

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1099**

*Modified*  
*Overpayment, No Penalties*

**PROCEDURAL HISTORY:** On June 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant willfully underreported earnings to obtain benefits, and therefore was overpaid \$9,899 in benefits she is liable to repay, is disqualified for 52 weeks of future benefits, and assessed a \$2,969.70 monetary penalty (decision # 195128). Claimant filed a timely request for hearing. On August 21, 2015, ALJ Murdock conducted a hearing, and on August 28, 2015 issued Hearing Decision 15-UI-43677, affirming the Department's decision. On September 17, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) On September 27, 2013, claimant filed an initial claim for benefits. Claimant claimed benefits for the week of November 17 through 23, 2013 (week 47-13), and the weeks from December 22, 2013 through September 20, 2014 (weeks 52-13 through 38-14). On September 29, 2014, claimant filed another initial claim for benefits. Claimant claimed benefits the weeks from September 28 through October 11, 2014 (weeks 40-14 and 41-14), and the weeks from January 4 through 24, 2015 (weeks 01-15 through 03-15).

(2) During weeks 47-13, 52-13 through 38-14, 40-14 and 41-14, claimant worked as a server for Gators Pub & Eatery LLC, and earned Oregon minimum wage, which was \$9.10 per hour, plus tips. When claiming benefits for each of those weeks, claimant reported earning her gross hourly wages, but not her tips. Based on claimant's failure to report her tips, the Department overpaid her \$9,862 in benefits.

(3) During weeks 01-15 through 03-15, claimant worked for Safeway Stores Inc., and earned Oregon minimum wage, which had increased to \$9.65 per hour. Claimant knew she was earning Oregon minimum wage, but was unaware that it had increased, and mistakenly believed she was earning \$9.10

per hour. When claimant claimed benefits for week 01-15, claimant reported earning \$195. She actually earned \$197.34. When claimant claimed benefits for week 02-15, she reported earning \$279.65. She actually earned \$296.17. When claiming benefits for week 03-15, claimant reported earning \$282. She actually earned \$299.78. Based on claimant's underreported earnings for weeks 01-15 through 03-15, the Department overpaid claimant \$37 in benefits for those weeks.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant underreported earnings and therefore was overpaid \$9,899 in benefits she is liable to either repay have deducted from any future benefits otherwise payable to her under ORS chapter 657. However, we disagree with the ALJ and conclude that claimant did not willfully underreport earnings to obtain benefits, and therefore is not disqualified from further benefits or assessed a monetary penalty.

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). The Department has the burden to establish by a preponderance of evidence that an individual received benefits to which she was not entitled, and that she willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In the present case, the record shows that claimant underreported her earnings for the weeks at issue, and that the Department therefore paid claimant \$9,899 in benefits to which she was not entitled. Claimant therefore is liable to either repay the \$9,899 or have it deducted from any future benefits otherwise payable to her under ORS chapter 657, regardless of her knowledge or intent when claiming benefits. At hearing, claimant testified that she underreported her earnings working for Safeway Stores Inc. during weeks 01-15 through 03-15 because she mistakenly believed she was earning \$9.10 per hour, but actually was earning \$9.65 per hour. Transcript at 25. The Department did not assert or show otherwise, and the ALJ did not decide whether claimant willfully underreported her earnings for weeks 01-15 through 03-15 to obtain benefits.<sup>1</sup> Given claimant's testimony and the small discrepancies between her reported and actual earnings, which resulted in a total over payment of only \$37, the record fails to show claimant willfully underreported her earnings for those weeks.

In Hearing Decision 15-UI-43677, the ALJ found as follows:

6. When claimant claimed the weeks at issue, she was asked to report her gross earnings, which were defined to be the earnings before deductions. The Claimant Handbook was mailed to claimant with her wage and benefits reports each time that she

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<sup>1</sup> See Hearing Decision 15-UI-43677 at 6.

filed the initial claims. The handbook explained that tips were to be included in the gross earnings reported for each week claimed. The handbook information was also accessible on the Department's on-line claim system. Claimant used the on-line claim system to file her weekly claims.

7. Claimant failed to report her earnings from gratuities (tips) from her work with Gator's Pub and Eatery LLC. She knew tips were included as "gross" earnings for income tax purposes. Claimant has experience as a manager.

8. Claimant had been found by the Employment Department, in a prior administrative decision mailed on December 30, 2013, to have willfully misrepresented her earnings and creating an overpayment.<sup>2</sup>

Based on those findings, the ALJ concluded that claimant willfully failed to report the tips she earned working for Gators Pub and Eatery to obtain benefits, reasoning as follows:

Claimant asserted that she did not know she was expected to report her tip income in addition to her regular wages earned at Gator's Pub and Eatery LLC, because she had not received the Claimant Handbook and was not told by an Employment Department representative to do so. However, she did not ask that question specifically of any Department representative and she admitted that she received her wage and benefit reports, which were mailed with the Claimant Handbook. Moreover, the information was accessible on the Department's on-line claim system, which she used to file her weekly claims.

Claimant also asserted that the weekly claim system asked for her "weekly wages," rather than her "gross earnings." I do not find her credible on that point, given that there are other types of earnings or remuneration besides "wages" that are material, by law, to a determination of a claimant's weekly eligibility for benefits. It is not logical that the Department would ask only for "wages" to be reported on weekly claims.

Finally, claimant had been found to have willfully misrepresented her earnings on a prior occasion, which resulted in an overpayment and penalties, and she has experience as a manager and knew that tips were considered part of an employee's gross earnings. I am persuaded that claimant was intelligent and experienced enough to know that she was expected to accurately report her earnings to the Employment Department and that she knew that tips were considered "gross earnings" and should be reported when she filed her weekly claims. She has not credibly established that she unintentionally failed to disclose her tip income each week.<sup>3</sup>

However, the Department had the burden to establish that claimant knew she was required to report her tip income when filing her weekly claims for benefits. That claimant could have asked a Department representative if she was required to do so, had access to the claimant handbook, was asked to report her

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

<sup>3</sup> *Id.* at 4-6.

“gross earnings” and knew tips were considered gross earnings for income tax purposes shows claimant should have known she was required to report her tip income. At hearing, however, claimant testified that she did not know she was required to do so, which is consistent with what she told the Department during its investigation. Transcript at 6, 15-22, 26-29, 39-40. According to claimant, she had never before claimed benefits while working for tips, Department representatives repeatedly instructed her to report her earnings by multiplying her hourly wage by the number of hours she worked, and they never told her to include her tips. Transcript at 15-17, 21-22, 26-27, 29, 39-40. Although the December 30, 2013 administrative decision concluded that claimant had misreported her earning for week 47-13 and prior weeks, the record shows that that was because claimant had allocated wages to the weeks they were received, and not in which they were earned. Transcript 9; Exhibit 1 at 1. The decision is not material to whether claimant knew she was required to report her tip income when claiming benefits for week 47-13 and subsequent weeks at issue.

We find the evidence as the evidence equally balanced as to whether claimant knew she was required to report her tip income when claiming benefits for weeks 47-13, 52-13 through 38-14, 40-14 and 41-14. The Department failed to establish by a preponderance of evidence that claimant willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits for any of the weeks at issue. Claimant therefore is not disqualified from further benefits or assessed a monetary penalty.

**DECISION:** Hearing Decision 15-UI-43677 is modified, as outlined above.

Susan Rossiter and J. S. Cromwell.

**DATE of Service: October 9, 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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