and any gross earnings for each week claimed. Audio at 16:30 and 27:57; Exhibit 1.

(3) During each of the weeks at issue, claimant worked part-time for O'Reilly Auto Parts, the employer. Claimant failed to accurately report his earnings from the employer and was overpaid benefits in the following amounts during the weeks at issue:

Weeks	Claimant Reported Earnings	Employer Reported Earnings	Benefits Paid	Correct Benefit Amount	Amount Overpaid
15/14	\$200.20	\$218.14	\$136	\$118	\$ 18
16/14	\$209.30	\$245.70	\$127	\$ 91	\$ 36
17/14	\$200.20	\$233.43	\$136	\$ 0	\$136
18/14	\$200.20	\$233.43	\$136	\$103	\$ 33
19/14	\$209.30	\$256.08	\$127	\$ 0	\$127
20/14	\$200.20	\$218.40	\$136	\$118	\$ 18
21/14	\$200.20	\$304.85	\$136	\$ 0	\$136
22/14	\$200.20	\$284.38	\$136	\$ 0	\$136
23/14	\$191.20	\$227.50	\$145	\$109	\$ 36
24/14	\$182.00	\$247.98	\$155	\$ 0	\$155
25/14	\$182.00	\$266.13	\$155	\$ 0	\$155
26/14	\$182.00	\$220.68	\$155	\$116	\$ 39
27/15	\$182.00	\$257.08	\$155	\$ 0	\$155
28/14	\$182.00	\$261.63	\$155	\$ 0	\$155
29/14	\$182.00	\$279.83	\$155	\$ 0	\$155
30/14	\$172.90	\$259.35	\$164	\$ 0	\$164
31/14	\$182.00	\$247.98	\$155	\$ 0	\$155
32/14	\$172.90	\$254.80	\$164	\$ 0	\$164
33/14	\$182.00	\$261.39	\$155	\$ 0	\$155
34/14	\$172.90	\$241.15	\$164	\$ 95	\$ 69
35/14	\$172.90	\$248.22	\$164	\$ 0	\$164
36/14	\$172.90	\$283.25	\$164	\$ 0	\$164
37/14	\$172.90	\$318.52	\$164	\$ 0	\$164
38/14	\$163.80	\$241.15	\$173	\$ 95	\$ 78
39/14	\$163.80	\$268.45	\$173	\$ 0	\$173
40/14	\$127.40	\$250.25	\$209	\$ 0	\$209
41/14	\$163.80	\$507.63	\$173	\$ 0	\$173
42/14	\$163.80	\$268.45	\$173	\$ 0	\$173
43/14	\$109.20	\$225.23	\$ 88	\$111	\$ -23

**Total Benefits Overpaid: \$3,472**

(Exhibit 1, Schedule of Adjustments)

(4) The Department audited claimant's unemployment claim, and obtained a report of claimant's earnings during the weeks at issue from the employer. On January 30, 2015, the Department sent claimant a form which included a record of these earnings, and a questionnaire in which claimant was asked whether the employer's information about his earnings was accurate. In his February 4, 2015 response to this letter, claimant stated that the information about his earnings was not correct. With his response, claimant included a list of net earnings from the employer and copies of his biweekly paycheck stubs for some of the weeks at issue. (Exhibit 1).

**Conclusion and Reasons:** Claimant had earnings which affected his weekly benefit amount, was overpaid \$3,472 in weekly benefits that he must repay, is disqualified for 26 weeks of future benefits, and subject to a \$1041.60 monetary penalty.

**Overpayment.** An individual is not “unemployed,” and therefore not eligible for benefits, for any week in which the remuneration paid or payable to the individual for services performed during the week is greater than the individual’s weekly benefit amount. *See* ORS 657.100(1), ORS 657.150(6), ORS 657.155(1)(f). 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). 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.*

Here, claimant earned more than his \$246 weekly benefit amount during weeks 17/14, 19/14, 21/14, 22/14, 24/14, 25/14, 27/14 through 33/14, 35/14 through 37/14, and 39/14 through 42/14. Claimant was thus not unemployed, is not eligible for benefits during those weeks, and was overpaid \$3,168 during these weeks. (Finding of Fact 2). For the remaining weeks at issue – 15/14, 16/14, 18/14, 20/14, 23/14, 26/14, 34/14, 38/14 – claimant’s weekly benefit amounts must be reduced by the amount of earnings he received that exceeds the greater of ten times the minimum hourly wage (\$91) or one-third of his weekly benefit amount (\$82). ORS 657.150(6). Applying this formula, we conclude that claimant was overpaid benefits in the amount of \$327 for the weeks in which his benefits must be reduced by the amount of earnings he received that exceeded \$91. Claimant was thus overpaid a total of \$3,472<sup>1</sup> in benefits during the weeks at issue. Regardless of claimant’s knowledge or intent when he misreported his earnings to the Department, he is liable to either repay the benefits or have the \$3,472 deducted from any future benefits otherwise payable to him under ORS chapter 657.

**Misrepresentation.** An individual who willfully makes a false statement or misrepresentation, or willfully fails to report a material fact to obtain benefits, may be disqualified for 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 for 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 to which the individual was not entitled to receive. ORS 657.310(2); OAR 471-030-0052(7)(d). 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).

Claimant provided no plausible explanation why he failed to accurately report his earnings. In his February 4, 2015, response to the Department questionnaire, he provided a list of his net earnings from the employer for some of the weeks at issue, apparently suggesting that he may have mistakenly listed net and not gross earnings when he filed his weekly claims. (Exhibit 1). The amounts claimant listed as his net earnings do not match the weekly earnings he reported to the Department when he filed his claims, however, contradicting any assertion by claimant that his inaccurate reports may have resulted from a good faith mistake. At hearing, claimant testified that he thought he was allowed to claim a certain number of hours before it would affect his benefits; when asked to explain specifically what he meant by this statement, he was unable to do so. Audio at 26:34. He also testified that he wrote down hours worked for the employer on a calendar, but was unable to provide any testimony about this calendar, such as what he recorded in it and where it was presently located. Audio

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<sup>1</sup> The total amount of benefits which claimant was overpaid – \$3,495 – is reduced by \$23, the amount of benefits claimant was underpaid in week 43-14.

29:01. We also note that claimant made no mention of this calendar in his February 4, 2015 response to the Department questionnaire. Claimant admitted that he underreported at least some of the hours worked for the employer, but asserted that he did not believe the figures of either the employer or the Department regarding his work hours and earnings were correct. Audio at 32:11. Other than his testimony that the information supplied by the Department and employer might not be correct, claimant offered no other evidence of any such errors. Given claimant's understanding that he was required to accurately report work and earnings, his failure to provide any credible or reasonable explanation for his failure to do so, and his admission that he underreported at least some of his earnings, we conclude that claimant willfully failed to accurately report his earnings to obtain benefits.

Based on claimant's willful misrepresentations to the Department to obtain benefits, he is subject to penalty weeks. ORS 657.215. Under OAR 471-030-0052(1)(a) (February 23, 2014), the number of penalty weeks is determined by dividing the total number of benefits overpaid (\$3,472) by the maximum weekly benefit amount in effect during the first effective week of the claim (\$538), rounding the result off to the nearest two decimal places (6.45), then multiplying the result by four and rounding the result up to the nearest whole number (26).

Claimant is also liable for a monetary penalty. For the seventh or greater occurrence within 5 years of the occurrence for which a penalty is being assessed, the monetary penalty is 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). Each week claimant failed to accurately report his work hours and earnings during the 29 weeks at issue is considered a separate "occurrence" for purposes of determining the monetary penalty for which he is liable. Thirty percent of \$3,472 is \$1,041.60. Claimant's total repayment liability is therefore \$4513.60.

Claimant was overpaid benefits he was not entitled to receive and must repay \$3,472 in benefits, is liable for a \$1,041.60 monetary penalty, and is disqualified from benefits for 26 weeks.

**DECISION:** Hearing Decision 15-UI-36625 is affirmed.

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, *pro tempore*, not participating.

**DATE of Service: June 15, 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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