

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0662

Reversed
No Overpayment, No Penalties

PROCEDURAL HISTORY: On April 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$742 overpayment, \$111.30 monetary penalty and 6 penalty weeks (decision # 195251). Claimant filed a timely request for hearing. On May 11, 2015, ALJ R. Davis conducted a hearing, and on May 14, 2015 issued Hearing Decision 15-UI-38530, affirming the Department's decision. On June 2, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

The ALJ held the record open after the May 11, 2015 hearing so that claimant could submit additional evidence. The ALJ instructed claimant that, in order for his evidence to be considered, he must mail the evidence to the Office of Administrative Hearings (OAH) within two days, and explained that meant the envelope had to be postmarked by May 13, 2015. OAH received claimant's evidence on May 18, 2015. The envelope in which the evidence was mailed was not postmarked; however, first class mail sent from Vancouver, Washington to Salem, Oregon generally takes approximately one to three days for delivery.¹ It is unlikely that a document mailed May 13, 2015 would take five days to be delivered. Therefore, we conclude that claimant did not submit his additional evidence within the period designated by ALJ Davis, and the ALJ did not err by failing to hold the record open long enough to receive it.

FINDINGS OF FACT: (1) On September 30, 2013, claimant filed an initial claim for benefits. His weekly benefit amount was \$371.

¹ <https://www.usps.com/ship/mail-shipping-services.htm>

(2) Express Employment Professionals, a temporary agency, employed claimant during the period surrounding the weeks at issue. The employer reported to the Department that claimant's rate of pay was \$12.00 per hour. Claimant sometimes worked Sundays. Express Employment Professionals paid claimant based on a Monday through Sunday workweek.

(3) Claimant claimed benefits for the week ending August 2, 2014. Claimant reported to the Department that he earned \$14.00 that week. The Department allocated waiting week credit to claimant based on that report. Claimant's employer reported to the Department that claimant's gross earnings were \$416.50, and his net earnings were \$27.55.

(4) Claimant claimed benefits for the week ending August 9, 2014. Neither he nor his employer reported any work or earnings that week. The Department paid claimant \$371 based on claimant's report.

(5) Claimant claimed benefits for the week ending September 13, 2014. Claimant reported to the Department that he had no work or earnings that week. The Department paid claimant \$371 based on his report. Claimant's employer reported to the Department that claimant worked 40.5 hours and earned \$489 for that week.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant is not liable for an overpayment, penalty weeks or a monetary penalty.

Overpayment. Only unemployed individuals may be eligible for unemployment insurance benefits. See ORS 657.155(1). Individuals are "unemployed" in any week in which he performs no services and expects no remuneration, or in any week of less than full-time work if the remuneration paid or payable is less than the individual's weekly benefit amount. ORS 657.100(1). An eligible individual who is employed in any week will have the weekly benefit amount reduced by the amount of earnings paid or payable that exceeds the greater of ten times the minimum 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.*

The Department paid benefits to claimant, or assigned waiting week credit, for each of the weeks at issue. Therefore, the Department has the burden to prove by a preponderance of the evidence that benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In Hearing Decision 15-UI-38530, the ALJ found as fact that claimant "earned \$416.30" the week ending August 2, 2014, "earned \$489.00" the week ending September 13, 2014, and was not eligible for

benefits or waiting week credit during those weeks.² The ALJ also concluded that claimant was overpaid benefits for the week ending August 9, 2014, reasoning that although claimant was eligible for benefits based on his lack of work or earnings that week, he should have been allocated waiting week credit that week instead of being paid benefits.³ We disagree that the preponderance of the evidence in the record supports those findings.

The Department's evidence of claimant's earnings for the week ending August 2, 2014 consisted of an earnings audit report the employer provided to the Department listing claimant's gross wages as \$416.50, and his net earnings as \$27.55.⁴ Claimant's bank statements show a direct deposit from the employer of \$27.55.⁵ Claimant had the usual payroll deductions and a garnishment. However, it is unlikely that those sorts of deductions would cause an almost 94% reduction between claimant's gross income and net paycheck, and the Department failed to identify a plausible reason for the discrepancy. Absent a plausible explanation for the discrepancy between claimant's gross earnings and net pay, we must conclude that the employer's earnings audit report is unreliable. We cannot conclude on the basis of the information available in the record that claimant's gross earnings for the week ending August 2, 2014 exceeded his weekly benefit amount, or that a \$27.55 net paycheck resulted from gross earnings that exceeded either ten times the minimum wage or one-third claimant's weekly benefit amount such that his weekly benefit amount would be subject to reduction. Accordingly, we conclude that the Department failed to prove by a preponderance of the evidence that claimant was not eligible for his full weekly benefit amount or waiting week credit for the week ending August 2, 2014.

The only basis for the Department's allegation that claimant was overpaid during the week ending August 9, 2014 was its conclusion, which we have reversed, that claimant was not eligible for waiting week credit the previous week. During the week ending August 9, 2014, the record shows that claimant had no work or earnings, and, having served his waiting week during the previous week, claimant was eligible to receive his full benefit amount during the week ending August 9, 2014. The Department paid claimant \$371, and claimant was entitled to receive it. Therefore, he was not overpaid for the week ending August 9, 2014.

The Department's evidence that claimant "earned \$489" for the week ending September 13, 2014 consisted of an earnings audit report the employer provided to the Department.⁶ That report was the basis for the Department's, and the ALJ's, conclusions that claimant was not entitled to receive any portion of his weekly benefit amount, and was overpaid \$371. However, the employer's pay period weeks upon which its report to the Department was based ended on a Sunday, and do not correspond to the Department's benefit weeks, which end on a Saturday. Because claimant worked some Sundays, when the employer reported to the Department that claimant earned \$489, that report may have omitted earnings that the employer allocated to the previous pay period, and may have included earnings that the Department should have allocated to the following pay period. The employer also reported to the

² Hearing Decision 15-UI-38530 at 2.

³ *Id.*

⁴ Exhibit 2.

⁵ Exhibit 1.

⁶ Exhibit 2.

Department that claimant worked 40.5 hours during the week ending September 13, 2014, and reported his gross earnings as \$489, which factors out to an hourly wage of \$12.07. That does not correspond with the employer's report to the Department that claimant earned \$12.00 per hour. Therefore, we must conclude that either the employer's report of claimant's hours, earnings or rate of pay were inaccurate, and its report to the Department was unreliable and cannot form the basis of a conclusion as to how many hours claimant worked or what his gross earnings were during the week at issue.

Finally, claimant is only ineligible for benefits in any week he earned more than his weekly benefit amount. If he earned less than that during the week ending September 13, 2015, his weekly benefit amount would only be subject to a reduction by the amount of his earnings that exceeded either ten times the minimum wage or one-third his weekly benefit amount, leaving some portion of his weekly benefit amount potentially payable. Based on the discrepancies between the employer's pay period weeks and the Department's benefit weeks, coupled with the fact that the employer's weekly earnings report does not correspond to its report about claimant's hourly wage, the record does not support a finding that claimant's earnings during the week ending September 13, 2015 exceeded his weekly benefit amount. As such, while it is possible that claimant's weekly benefit amount was subject to some amount of reduction during the week ending September 13, 2015, the preponderance of the evidence in the record will not support the conclusion that claimant was overpaid by any particular amount for that week, much less that he was overpaid \$371.

Misrepresentation. ORS 657.215 provides that, whenever the Department finds that an individual "has willfully made a false statement or misrepresentation, or willfully failed to report a material fact, to obtain any benefits," then he "is disqualified for benefits for a period not to exceed 52 weeks." OAR 471-030-0052 sets forth the Department's equations for calculating the length of the penalty disqualification period.

The ALJ concluded that claimant made a willful misrepresentation by failing to accurately report his earnings, reasoning that, based on the "large discrepancy" between the amounts of wages he and the employer reported to the Department, and because "[c]laimant did not provide tangible persuasive evidence that the employer's income figures were incorrect," the ALJ was "persuaded that claimant willfully made the false statements . . . in order to obtain benefits."⁷ We disagree.

First, as previously noted, claimant did not have the burden of proof or persuasion in this matter, the Department did, so it's immaterial to this analysis that claimant failed to provide "tangible persuasive evidence" that the employer's figures were incorrect. Rather, it was the Department's burden to prove that the figures were correct. Given the discrepancies in the Department's evidence already identified in this decision, and the Department's inability to reconcile them, we have concluded that the employer's evidence of claimant's income was unreliable.

There was a \$13 discrepancy between the earnings claimant reported to the Department for the week ending August 2, 2014 and the net amount the employer deposited into his bank account, and, likely, a slightly larger discrepancy between claimant's report and his gross earnings. However, claimant's confusion at the time over whether he should report gross or net earnings, and the fact that the discrepancy was so small and did not make any difference in his eligibility for benefits that week, tend

⁷ Hearing Decision 15-UI-38530 at 6.

to show that claimant did not misreport his earnings willfully or to obtain benefits he was not otherwise entitled to receive.

There was also, likely, a discrepancy between claimant's earnings report for the week ending September 13, 2014 and the employer's earnings report. However, the actual amount of the discrepancy cannot be identified because the employer's report was not reliable, and the record fails to identify the basis of whatever discrepancy there was. Regardless, this record shows that claimant had at least one week in which he made an accurate report to the Department, and, when questioned about the accuracy of the earnings reports at issue claimant candidly provided copies of bank statements to substantiate his report, behavior which is inconsistent with that of an individual who had intentionally provided false information to the Department to obtain benefits he was not entitled to receive. Given claimant's transparency, while it is possible, if not likely, that claimant did not accurately report his earnings to the Department for the week ending September 13, 2014, the record fails to show that claimant's inaccurate report was done willfully or for the purpose of obtaining benefits. We therefore conclude that claimant did not make a willful misrepresentation, and is not liable for any penalty disqualification weeks.

In sum, on the evidence in this record, the Department failed to prove by a preponderance of the evidence that claimant was overpaid or liable for penalties.

DECISION: Hearing Decision 15-UI-38530 is set aside, as outlined above.

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

DATE of Service: July 21, 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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