

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0521**

*Modified*  
*Overpayment, No Penalties*

**PROCEDURAL HISTORY:** On March 11, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision assessing an \$11,037 overpayment, \$3,311.10 monetary penalty, and 52 penalty weeks (decision # 204431). Claimant filed a timely request for hearing. On April 8, 2015 and April 28, 2015, ALJ Triana conducted a hearing, and on April 30, 2015 issued Hearing Decision 15-UI-37705, concluding claimant was an employee rather than an independent contractor during the weeks at issue and affirming the Department's decision. On May 6, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) On February 16, 2014, claimant filed an initial claim for unemployment insurance benefits, with a weekly benefit amount of \$538.

(2) In 2012, the Department determined claimant was an employee, and not an independent contractor for purposes of unemployment benefits insurance. The Department did not, at that time, advise claimant how to report his earnings to the Department. Clear Signal Inc. continued to issue claimant a Form 1099 each year, and not a Form W-2, to report his earnings.

(3) During the weeks at issue, claimant worked for Clear Signal Inc. as a satellite installation technician. Clear Signal Inc. required claimant to maintain his own contractor's license and bond. Clear Signal Inc. required claimant to follow a schedule, and did not permit him to schedule other work on days he was scheduled to work for Clear Signal Inc. Claimant had to ask for permission to take time off from work for vacation or illness, and had to wear a uniform directed by Clear Signal Inc. and attend bi-weekly mandatory trainings. Clear Signal Inc. did not permit claimant to display advertising on the truck he used for work, or take anyone in the vehicle with him while he worked.

(4) Claimant did not control the amount of remuneration he received from Clear Signal Inc., the work assignments, or the assignment locations. Claimant was paid a flat fee per job for Clear Signal Inc., and was occasionally paid bonuses. If Clear Signal Inc. sent other installers to repair or redo claimant's work, it sometimes subtracted bonuses and job fees that it had already paid claimant from future

earnings. Transcript (April 8, 2015) at 40-41. Claimant used his own vehicle and paid for gasoline to travel for work, and regularly traveled more than 100 miles per day for work. Exhibit 2. Clear Signal Inc. required claimant to purchase the installation equipment and supplies he used from Clear Signal Inc.

(5) Claimant filed weekly online claims for unemployment insurance benefits for the period February 23 through August 30, 2014 (weeks 9/14 through 35/14), the weeks at issue. Each week he filed his claim, the Department asked claimant to report the hours he worked and the wages he received for the week claimed. For each week at issue, claimant reported an average of his estimated earnings after subtracting his work expenses, including mileage, automobile repairs, and the cost of tools and equipment necessary to install and repair DISH antennas and receivers provided by Clear Signal Inc.

(6) All claimant's wages during the weeks at issue were from Clear Signal Inc. Claimant reported wages, had gross earnings, and was paid benefits in the following amounts during the weeks at issue, and, as a result, was overpaid benefits totaling \$11,037 in the following amounts:

<b><u>Week No.</u></b>	<b><u>Claimant Reported Wages</u></b>	<b><u>Claimant's Gross Earnings</u></b>	<b><u>Benefits Paid</u></b>	<b><u>Correct Benefit Amount</u></b>	<b><u>Amount Overpaid</u></b>
09/14	\$240	\$735	\$477	\$0	\$477
10/14	\$240	\$730	\$477	\$0	\$477
11/14	\$200	\$1010	\$517	\$0	\$517
12/14	\$0	\$290	\$538	\$427	\$111
13/14	\$80	\$287	\$538	\$430	\$108
14/14	\$140	\$875	\$538	\$0	\$538
15/14	\$120	\$260	\$538	\$457	\$81
16/14	\$140	\$690	\$538	\$0	\$538
17/14	\$140	\$770	\$538	\$0	\$538
18/14	\$140	\$1020	\$538	\$0	\$538
19/14	\$140	\$613	\$538	\$0	\$538
20/14	\$120	\$375	\$538	\$342	\$196
21/14	\$140	\$790	\$538	\$0	\$538
22/14	\$140	\$515	\$538	\$202	\$336
23/14	\$120	\$565	\$538	\$0	\$538
24/14	\$140	\$887	\$538	\$0	\$538
25/14	\$140	\$820	\$538	\$0	\$538
26/14	\$140	\$430	\$538	\$287	\$251
27/14	\$140	\$445	\$538	\$272	\$266
28/14	\$140	\$460	\$538	\$257	\$281
29/14	\$140	\$550	\$538	\$0	\$538
30/14	\$140	\$830	\$538	\$0	\$538
31/14	\$140	\$758	\$538	\$0	\$538
32/14	\$140	\$910	\$538	\$0	\$538
33/14	\$140	\$440	\$538	\$277	\$261
34/14	\$140	\$880	\$538	\$0	\$538
35/14	\$140	\$865	\$143	\$0	\$143

Exhibit 1, Schedule of Adjustments.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant was an employee of Clear Signal, Inc. and that claimant received remuneration during all the weeks at issue that reduced or eliminated his weekly benefit amount. Claimant received \$11,037 in unemployment insurance benefits to which he was not entitled. He is liable to repay those benefits or have them withheld from future benefits. However, claimant is not subject to penalty weeks or a monetary penalty.

**Claimant's Employment Status.** ORS 657.040(1) provides that services performed by an individual for remuneration are deemed to be employment subject to Chapter 657 unless and until it is shown that the individual is an independent contractor, as that term is defined in ORS 670.600. ORS 670.600(2) provides, in relevant part, that "independent contractor" means a person who provides services for remuneration and who, in the provision of the services, is free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results, and is customarily engaged in an independently established business.

With respect to the "direction and control" test, OAR 471-031-0181(3)(a)(C) (February 1, 2007) states that "free from direction and control" means that the independent contractor is free from the right of another person to control the means or manner by which the independent contractor provides services. If the person for whom services are provided has the right to control the means or manner of providing the services, it does not matter whether that person actually exercises the right of control. *Id.* OAR 471-031-0181(3)(a)(B) states that "manner" is the method by which services are performed. To be free from direction and control over the manner of providing services an independent contractor must determine how to perform the work. *Id.* Depending upon the nature of the business, examples of the "manner" by which services are performed include such things as work processes and procedures, among other things. *Id.* Specifying the final desired results of the contractor's services does not constitute direction and control over the manner of providing those services. OAR 471-031-0181(3)(b).

ORS 670.600(3) provides that a person is customarily engaged in an independently established business if any three of the following requirements are met: the person maintains a business location that is separate from the business or work location of the person for whom the services are provided, or that is in a portion of the person's residence and that portion is used primarily for the business; the person bears the risk of loss related to the business or the provision of services as shown by factors such as, the person enters into fixed-price contracts, is required to correct defective work, warrants the services provided, or negotiates indemnification agreements or purchases liability insurance, performance bonds or errors and omissions insurance; the person provides contracted services for two or more different persons within a 12-month period, or the person routinely engages in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services; the person makes a significant investment in the business, through means such as purchasing tools or equipment necessary to provide the services, paying for the premises or facilities where the services are provided, or paying for licenses, certificates or specialized training required to provide the services; the person has the authority to hire other persons to provide or to assist in providing the services and has the authority to fire those persons.

It is unnecessary to determine whether claimant was customarily engaged in an independently established business because the record shows he was not free from the direction and control of Clear Signal Inc. Claimant was subject to Clear Signal Inc.'s direction and control over the manner in which he scheduled, performed, and advertised its services, and the supplies he used for the work. Because claimant was not free from Clear Signal Inc.'s direction and control over the manner of providing services, he was not an independent contractor as defined by ORS 670.600(2) and OAR 471-031-0181(3). Under ORS 657.040(1), the services performed by claimant therefore are deemed employment, and claimant provided services to Clear Signal Inc. as an employee.

**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.*

In the present case, claimant earned more than one-third his weekly benefit amount of \$538, but less than \$538, during weeks 12/14, 13/14, 15/14, 20/14, 22/14, 26/14 through 28/14, and 33/14. Claimant’s benefit amount for each of those weeks was therefore subject to reduction by the amount of his earnings that exceeded one-third his weekly benefit amount for each of those weeks. Claimant earned more than \$538 during all the other weeks at issue, and was therefore not “unemployed” during those weeks or entitled to benefits for those weeks. Because claimant underreported his earnings for every week at issue, claimant was overpaid benefits every week at issue, for a total overpayment of \$11,037. Regardless of claimant’s knowledge or intent, he is liable to either repay the benefits or have the \$11,037 deducted from any future benefits otherwise payable to him under ORS chapter 657.

**Misrepresentation.** 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).

In Hearing Decision 15-UI-37705, the ALJ concluded that during the weeks at issue, claimant engaged in willful misrepresentation or willfully omitted facts to obtain benefits.<sup>1</sup> Finding that claimant was not credible based on his demeanor at hearing, and the manner in which he failed to answer questions and allegedly attempted to “divert attention away from his acts” by testifying about how the employer treated him, the ALJ was not persuaded by claimant’s testimony that he tried to accurately report his earnings, but had to estimate them based on the confusing manner in which the employer paid him, and his understanding that he could deduct his work expenses from his earnings.<sup>2</sup> Transcript (April 8, 2015) at 62-63.

However, we disagree with the ALJ’s credibility determination and conclude the Department failed to show that claimant’s false statements to the Department regarding his weekly earnings were made willfully. Claimant’s assertion that he averaged his earnings based on the information he had available to him regarding his earnings and expenses was plausible given his confusion about his status as an independent contractor or employee. Claimant’s confusion was reasonable based on how the employer treated him, statements made to him by the Department about his status as an independently established business, and his experience reporting his earnings to social service agencies. *See* Transcript (April 8, 2015) at 63-64, Transcript (April 28, 2015) at 6. Claimant’s testimony about his employer’s actions were not attempts to “divert attention,” but, rather, claimant’s attempts to explain why he did not have the earnings information necessary to accurately report his earnings each week. On this record, the evidence that claimant falsely reported his earnings to obtain benefits was no more than equally balanced. Consequently, the Department failed to establish that claimant is subject to penalty weeks under ORS 657.215 or a monetary penalty under ORS 657.310(2).

**DECISION:** Hearing Decision 15-UI-37705 is modified, as outlined above.

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

**DATE of Service:** June 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](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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<sup>1</sup> Hearing Decision 15-UI-37705 at 11.

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