

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0160

Affirmed
Overpayment and Penalties

PROCEDURAL HISTORY: On September 28, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$25,554 overpayment, a \$7,666.20 monetary penalty and 52 penalty weeks. Claimant filed a timely request for hearing. On January 21, 2016, ALJ R. Frank conducted a hearing, and on January 29, 2016, issued Hearing Decision 16-UI-52010, affirming the Department's decision. On February 16, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On August 27, 2011, claimant filed an initial claim for unemployment insurance benefits. Claimant's weekly benefit amount for this claim was \$370 (BYE 33-12). The maximum weekly benefit amount in effect at the time of claimant's initial claim filing was \$507.

(2) On September 13, 2012, claimant filed another initial claim for unemployment insurance benefit. Claimant's weekly benefit amount on this claim was \$389 (BYE 36-13). On December 19, 2013, claimant filed another initial claim for unemployment insurance benefits that had a weekly benefit amount of \$501 (BYE 50-14). On December 15, 2014, claimant filed another initial claim for unemployment insurance benefits that had a weekly benefit amount of \$365 (BYE 49-15).

(3) Claimant filed weekly claims and received regular benefits for various weeks in 2011, from August 28, 2011 through December 31, 2011 (weeks 35-11 through 52-11); in 2012, from January 1, 2012 to December 29, 2012 (weeks 01-12 through 06-12 and 40-12 through 52-12); in 2013, from December 30, 2012 through March 16, 2013 and December 15, 2013 through December 28, 2013 (weeks 01-13 through 11-13 and 51-13 through 52-13); in 2014, from December 29, 2013 through February 1, 2014, April 6, 2014 through July 5, 2014 and December 21, 2014 through January 3, 2015 (weeks 01-14

through 05-14, 15-14 through 27-14 and 52-14 through 53-14); and in 2015, from January 4, 2015 through July 4, 2015 (weeks 01-15 through 26-15). These are the weeks at issue.

(4) American Public University (APU) and the University of Phoenix (UOP) each employed claimant as a part-time adjunct instructor during the weeks at issue. The classes claimant taught for APU generally lasted eight weeks and the classes claimant taught for UOP generally lasted four weeks. Exhibit 1. Neither employer paid claimant on a weekly basis. APU paid claimant \$130 per student in each class that he taught, and paid him one half of that amount approximately two weeks after the class started and the other half approximately three weeks after the class finished. UOP paid claimant by the class and paid him approximately three weeks after the class finished.

(5) Claimant filed each of his weekly claims for benefits either online or by telephone. When filing each claim, claimant was required to answer the following question, among others: “Did you work last week...?” Exhibit 1. If he answered “Yes” to the question, the claim system required him to enter his work hours and earnings for that week. Transcript at 10-11. If he answered “No” to the question, the claim system did not require any other answers. When claiming benefits for at least 54 of the weeks at issue, claimant answered “No” to the question even though he knew he had worked for one or both employers during the week. When claiming benefits for many of the remaining weeks at issue, claimant answered yes to the question regarding whether he had worked but understated his projected earnings for the week. Claimant understood that his answers to the questions would affect the amount of benefits he would receive for the week and answered the questions as he did to maximize his benefits knowing that “this was all wrong” and “eventually...[he] was gonna have to answer for [his false reports].” Transcript at 28, 33.

(6) As a result of claimant’s failure to report all of his work hours and wages for the weeks at issue, claimant received \$25,554 in regular benefits to which he was not entitled.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. Claimant was paid regular benefits he was not entitled to receive and is liable to repay \$25,554 to the Department or have that amount deducted from future benefits otherwise payable to him. Claimant also is subject to 52 penalty weeks and a \$7,666.20 monetary penalty.

As a preliminary matter, only “unemployed” individuals are eligible for benefits. ORS 657.150(1). An individual is not “unemployed,” and, therefore, ineligible for benefits, in any week in which his earnings exceed his weekly benefit amount. *See* ORS 657.100(1). A claimant is responsible for furnishing the Department with the information required for correctly processing the claim, including “current work activity and earnings.” OAR 471-030-0025 (December 16, 1985). The information required may include the amount of time devoted to the work activity and the gross amount of remuneration or wages, including tips, received or expected to be received. *Id.*; OAR 471-030-0017 (1)(c) (July 12, 2007). Remuneration for services provided to an employer shall be allocated to the week in which the services were performed, or if the dates of service are not clearly established or reasonably estimated by the claimant, allocated equally over the period during which services were rendered. OAR 471-030-0017 (3). An eligible individual who has employment in any week claimed shall have his (or her) weekly benefit amount reduced by the amount of earnings paid or payable that exceeds the greater of ten times the Oregon minimum hourly wage or one-third of his (or her) weekly benefit amount. ORS 657.150(1).

Overpayment. 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.*

Claimant did not dispute the Department's evidence regarding his actual earnings for the weeks at issue or that he failed to accurately report his work hours and the earnings he received or was projected to receive for those weeks when he filed his claims for benefits. As the result of claimant's failure to disclose those material facts, the Department paid claimant a total of \$25,554 in regular benefits he was not entitled to receive. Exhibit 1. Therefore, he must repay that amount or have that amount deducted from any future benefits otherwise payable to him under ORS chapter 657.

Misrepresentation. An individual who willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, also may be disqualified from future benefits for a period not to exceed 52 weeks. ORS 657.215. In addition, an individual who has been disqualified from future benefits under ORS 657.215 for making willful misrepresentations is liable for a monetary penalty in an amount equal to at least 15, but not greater than 30, percent of the amount of the benefits paid as the result of the misrepresentations in question. ORS 657.310(2).

Claimant failed to accurately report material facts concerning his work and earnings when he filed claims for benefits during the weeks at issue. Claimant attempted to explain his actions by asserting that he was confused by his irregular payment schedule. Transcript at 27-34. However, claimant's explanation was inconsistent with undisputed evidence in the record that as early as October 2012 (week 41-12) a Department employee explained to him that he needed to project his hours and earnings for a given week by dividing his expected earnings for an entire class by the number of weeks the class lasted and that even after that explanation was given, he failed to report any hours or earnings for a substantial number of weeks. Transcript at 9. Claimant even admitted that when he failed to accurately report his hours and earnings for the weeks at issue, he knew "this was all wrong" and "eventually...[he] was gonna have to answer for [his false reports]." Transcript at 28, 33; Exhibit 1. More likely than not, claimant willfully withheld material facts regarding his hours and earnings from the Department for the purpose of obtaining benefits which constituted willful misrepresentation.

Penalties. Claimant's willful misrepresentations subject him to a penalty disqualification from future benefits under ORS 657.215 in accordance with the provisions of OAR 471-030-0052 (February 23, 2014). The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052(1)(a). Under OAR 471-030-0052(1)(a), the number of penalty weeks imposed is the result reached by dividing the total overpayment by the maximum Oregon weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the individual's disqualifying act(s), rounding off to the nearest two decimal places, multiplying the result by four and rounding it up to the nearest whole number. Under the cited calculation, \$25,554 (claimant's total overpayment) ÷ \$507 (maximum Oregon weekly benefit amount) = 50.40 x 4 = 201.6, rounded up = 202. However, the maximum number of penalty weeks that may be imposed is 52 weeks. ORS 657.215; OAR 471-030-0052(4). Therefore, claimant's penalty disqualification period is reduced to 52 weeks.

In addition, an individual who has been disqualified from future benefits under ORS 657.215 for making willful misrepresentations, and who has seven or more “occurrences” within five years, is liable to pay a penalty assessment in an amount equal to 30 percent of the total amount of benefits the individual received but was not entitled to receive. ORS 657.310(2); OAR 471-030-0052(7). An occurrence shall be counted each time an individual willfully makes a false statement or representation, or willfully fails to report a material fact to obtain benefits. OAR 471-030-0052(7). Claimant is liable for a monetary penalty equal to 30 percent of the overpaid benefits because each time he falsely reported that he had not worked or generated earnings, or underreported his earnings to obtain benefits, which the Department asserted occurred at least 23 times during the weeks at issue, claimant made a false statement to the Department that counted as an “occurrence” for purposes of determining the penalty percentage for which he is liable. Transcript at 18; Exhibit 1. Because claimant had seven or more occurrences within five years, he is liable for a penalty of 30 percent of the total overpayment amount. Thirty percent of \$25,554 is \$7,666.20, making claimant’s total repayment liability \$33,220.20.

In sum, claimant was overpaid and must repay the Department \$25,554 in regular benefits, is liable for a \$7,666.20 monetary penalty, and is disqualified from receiving future benefits for 52 weeks.

DECISION: Hearing Decision 16-UI-52010 is affirmed.

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

DATE of Service: March 24, 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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