

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1318

Modified
Overpayment and Penalties

PROCEDURAL HISTORY: On September 14, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant made willful misrepresentations to obtain benefits and assessing an overpayment of \$4,339, a monetary penalty of \$1,301.53 and 52 penalty weeks. Claimant filed a timely request for hearing. On October 19, 2015, ALJ Triana conducted a hearing, and on October 23, 2015 issued Hearing Decision 15-UI-46479, modifying the Department's decision and assessing an overpayment of \$3,843, a monetary penalty of \$1,152.90 and 52 penalty weeks. On November 14, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he sought to introduce new facts about the circumstances giving rise to his alleged misreporting of earnings as well as reports from health professionals about his mental state during the weeks in which he allegedly misreported his earnings. The relevance of this new information to the matters at issue is not clear since claimant did not contend in the argument or at hearing that his mental state impaired his ability to accurately report his earnings during the weeks at issue. In addition, according to reports from a mental health professional, claimant reported that he did not have trouble concentrating and one professional evaluated his insight, memory and judgment as "good." Claimant's Argument at 3, 6. These documents do not support a claim that that claimant's mental state interfered with his ability to accurately report his earnings and for that reason are not relevant to this matter. *See* OAR 471-041-0090(1)(October 29, 2006). In addition, claimant did not certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080 (October 29, 2006). For both of the reasons, EAB did not consider claimant's written argument or the new facts and information he sought to present. EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Before December 2013, claimant had received unemployment insurance benefits under six previously filed claims. On December 16, 2013, claimant filed a seventh claim for unemployment insurance benefits. The claim was valid with a weekly benefit amount of \$211. The maximum weekly benefit amount in effect at the time claimant filed this seventh claim was \$538. On and off after December 16, 2013, claimant claimed weekly benefits under this claim.

(2) On February 4, 2013, the Department issued an administrative decision concluding that claimant had made willful misrepresentations or false statements when he did not accurately report earnings during some weeks that he claimed benefits. On February 24, 2013, the Department amended its February 4, 2013 decision but did not change its determination that claimant willfully misreported his earnings to obtain benefits. On March 20, 2013, the amended decision became final without claimant having filed a request for hearing.

(3) Sometime before February 2, 2014, claimant understood the Department expected him to accurately report the gross earnings that he had from employment during each benefit week in order to calculate the weekly benefit amount to which he was entitled. Claimant also understood that he would not receive benefits in any week where his gross earnings from employment exceeded his weekly benefit amount.

(4) On March 5, 2014, Professional Transportation hired claimant as a truck driver. The employer paid claimant \$0.247 for each mile that he drove and \$9.84 per hour for waiting time. While claimant was working and had earnings from the employer, he claimed benefits online for the weeks of March 2, 2014 through August 2, 2014 (weeks 10-14 through 31-14), the weeks at issue. The Department paid claimant benefits for those weeks.

(5) During the weeks at issue, claimant had earnings from the employer. For work performed during the period of March 5, 2014 through March 18, 2014, the employer paid claimant \$265.62 in gross wages. Exhibit 1 at 5. For work performed during the period of March 19, 2014 through April 1, 2014, the employer paid claimant \$454.35. Exhibit 1 at 6. For work performed during the period of April 2, 2014 through April 15, 2014, the employer paid claimant \$652.40 in gross wages. Exhibit 1 at 7. For work performed during the period of April 16, 2014 through April 29, 2014, the employer paid claimant \$562.70. Exhibit 1 at 8. For work performed during the period of April 30, 2014 through May 13, 2014, the employer paid claimant \$831.01 in gross wages. Exhibit 1 at 9. For work performed during the period of May 14, 2014 through May 27, 2014, the employer paid claimant \$776.85 in gross wages. Exhibit 1 at 10. For work performed during the period of May 28, 2014 through June 10, 2014, the employer paid claimant \$661.38 in gross wages. Exhibit 1 at 11. For work performed during the period of June 11, 2014 through June 24, 2014, the employer paid claimant \$461.34 in gross wages. Exhibit 1 at 12. For work performed during the period of June 25, 2014 through July 8, 2014, the employer paid claimant \$479 in gross wages. Exhibit 1 at 13. For work performed during the period of July 9, 2014 through July 22, 2014, the employer paid claimant \$635.16 in gross earnings. Exhibit 1 at 14. For work performed during the period of July 23, 2014 through August 5, 2014, the employer paid claimant \$473.68 in gross wages. Exhibit 1 at 15. Although the calendar days of the employer's work weeks were Wednesdays through Tuesdays, the pay checks that the employer issued to claimant covered the same period as benefit weeks of 10-14 through 31-14.

(6) During the weeks at issue, claimant reported the following gross earnings and hours worked to the Department, and the Department paid claimant the following benefit amounts:

<u>Weeks</u>	<u>Claimant Reported Earnings</u>	<u>Claimant Reported Hours</u>	<u>Benefits Paid</u>
10-14 (3/2-3/8)	\$164	18	\$138
11-14 (3/9-3/15)	\$19	2	\$211
12-14 (3/16-3/22)	\$46	5	\$211
13-14 (3/23-3/29)	\$46	5	\$211
14-14 (3/30-4/5)	\$46	5	\$211
15-14 (4/6-4/12)	\$64	7	\$211
16-14 (4/13-4/19)	\$64	7	\$211
17-14 (4/20-4/26)	\$64	7	\$211
18-14 (4/27-5/3)	\$64	7	\$211
19-14 (5/4-5/10)	\$64	7	\$211
20-14 (5/11-5/17)	\$64	7	\$211
21-14 (5/18-5/24)	\$64	7	\$211
22-14 (5/25-5/31)	\$64	7	\$211
23-14 (6/1-6/7)	\$64	7	\$211
24-14 (6/8-6/14)	\$64	7	\$211
25-14 (6/15-6/21)	\$30	3	\$211
26-14 (6/22-6/28)	\$30	3	\$211
27-14 (6/29-7/5)	\$30	3	\$211
28-14 (7/6-7/12)	\$30	3	\$118
29-14 (7/13-7/19)	\$30	3	\$211
30-14 (7/20-7/26)	\$30	3	\$211
31-14 (7/27-8/2)	\$0	0	\$73
Total Benefits Paid			\$4,338

CONCLUSIONS AND REASONS: Claimant was overpaid \$3,841 in benefits that he is liable to repay or have deducted from any future benefits payable to him. Claimant willfully misrepresented his earnings to obtain these benefits and is assessed a \$1,152.30 monetary penalty and 52 penalty weeks, or weeks in which he is disqualified from receiving future benefits to which he would otherwise be entitled.

The Overpayment. ORS 657.100(1) states that an individual is deemed unemployed only during any weeks in which the remuneration the individual receives for work performed during that week is less than the individual's weekly benefit amount. In other words, in weeks where the remuneration which the individual will receive for work performed during that week exceeds the individual's weekly benefit amount, the individual is not eligible to receive any unemployment insurance benefits. ORS 657.150(6) states that if an individual will receive earnings for work performed on any benefit week that is equal to or less than the individual's weekly benefit amount, the individual's weekly benefit amount shall be reduced by the amount of the earnings paid or payable that exceeds either ten times the state minimum wage or one-third of the individual's weekly benefit amount, whichever is the greater. ORS 657.310(1) provides that if an individual received benefits to which the individual was not entitled because the individual made inaccurate or false representations to the Department, regardless of the individual's knowledge or intent in making those representations, the individual is liable to repay those overpaid

benefits to the Department or have the amount of the overpaid benefits deducted from any future benefits otherwise payable to the individual.

The Department paid claimant weekly benefit amounts during the weeks at issue based on the earnings that he reported. If those earnings amount were inaccurate, even if claimant did not intend to provide incorrect earnings amounts, ORS 657.310(1) requires that he repay those overpaid benefits or have them deducted from future benefits payable to him. At hearing, claimant testified that he could have made errors in the amount of earnings that he reported to the Department during the weeks at issue. Transcript at 26-29, 32. Claimant also ultimately testified that the pay stubs contained in Exhibit 1 likely were accurate statements of his earnings during the weeks for which they were issued. Transcript at 28. Moreover, the pay stubs appear authentic, and there was no suggestion at hearing that they were falsified. Claimant also appeared to agree that the Schedule of Adjustments appended to the administrative decision was accurate about the income and hours that the Department received for him during the weeks at issue. Transcript at 33. We accept the accuracy of these documents.

For purposes of calculating the amount of benefits that claimant was overpaid, the earnings set out in the employer's paystubs were conformed to the Department's benefit weeks. *See* OAR 471-030-0017(4)(d) (July 12, 2007). For example, using the paystub for the period of March 5, 2014 through March 18, 2014, the total pay set for that period (\$265.62) was divided by the 14 days in that pay period to determine claimant's average daily pay for that period, which was \$18.97. Since benefit week 10-14 encompassed March 2, 2014 through March 8, 2014, but claimant did not start working for the employer until March 5, 2014 only four days at an average compensation of \$18.97 fell within benefit week 10-14, or \$75.88 (4 x \$18.97). Benefit week 11-14 encompassed March 9, 2014 through March 15, 2014, all of which fell within the period encompassed by the paystub for March 5, 2014 through March 18, 2014 and for which claimant was imputed to have earned an average of \$18.97 per day. Claimant's pay for benefit week 11-14 was calculated by multiplying claimant's average daily pay of \$18.97 by the seven days in that benefit week for a total of \$132.79. The remaining three days accounted for by the paystub for the period of March 5, 2014 through March 18, 2014, which were March 16, 17, and 18, 2014 fell within benefit week 12-14 that encompassed March 16, 2014 through March 22, 2014, so claimant's earnings during the first three days of that benefit week were calculated an average of \$18.97 per day, or \$56.91. Claimant's earnings during the remaining four days of benefit week 12-14 were determined by taking an average of claimant's daily earnings during the pay period of March 19, 2014 through April 1, 2014, which was an average of \$32.45, and multiplying that average by four to yield a result of \$129.80. Claimant's total earnings for benefit week 12-14 were the sum of \$56.91 and \$129.80, which is \$186.71. The earnings imputed to claimant during other benefit weeks were calculated similarly from the claimant's pay stubs.

Based on these calculations, the benefits that claimant was overpaid during the weeks at issue are set out below:

<u>Weeks</u>	<u>Claimant Reported Earnings</u>	<u>Correct Earnings</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount¹</u>	<u>Benefits Over/Under Paid</u>
10-14 (3/2-3/8)	\$164	\$75.88	\$138	\$211	-\$73
11-14 (3/9-3/15)	\$19	\$132.79	\$211	\$170	\$41
12-14 (3/16-3/22)	\$46	\$186.71	\$211	\$116	\$95
13-14 (3/23-3/29)	\$46	\$227.15	\$211	0	\$211
14-14 (3/30-4/5)	\$46	\$283.75	\$211	0	\$211
15-14 (4/6-4/12)	\$64	\$326.20	\$211	0	\$211
16-14 (4/13-4/19)	\$64	\$300.56	\$211	0	\$211
17-14 (4/20-4/26)	\$64	\$281.33	\$211	0	\$211
18-14 (4/27-5/3)	\$64	\$357.97	\$211	0	\$211
19-14 (5/4-5/10)	\$64	\$415.45	\$211	0	\$211
20-14 (5/11-5/17)	\$64	\$399.97	\$211	0	\$211
21-14 (5/18-5/24)	\$64	\$388.36	\$211	0	\$211
22-14 (5/25-5/31)	\$64	\$355.40	\$211	0	\$211
23-14 (6/1-6/7)	\$64	\$330.68	\$211	0	\$211
25-14 (6/15-6/21)	\$30	\$230.65	\$211	0	\$211
26-14 (6/22-6/28)	\$30	\$235.69	\$211	0	\$211
27-14 (6/29-7/5)	\$30	\$239.47	\$211	0	\$211
28-14 (7/6-7/12)	\$30	\$284.07	\$118	0	\$118
29-14 (7/13-7/19)	\$30	\$317.52	\$211	0	\$211
30-14 (7/20-7/26)	\$30	\$271.40	\$211	0	\$211
31-14 (7/27-8/2)	\$0	\$236.81	\$73	0	<u>\$73</u>
Total Benefits Overpaid					\$3,841

Even if claimant did not know that he was reporting incorrect information about his earnings to the Department, or even if claimant's computer was malfunctioning and unknown to him it was transmitting incorrect information, the Department was nonetheless determining the amount of the benefits he was eligible to receive based on claimant's erroneous report of his income. Because claimant received \$3,841 in benefits to which he was not eligible based on erroneous representations of his earnings, claimant is liable either to repay this amount to the Department or to have it deducted from any future benefits otherwise payable to him.

¹ For all weeks in which claimant's earnings equaled or exceeded his weekly benefit of \$211, his correct benefit amount was zero. See ORS 657.100. For weeks in which claimant's earnings were less than his weekly benefit amount, his correct benefit amounts were calculated under ORS 657.150(6). During the weeks at issue in 2014, the minimum wage was \$9.10 per hour; ten times the minimum wage was \$91.00. See www.oregon.gov/boli/whd/docs/oregonminimumwage_eng_2014.pdf. Since 1/3 of claimant's weekly benefit amount of \$211 was \$70, which is less than \$91, his weekly benefit amounts were required to be reduced by the extent to which his earnings exceeded \$91. Using week 11-14 as an example, the amount that claimant earned which exceeded \$91 was \$41 (132.79 less \$91.) Reducing claimant's weekly benefit amount of \$211 by \$41 yields a correct benefit amount for week 11-14 of \$170. Since claimant was paid benefits of \$211 for that week, he was overpaid \$41 in benefits (\$211 less \$170).

The Penalties. Read together, ORS 657.215 and ORS 657.310(2) provide that if an individual willfully made false statements or misrepresentations, or willfully fails to report material facts in order to obtain benefits, the individual is liable to pay a monetary penalty of at least 15, but not greater than 30 percent of the amount of benefits the individual received to which the individual was not entitled. OAR 471-030-0052(7) (February 23, 2014) states that the percentage applied for purposes determining the amount of the monetary penalty is based on the number of occurrences of misrepresentation that the individual made to obtain benefits. Each time the individual willfully made a false statement or misrepresentation, or willfully failed to report material facts in order to obtain benefits is counted as one occurrence. OAR 471-030-0052(7)(a)-(d) sets out the percentage penalties that apply based on the number of occurrences of misrepresentation that occurred.

Claimant was an experienced recipient of unemployment insurance benefits, given that the weeks at issue occurred during his seventh filed claim, and he knew the Department's reporting requirements when he made his weekly claims. Approximately one year before the weeks at issue, a Department inquiry had concluded that claimant had willfully failed to report accurate information about earnings when he filed claims during those previous weeks and it issued an administrative decision so determining. From this prior decision of the Department, claimant was clearly aware of the importance of reporting accurate earnings information to the Department and the penalties for failing to do so. As well, claimant testified during the hearing to this knowledge and to his awareness that earnings he had during any claim week might reduce or eliminate the benefits he would be paid for that benefit week. Transcript at 35, 36.

Claimant's explanations about why he might have innocently reported inaccurate earnings amounts to the Department for the weeks at issue were conflicting. He first contended that he reported his hours and earning correctly to the Department, but that his computer somehow eliminated the first digit of his reported hours when he intended to report three digit earnings amounts. Transcript at 22, 23, 24. He then contended that it was difficult for him to determine his accurate earnings during any week because his pay was calculated based on his waiting time as well as the miles he drove, suggesting that the earnings he reported might actually not have been correct. Transcript at 27. Each explanation undercuts the reliability of the other. With respect to the first, claimant's contention that his computer malfunctioned and eliminated the first digit in the three digit earnings figures he intended to and thought he was reporting to the Department is implausible. First, it is unlikely that the Department's automated system would register a three digit earnings figure for the first week at issue, week 10-14, and then suddenly and spontaneously his or the Department's system would begin dropping the first digits of the earnings that he reported. Second, it is unlikely that the Department's automated system would, when claimant was asked to verify the correctness of the earnings figures he had entered, show him earnings amounts with three digits and then, somehow, through the interface of his computer with the Department's system, only two digit earnings figures would be recorded in the Department's electronic records. No explanation for such an occurrence is known to us, and the Department's witness testified that she had never heard of such a problem either in the Department's automated system or its interface with a claimant's computer. Transcript at 12. Finally, accepting claimant's explanation, it is unlikely that accurate earnings figures would have ended in 46 for three consecutive weeks (weeks 12-14 through 14-14), 64 for ten consecutive week (weeks 15-14 through 24-14) and 30 for six consecutive weeks (weeks 25-14 through 30-14). While coincidences may occur, it is beyond plausibility that they occurred with the frequency that claimant's explanation requires.

From the frequency with which the same earnings amounts for claimant were recorded in the Department's records for many weeks, it can be inferred that claimant was not trying to report accurate amounts. The consistently large discrepancy between the employer's earnings figures for claimant and the figures that claimant reported, and the high number of incidents during the weeks at issue where the employer's earnings figures show that claimant earned more than his weekly benefit amount and was eligible for no benefits, strongly indicate that claimant was intentionally under-reporting his earnings in order to receive benefits during those weeks in which he was eligible to receive none. On these facts, absent a persuasive explanation from claimant, claimant's misreporting of his earnings could only have been intentional and willful. Since claimant provided no plausible explanation for why he might have reported such conspicuously inaccurate earnings amounts to the Department during the weeks at issue, it is most likely that claimant willfully reported inaccurate earnings amounts to the Department in order to obtain benefits, and he is subject to penalties for this misreporting.

Over the weeks at issue, there were twenty-one occurrences when claimant willfully misrepresented his earnings to obtain benefits (week 11-14 through 31-14.) Applying the standard set forth in OAR 471-030-0052(7)(d), the penalty for seven or more occurrences of misrepresentation within five years of the occurrence for which a penalty is assessed is 30 percent of the total amount of the benefits that claimant received to which he was not entitled. 30 percent of the \$3,841 in benefits that claimant received but was not entitled, is \$1,152.30. Claimant is liable to pay the Department \$1,152.30 as a monetary penalty.

ORS 657.215 states that if an individual willfully made false statements or misrepresentations or willfully failed to report material facts in order to obtain benefits, the individual is disqualified from future benefits for a period not to exceed 52 weeks. OAR 471-030-0052(1)(a) sets out the method for calculating the number of weeks of the penalty disqualification where, as here, claimant failed to accurately report work and earnings. OAR 471-030-0052(2) provides that when claimant had a prior disqualification and the disqualification determination has become final, the period of penalty determined under OAR 471-030-0052(1)(a) is doubled, but it cannot exceed 52 penalty weeks.

Applying OAR 471-030-0052(1)(a), claimant's period of disqualification is calculated as follows: dividing the \$3,841 in total benefits overpaid by \$538, which was the maximum weekly benefit amount in effect during the first week of the initial claimant, yields the result of 7.139, rounding that result off to the nearest two decimal places yields that result of 7.13 and multiplying that result by four yields 28.52 and rounding that result up to the nearest whole number is 29. Applying OAR 471-030-0052(2), doubling the initial penalty period of disqualification yields the result of 58 weeks. However, since the period of disqualification may not exceed a ceiling of 52 weeks, claimant is disqualified from receiving future benefits for a period of 52 weeks.

DECISION: Hearing Decision 15-UI-46479 is modified, as outlined above.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: December 23, 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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