

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1323

Modified
Reduced Overpayment, No Penalties

PROCEDURAL HISTORY: On August 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant willfully underreported earnings to obtain benefits and was overpaid \$5,169 in benefits she is liable to repay, is disqualified for 43 weeks of future benefits, and assessed a \$1,550.70 monetary penalty. Claimant filed a timely request for hearing. On October 5 and 20, 2015, ALJ Seideman conducted a hearing, and on October 21, 2015 issued Hearing Decision 15-UI-46298, concluding that claimant willfully underreported earnings to obtain benefits, but was overpaid \$2,293 in benefits she is liable to repay, was disqualified from 19 weeks of future benefits, and assessed a \$687.97 monetary penalty. On November 6, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. Claimant submitted written argument with her application for review but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) On November 5, 2008, claimant filed an initial claim for benefits. Her weekly benefit amount was \$242. Claimant claimed benefits for weeks from January 11 through September 5, 2009, including weeks 02-09, 11-09, 12-09, 15-09, 16-09, 22-09 and 35-09. For those weeks, claimant correctly reported her earnings and was not overpaid benefits.

(2) On December 7, 2009, claimant filed a new initial claim for benefits. Her new weekly benefit amount was \$124. Claimant claimed benefits for weeks from December 5, 2009 through November 6, 2010, including weeks 48-09 through 51-09, 10-10, 11-10, 14-10 through 22-10, 29-10 through 34-10, 36-10 through 40-10, 44-10 and 47-10.

(3) For week 48-09, claimant underreported her earnings by \$37.50 and received waiting week credit to which she was not entitled. For week 49-09, claimant correctly reported her earnings and was paid \$117 in benefits, although she only was entitled to waiting week credit. For week 50-09, claimant underreported her earnings by \$30 and was overpaid \$117. For week 51-09, claimant correctly reported her earnings and was paid \$149.

(4) For weeks 10-10 and 11-10, claimant correctly reported her earnings and was not overpaid benefits. For week 14-10, claimant over-reported her earnings by \$21 and was underpaid \$92. For weeks 15-10 through 22-10, claimant correctly reported her earnings and was not overpaid benefits.

(5) For weeks 29-10 through 34-10, claimant underreported her earnings by \$2 each week and was overpaid \$2 for each week. In week, 36-10, claimant earned between \$124 and \$224.88, including holiday pay, but reported earning \$120, and was overpaid \$113. For weeks 37-10 through 39-10, claimant underreported her earnings by \$2 each week and was overpaid \$2 for each week.

(6) For week 40-10, claimant correctly reported her earnings and was not overpaid benefits. For week 44-10, claimant underreported her earnings by \$5 and was overpaid \$5. For week 47-10, claimant underreported her earnings by \$10 and was overpaid \$113.

(7) On November 29, 2010, claimant filed a new initial claim for benefits. Her new weekly benefit amount was \$181. Claimant claimed benefits for weeks from December 19, 2010 through October 22, 2011, including weeks 51-10, 02-11 through 05-11, 07-11 through 09-11, 11-11 through 14-11, 33-11, 34-11, 37-11 through 39-11, 41-11 and 42-11.

(8) For week 51-10, claimant correctly reported no earnings and was not overpaid benefits. For week 02-11, claimant underreported her earnings by \$20 and was overpaid \$15 in benefits. For week 03-11, claimant correctly reported her earnings and was not overpaid benefits. For week 04-11, claimant underreported her earnings by \$23.90 and was overpaid \$85. For week 05-11, claimant correctly reported her earnings and was not overpaid benefits.

(9) For weeks 07-11 and 08-11, claimant over-reported her earnings by \$5 each week, and was underpaid \$5 for each week. For week 09-11, claimant underreported her earnings by \$7 and was overpaid \$7. For weeks 11-11 through 14-11, claimant underreported her earnings by \$5 each week and was overpaid \$5 for each week.

(10) For week 33-11, claimant underreported her earnings by \$2.50 and was overpaid \$3. For weeks 34-11 and 37-11 through 39-11, claimant correctly reported her earnings and was not overpaid benefits. For week 41-11, claimant underreported her earnings by \$2 and was overpaid \$2. For week 42-11, claimant correctly reported her earnings and was not overpaid benefits.

(11) On December 5, 2011, claimant filed a new initial claim for benefits. Her new weekly benefit amount was \$140. Claimant claimed benefits for weeks from December 4, 2011 through September 29, 2012, including weeks 49-11, 50-11, 14-12, 19-12, 32-12, 37-12 and 39-12.

(12) For week 49-11, claimant over-reported her earnings by \$120 and was underpaid \$35 in benefits. For weeks 50-11 and 14-12, claimant correctly reported her earnings and was not overpaid benefits. For week 19-12, claimant underreported her earnings by \$13 and was overpaid \$98.

(13) For week 32-12, claimant underreported her earnings by \$22 and was overpaid \$22. For week 37-12, claimant underreported her earnings by \$13 and was overpaid \$98. For week 39-12, claimant underreported her earnings by \$21 and was overpaid \$98.

(14) On November 29, 2012, claimant filed a new initial claim for benefits. Her new weekly benefit amount was \$136. Claimant claimed benefits for weeks from December 16, 2012 through November 23, 2013, including weeks 51-12, 52-12, 15-13, 16-13, 19-13, 23-13, 26-13, 39-13, 41-13, 44-13, 45-13 and 47-13.

(15) For week 51-12, claimant underreported her earnings by \$1.50 and was overpaid \$2 in benefits. In week 52-12, claimant earned between \$200 and \$505.50, but reported earning \$130, and was overpaid \$94. For weeks 15-13 and 16-13, claimant underreported her earnings by \$2 each week and was overpaid \$2 for each week.

(16) For week 19-13, underreported her earnings by \$189.63 and was overpaid \$136. For week 23-13, claimant correctly reported her earnings and was not overpaid benefits. For week 26-13, claimant underreported her earnings by \$1.50 and was overpaid \$1.

(17) For weeks 39-13 and 41-13, claimant correctly reported her earnings and was not overpaid benefits. For week 44-13, claimant correctly reported no earnings and was underpaid \$114. For week 45-13, claimant over-reported her earnings by \$8 and was not overpaid benefits. For week 47-13, claimant correctly reported no earnings and was not overpaid benefits.

(18) On December 4, 2013, claimant filed a new initial claim for benefits. Her new weekly benefit amount was \$126. Claimant claimed benefits for weeks from December 8, 2013 through November 1, 2014, including weeks 50-13 through 01-14, 12-14, 13-14, 15-14, 18-14, 24-14, 26-14 through 28-14, and 39-14 through 44-14.

(19) For weeks 50-13 through 52-13, claimant correctly reported her earnings and was not overpaid benefits. For weeks 01-14 and 12-14, claimant underreported her earnings by \$6 each week and was overpaid \$97 for each week. For week 13-14, claimant underreported her earnings by \$24.20 and was overpaid \$97. For week 15-14, claimant underreported her earnings by \$33 and was overpaid \$97. For week 18-14, claimant over-reported her earnings by \$4.50 and was underpaid \$4.

(20) For week 24-14, claimant underreported her earnings by \$7.21 and was overpaid \$7. For week 26-14, claimant underreported her earnings by \$76.52 and was overpaid \$107. For week 27-14, claimant underreported her earnings by \$18.65 and was overpaid \$10. For week 28-14, claimant underreported her earnings by \$24.21 and was overpaid \$107.

(21) For week 39-14, claimant underreported her earnings by \$89.55 and was overpaid \$97. For weeks 40-14 through 44-14, claimant underreported her earnings by \$6 each week and was overpaid \$97 for each week except 44-14, for which she was overpaid \$62.

(22) On November 25, 2014, claimant filed a new initial claim for benefits. Her new weekly benefit amount was \$128. Claimant claimed benefits for weeks from November 23, 2014 through January 31, 2015, including weeks 48-14 through 02-15, and 04-15.

(23) In week 48-14, claimant earned between \$128 and \$210 including holiday pay, but reported earning \$120, and received waiting week credit. For week 49-14, claimant underreported her earnings by \$.75 and was overpaid \$99 in benefits. For weeks 50-14 through 52-14 and 54-14, claimant underreported her earnings by \$6 each week and was overpaid \$6 for each week.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant underreported earnings and therefore was overpaid benefits that she is liable to either repay or have deducted from any future benefits otherwise payable to her under ORS chapter 657. However, we disagree with the ALJ and conclude that that claimant was overpaid \$2,188, not \$2,293. We also disagree with the ALJ and conclude the Department failed to establish claimant willfully underreport earnings to obtain benefits. Claimant therefore is not disqualified from future benefits or assessed a monetary penalty.

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.* 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).

Overpayment. In the present case, it is undisputed that claimant underreported earnings and therefore was overpaid benefits that she is liable to either repay or have deducted from any future benefits otherwise payable to her under ORS chapter 657. In Hearing Decision 15-UI-46298, the ALJ determined that claimant was overpaid a total of \$2,293.¹ At hearing, however, the Department determined that claimant was overpaid \$2,220. Transcript at 74-75. That determination was based, in part, on the assertion that because claimant mistakenly received waiting week credit for week 48-09, she only was entitled to waiting week credit for week 51-09, and not the \$149 in benefits she received for that week. Transcript at 19-20, 29-30, 32. However, it is undisputed that claimant was eligible for benefits for week 49-09. Claimant therefore was entitled to waiting week credit for week 49-09, and not the \$117 in benefits she received for that week. However, claimant was entitled to receive the \$149 she received for week 51-09. We therefore conclude that claimant was overpaid at total of \$2,188 that she is liable to either repay or have deducted from any future benefits otherwise payable to her under ORS chapter 657.²

Misrepresentation. In Hearing Decision 15-UI-46298, the ALJ concluded claimant willfully underreported earnings to obtain benefits, asserting that she “knew that she was being overpaid and that it was important to report her earnings correctly.”³ However, the record fails to show claimant knew she was being overpaid benefits, or willfully underreported earnings to obtain benefits to which she knew she was not entitled. At hearing, claimant admitted making mistakes when reporting her earnings, but testified that they were not intentional. Transcript at 79. The record shows that of the 97 weeks at issue, claimant over-reported her earnings for 6 weeks, correctly reported her earnings for 38 weeks, and underreported her earning by \$6 or less for 32 weeks. The record also shows that some of claimant’s mistakes likely were due to confusion regarding pay differentials during individual shifts, and the reporting of holiday pay. Transcript at 23-24, 34, 36, 39, 41, 48, 58, 66, 72-73. Absent a basis for determining that claimant was not a credible witness, we find the evidence as to whether she willfully underreported earnings to obtain benefits, at best, equally balanced. The Department therefore failed to meet its burden to establish by a preponderance of evidence that claimant should be disqualified from future benefits, or assessed a monetary penalty.

DECISION: Hearing Decision 15-UI-46298 is modified, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: December 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,

¹ Hearing Decision 15-UI-46298 at 2-3, 5.

² \$2,220 + \$117 - \$149 = \$2,188.

³ Hearing Decision 15-UI-46298 at 4-5.

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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