

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0773**

*Modified*  
*Overpayment, No Penalties*

**PROCEDURAL HISTORY:** On April 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant made willful misrepresentations to obtain benefits and assessing a \$628 overpayment, a \$188.40 monetary penalty and five penalty weeks. Claimant filed a timely request for hearing. On June 1, 2015, ALJ Murdock conducted a hearing at which the employer did not appear, and on June 4, 2015 issued Hearing Decision 15-UI-39557, affirming the Department's decision. On June 24, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted three written arguments to EAB, the first was received on June 26, 2015, the second on July 14, 2015 and the third on July 17, 2015. None of the written arguments included a statement that it was provided to the other parties appearing at hearing as required by OAR 471-041-0080(2) (October 29, 2006). For this reason, EAB did not consider claimant's written arguments when reaching this decision.

**FINDINGS OF FACT:** (1) On August 20, 2014, claimant filed an initial claim for unemployment insurance benefits. The claim was determined valid with a weekly benefit amount of \$195. Claimant claimed benefits for the weeks of August 17, 2014 through January 3, 2015 (weeks 34-14 through 53-14). The weeks at issue are week 35-14, weeks 40-14 through 41-14 and weeks 43-14 through 53-14.

(2) Claimant was diagnosed several years ago with dyslexia and astigmatism. These conditions make it difficult for claimant to read, to comprehend the intended meaning of written materials and to correctly respond to written questions. Beginning in approximately 2012, claimant noticed that she was experiencing increased difficulties in understanding the intentions of written and oral communications.

(3) During the weeks at issue, Express Employment Professionals employed claimant. Claimant worked approximately three to five hours per week and her hourly wage was \$33.

(4) During the weeks at issue, claimant claimed unemployment benefits each week online. The Department's online written weekly claim report required claimant to enter the hours that she had

worked during that week. Transcript at 8. The weekly claim report also required claimant to enter the “gross earnings,” before deductions (including vacation and holiday pay), that she was going to receive for any work that she performed during that week. Transcript at 8. In her claim reports for weeks 36-14 through 39-14, which were not part of the weeks at issue, claimant entered the hours that she worked on the Department’s claim report, as the report asked her to do. Claimant thought that the question in the report about her “gross earnings” was intended to have her enter her gross hourly wage, and that the Department was going to calculate itself her weekly earnings by multiplying the number of work hours she reported by her hourly wage. For those weeks, claimant entered her hourly wage as her “gross earnings.” Claimant continued to enter her \$33 gross hourly wage as her earnings for weeks 40-14 through 41-14 and 43-14 through 48-14, which were part of the weeks at issue.

(5) On November 24, 2014 (during week 48-14), the Department sent claimant a letter notifying her that there was a discrepancy between the number of hours she reported that she had worked during week 47-14 and the earnings she reported for that week. After claimant received this letter, sometime after November 24, 2014, she reviewed the questions in the Department’s online weekly claim report as she prepared the claims report for week 49-14. During this review, claimant read the question in the claim report about earnings to mean that the Department wanted her to enter her pay for all of the hours that she worked during the claim week and not only her hourly wage. Claimant concluded that the Department had changed the question from what it had been during the previous weeks. Transcript at 16. For weeks 49-14 through 53-14, claimant reported her gross earnings for all of her hours of employment during each week.

(6) During the weeks at issue, the hours that claimant reported, the earnings that claimant and the employer reported, the benefits the Department paid to claimant, the correct benefit amount based on the earnings that the employer reported and the amount of benefits overpaid or underpaid to claimant are set out below:

<b>Week</b>	<b>Hours Claimant Reported</b>	<b>Earnings Claimant Reported</b>	<b>Earnings Employer Reported</b>	<b>Benefits Paid</b>	<b>Correct Benefit Amount</b>	<b>Benefits Overpaid/Underpaid</b>
35-14	N/A	\$115.50	\$123.75	\$170	\$162	\$8 <sup>1</sup>

<sup>1</sup> Week 35-14 is used as an example of the calculation used to determine claimant’s correct benefit amount and the amount of benefits she was overpaid. ORS 657.150(6) states that an unemployed individual who works in any week shall have her benefits reduced by the amount of her earnings that exceed whichever is the greater of ten times the state minimum wage or one-third the individual’s weekly benefit. One-third of claimant’s weekly benefit amount of \$195 was \$65 and ten times the Oregon minimum wage of \$9.10 per hour in 2014 was \$91, which required reducing her benefits by the extent that her earnings in that week exceeded \$91 to determine the correct benefit amount.

[http://www.oregon.gov/boli/WHD/pages/minimum\\_wage\\_aspx](http://www.oregon.gov/boli/WHD/pages/minimum_wage_aspx). The extent to which the \$123.75 in earnings reported by the employer exceeded \$91 is \$32.72, which was the amount by which claimant’s weekly benefits should have been reduced to account for her earnings. \$195 (claimant’s benefit amount) less \$32.75 equals \$162.75, which was the correct benefit she should have been paid, rounded down was \$162. \$170 (benefits paid) less \$162 (correct benefit amount) equals \$8 in benefits overpaid for week 35-14.

<u>Week</u>	<u>Hours Claimant Reported</u>	<u>Earnings Claimant Reported</u>	<u>Earnings Employer Reported</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Benefits Overpaid/ Underpaid</u>
40-14	4	\$33	\$132	\$195	\$154	\$41
41-14	3	\$33	\$99	\$195	\$187	\$8
43-14	3	\$33	\$198	\$195	\$0	\$195 <sup>2</sup>
44-14	3	\$33	\$99	\$195	\$187	\$8
45-14	3	\$33	\$132	\$195	\$154	\$41
46-14	4	\$33	\$231	\$195	\$0	\$195
47-14	7	\$33	\$99	\$195	\$187	\$8
48-14	3	\$33	\$132	\$195	\$154	\$41
49-14	3	\$99	\$132	\$187	\$154	\$33
50-14	3	\$99	\$165	\$187	\$121	\$66
51-14	3	\$99	\$0	\$187	\$195	-\$8
52-14	33	\$132	\$165	\$154	\$121	\$33
53-14	4	\$132	\$0	\$154	\$195	<u>-\$41</u>

**Total Benefits Overpaid** **\$628**

Exhibit 1 at 3; Exhibit 1 at 8-9.

**CONCLUSIONS AND REASONS:** Claimant was overpaid \$628 in benefits and is liable to repay this amount to the Department or to have this amount deducted from any future benefits otherwise payable to her. Claimant is not subject to any penalty assessments.

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 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). An individual who has been disqualified from benefits under ORS 657.215 is also subject to a period of disqualification from future benefits for a period not to exceed 52 weeks. ORS 657.215.

In Hearing Decision 15-UI-39557, the ALJ concluded that the Department overpaid \$628 in benefits to claimant based principally on claimant’s failure to dispute the accuracy of the earnings figures that the employer reported to the Department for her earnings during the weeks at issue. Hearing Decision 15-UI-39557 at 3. Based on claimant’s testimony at hearing, we agree with the ALJ’s conclusion. *See* Transcript at 14. During the weeks at issue, claimant was overpaid \$628 in benefits which she is liable to repay to the Department or to have deducted from any future benefits otherwise payable to her.

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<sup>2</sup> For week 43-14, the \$198 in earnings the employer reported for claimant exceeded her weekly benefit amount of \$195. ORS 657.100 provides that an individual is not considered “unemployed” in any week where her earnings exceeded her weekly benefit amount. Because claimant was not “unemployed” in this week, her correct benefit amount was \$0.

In Hearing Decision 15-UI-39557, the ALJ also concluded that claimant willfully misrepresented her earnings to the Department in order to obtain benefits and was liable to pay a monetary penalty of \$188.40 and was subject to five weeks of disqualification from future benefits otherwise payable to her. Hearing Decision 15-UI-39557 at 4. The ALJ found that claimant's contention that she misperceived the intent of the weekly claim question about her gross earnings from week 40-14 through week 48-14, and then corrected her method of reporting beginning in week 49-14, was not credible. Hearing Decision 15-UI-39557 at 4. The ALJ also inferred that claimant willfully misrepresented her earnings during weeks 40-14 through 48-14 because she correctly interpreted the import of the Department's question during a single week, 35-14, and, despite claimant's dyslexia and difficulties with cognitive functioning, the ALJ was not persuaded that claimant had initially been confused and did not understand the information that was sought of the question about earnings. Hearing Decision 15-UI-39557 at 5. The ALJ further reasoned that claimant's failure to notify the Department of her initial "error" in understanding the information that was desired in response to the question about earnings after she changed her method of answering that question in week 49-14 also suggested that claimant had a fraudulent intention when she reported her earnings in her weekly claims reports. Hearing Decision 15-UI-39557 at 5. We disagree.

When the Department has paid benefits to a claimant and is seeking to recover them, the Department has the burden to show, more likely than not, claimant was overpaid those benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By logical extension of this principle, when the Department is seeking to assess penalties and to recover them from claimant, it has the burden to show the existence of the facts necessary to support its position. Here, because the Department can assess and recover penalties only if claimant willfully misreported her earnings during the weeks at issue, it has the burden of persuasion as to claimant's willfulness.

Claimant's testimony that she was subject to dyslexia, and was experiencing cognitive impairments that caused her to misperceive the intended import of written materials, such as the weekly claim report, was not disputed at the hearing, and appeared credible. Dyslexia in adults commonly manifests itself as a difficulty in reading and remembering what was read, in remembering and following instructions and in correctly understanding the intent of communications. *See* <http://mayoclinic.org/diseases/-dyslexia/basics/symptoms/con-20021904>; <http://www.learningrx.com/dylexia-symptoms-in-adults-fax.html>. It appears that an individual who was subject to dyslexia, which claimant stated caused her to misperceive the Department's questions on earnings until week 49-14, might well have experienced the difficulties that claimant contended. Absent supporting evidence, of which there is none in the record, we do not agree with the ALJ's inference that it was not credible that a dyslexic person such as claimant would have misunderstood what information was being sought by the Department's question about earnings. Accepting that claimant had dyslexia, no reliable inference may be drawn about claimant's willfulness from only the fact that she stated she misperceived what the ALJ thought was a relatively straightforward question for an unimpaired person.

With the exception of week 35-14, claimant consistently reported her gross earnings on her weekly claim report as \$33, her gross hourly wage, from week 36-14 until week 48-14, when she reviewed the earnings question and then interpreted it to mean that it wanted her to provide her entire earnings for all hours that she had worked during the claim week. Exhibit 1 at 13-14. How or why claimant reported her earnings as she did for week 35-14 was only very briefly addressed at the hearing, and from the ALJ's exchange with claimant about it, no explanation can be discerned one way or the other.

Transcript at 16. Absent additional evidence about week 35-14, no reliable inference can be drawn from it about why it was not consistent with the manner in which claimant otherwise reported her gross hourly wage in an unbroken pattern until week 49-14. That week 35-14 was aberrational is not, in itself, a sufficient basis on which to infer that claimant willfully misreported her income during weeks 40-14 through 48-14.

That claimant did not notify the Department that her understanding of the earnings question in the weekly claims report changed in week 49-14 and her method of reporting her earnings was different beginning in week 49-14, was also not a sufficient basis to allow the ALJ to infer that claimant had willfully misreported her earnings in weeks 40-14 through 53-14. Claimant's testimony was clear that she thought the Department had changed its earnings question in week 49-14, and she did not consider that her prior answers might have been incorrect and based on a misunderstanding of it. Transcript at 15, 18, 20, 22, 23. Given claimant's explanation, there is no reliable basis on which to infer that her failure to notify the Department of ostensible prior errors in her reporting was circumstantial evidence of willful misreporting. Viewing the evidence as a whole, claimant consistently misreported her gross earnings for weeks 36-14 through 48-14 as her gross hourly wage, supporting that she was innocently misunderstanding the information that was sought by the earnings question. Beginning in week 49-14, claimant started to report the weekly gross earnings that she expected to receive from the employer for her work during the claims week. Although the earnings that claimant reported for weeks 49-14 through 53-14 differed somewhat from those that the employer reported, the differences were not generally marked, but plausibly could have resulted from the fact that the employer had a pay week that differed from the Department's claim week, and the employer did not adjust its reporting to accommodate the claim week. *See* Exhibit 1 at 8-9. Moreover, during weeks 49-14 through 53-14, claimant twice reported earnings when the employer did not. Given that the Department did not rule out that the earnings discrepancies resulted from the method of reporting the employer used, and did not offer an explanation for the anomalous result of claimant reporting more earnings for herself than the employer did, the employer did not show that claimant's method of reporting her earnings during weeks 49-14 through 53-14 was the result of a willful misreporting of those earnings.

The Department did not meet its burden to show that claimant willfully misreported her earnings during weeks 35-14 through 53-14. As a result, claimant is not subject to penalties under ORS 657.215 and ORS 657.310(2), and the ALJ erred in assessing a monetary penalty of \$188.40 and five penalty weeks.

**DECISION:** Hearing Decision 15-UI-39557 is modified, as outlined above.

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

**DATE of Service:** August 17, 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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