

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1455

Affirmed
Overpayment and Penalties

PROCEDURAL HISTORY: On October 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision (# 195377) assessing a \$5,934 overpayment, 44 penalty weeks, and a \$1780.20 monetary penalty. Claimant filed a timely request for hearing. On November 23, 2015, ALJ Murdock conducted a hearing, and on November 25, 2015, issued Hearing Decision 15-UI-48449, affirming the administrative decision. On December 3, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On December 23, 2014, claimant filed an initial claim for unemployment benefits. His weekly benefit amount was \$437. The maximum weekly benefit amount in effect at the time was \$549. Claimant claimed benefits from January 25 through May 30, 2015 (weeks 4-15 through 21-15), the weeks at issue.

(2) When claimant filed his initial claim for benefits, he reported that he had been laid off from his position as president of Innovative Construction of Oregon due to a lack of work. When claimant filed his claim for benefits for each of the weeks at issue, he stated that he had not worked during the week for which he was claiming benefits and had no earnings, that he was willing and capable of accepting and reporting for full time, part time or temporary work, and that he was actively looking for work. Based at on these responses, the Department paid claimant \$437 in benefits for each of the weeks at issue.

(3) During the weeks at issue, claimant continued to perform work for Innovation Construction of Oregon. He received a \$1,600 monthly payment from this company during the weeks at issue, and also received a \$450 housing allowance for the months of January, February and March 2015.

CONCLUSIONS AND REASONS: Claimant was overpaid \$5,934 in benefits that he is liable to repay or have deducted from any future benefits payable to him. Claimant willfully misreported his earnings to obtain these benefits and is assessed a \$1,7820.20 monetary penalty and 44 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 his report that he had not worked during those weeks and had no earnings. Although claimant received \$1,600 per month from Innovation Construction Company during the weeks at issue, and also received a \$450 housing allowance for the months of January, February and March, claimant asserted that these payments were not remuneration for work he performed for the company. Instead, claimant contended that these payments constituted distributions of profits earned by the company that he was entitled to receive as a company officer. We disagree, and conclude, as did the ALJ, that it is highly implausible that claimant stopped performing work for the company, and left it under the complete control and oversight of other employees for several months. The check detail provided as part of Exhibit 1 shows that the Innovation Construction purchased materials for numerous construction projects undertaken during the weeks at issue. Given the volume and nature of this business, we find it more likely than not that claimant continued to perform work as an employee for Innovation Construction during the weeks at issue.

Under OAR 471-030-0017(1)(b), when an employee-employer relationship exists, remuneration is defined as all compensation resulting from that relationship. To calculate the amount of benefits claimant was overpaid for each of the weeks at issue, the total remuneration claimant received for the month (\$1,600 monthly payment plus housing allowance, when paid) was divided by the number of days in the month and then multiplied by seven. For example, for week 4/15 (January 24 through 31, 2015), claimant's total monthly remuneration of \$2,050 (\$1,600 payment plus \$450 housing allowance) was divided by 31, resulting in a daily wage of \$66.12 and a weekly wage of \$462.91. Using these calculations, the benefits that claimant was overpaid during the weeks at issue are set out below:

<u>Weeks</u>	<u>Benefits Paid</u>	<u>Earnings</u>	<u>Correct Benefit</u> <u>Amount</u>	<u>Overpayment</u> ¹
4/15	\$437	\$462.91	\$0	\$437
5/15	\$437	\$512.47	\$0	\$437
6/15	\$437	\$512.47	\$0	\$437
7/15	\$437	\$512.47	\$0	\$437
8/15	\$437	\$512.47	\$0	\$437
9/15	\$437	\$462.91	\$0	\$437
10/15	\$437	\$462.91	\$0	\$437
11/15	\$437	\$462.91	\$0	\$437
12/15	\$437	\$462.91	\$0	\$437
13/15	\$437	\$373.31	\$209	\$228
14/15	\$437	\$373.31	\$209	\$228
15/15	\$437	\$373.31	\$209	\$228
16/15	\$437	\$373.31	\$209	\$228
17/15	\$437	\$369.87	\$212	\$225
18/15	\$437	\$361.27	\$221	\$216
19/15	\$437	\$361.27	\$221	\$216
20/15	\$437	\$361.27	\$221	\$216
21/15	\$437	\$361.27	\$221	\$216

Total Overpayment:

\$5,934

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, having filed four claims prior to the one at issue here. Audio at 14:35. As a result, he was well aware of the Department's reporting requirements when he made his weekly claims. Claimant's contention – that he did not willfully misrepresent his lack of work and earnings when he filed his weekly claims because he performed no work for Innovation Construction during the weeks at issue – was not credible. Claimant asserted that he stopped working for the company in December 2014. Audio Recording at 21:43. When the ALJ asked him who ran the company after December, however, claimant did not directly respond, stating only that the bookkeeper and other long term employees knew their jobs. Audio Recording at

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.

23:15. We find it implausible that the bookkeeper was able to run a business that actively engaged in construction projects during the 18 weeks at issue. In addition, claimant provided conflicting explanations regarding the work of Innovation Construction during the weeks at issue. Claimant testified that after December 2014, there was no work for him with the company, even though he also asserted that other employees continued the work of the company from January through May 2015. Audio Recording at 23:15 and 30:07. Because claimant provided no credible explanation why he reported no work or earnings to the Department during the weeks at issue, we conclude it more likely than not that claimant willfully reported inaccurate earnings amounts to the Department in order to obtain benefits. He is therefore subject to penalties for this misreporting.

Over the weeks at issue, claimant willfully misrepresented his earnings to obtain benefits 18 times (weeks 4-15 through 21-15). 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 \$5,934 in benefits that claimant received but was not entitled, is \$1,780.20. Claimant is liable to pay the Department \$1,780.20 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.

Applying OAR 471-030-0052(1)(a), claimant's period of disqualification is calculated as follows: dividing the \$5,934 in total benefits overpaid by \$549, which was the maximum weekly benefit amount in effect during the first week of the initial claim, yields the result of 10.81; multiplying that result by four yields 43.24 and rounding that result up to the nearest whole number is 44. Claimant is disqualified from receiving future benefits for a period of 44 weeks.

DECISION: Hearing Decision 15-UI-48449 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 6, 2016

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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