

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0299

Modified
Reduced Overpayment, No Penalties

PROCEDURAL HISTORY: On October 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant made willful misrepresentations to receive benefits and assessing a \$6,236 overpayment, a \$1,870 monetary penalty and 46 weeks of disqualification from future benefits. That decision became final on November 18, 2015 without claimant having filed a timely request for a hearing. On January 15, 2016, claimant filed an untimely request for hearing. On January 21, 2016, ALJ Kangas issued Decision 16-UI-51456, dismissing claimant request for hearing as untimely, subject to reconsideration if claimant responded to an “Appellant Questionnaire” within 20 days of the mailing of Decision 16-UI-51456. On a January 27, 2016, claimant responded to the Appellant Questionnaire. On February 5, 2016, the Office of Administrative Decisions (OAH) issued a letter order canceling Hearing Decision 16-UI-51456. On February 23, 2016, ALJ S. Lee conducted a hearing at which Paul Mitchell The School did not appear, and on February 26, 2016 issued Hearing Decision 16-UI-53929, allowing claimant’s untimely hearing request and affirming the Department’s administrative decision. On March 14, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Because no adversely affected party sought review of that part of Hearing Decision 16-UI-53929 allowing claimant’s untimely hearing request, EAB has confined its review to the propriety of assessing an overpayment and penalties against claimant.

FINDINGS OF FACT: (1) Before October 8, 2014, Paul Mitchell The School employed claimant as a learning leader. Claimant was paid a salary of \$1,541.67 per month for his work with that employer. Exhibit 1 at 5. On October 8, 2014, Paul Mitchell The School discharged claimant. On October 8, 2014, claimant filed an initial claim for unemployment insurance benefits. That claim was determined

valid with a weekly benefit amount of \$458. The maximum weekly benefit amount in effect at the time claimant filed his claim was \$549.

(2) Claimant claimed benefits for the week of October 5, 2014 through October 11, 2014 (week 41-14), one of the weeks at issue. Claimant reported to the Department when he made his claim that he had earned \$140 from Paul Mitchell during week 41-14. Paul Mitchell The School reported to the Department that claimant earned \$616.65 from it during week 41-14. Exhibit 1 at 5. The Department paid claimant no benefits during week 41-14. Exhibit 1 at 2. Claimant claimed benefits during week 42-14 and did not report any earnings for that week. The Department paid claimant \$458 in benefits for week 42-14. Exhibit 1 at 2.

(3) On November 4, 2014, HSNW Employee Group, LLC hired claimant as a licensed esthetician. That employer paid claimant an hourly wage of \$9.47 for his work or the amount of a commission from the business he generated, whichever was greater, as well as a monthly commission on the product sales he made. Claimant also earned gratuities or tips from the customers to whom he provided services. Claimant was paid every two weeks for the hours he worked and the tips he received, or based on the business he generated and his tips. HSNW calculated claimant's bi-weekly pay based on a work week running from Sunday through Saturday. Claimant was paid the monthly commission for product sales early in the month following the month during which the sales were generated.

(4) During the time claimant worked for HSNW, he claimed benefits for the weeks of November 2, 2014 through June 6, 2015 (weeks 45-14 through 22-15), the balance of the weeks at issue. During the weeks at issue, claimant determined his earnings from HSNW in particular weeks by estimating the hours he had worked, multiplying those hours by \$9.47, and adding an amount to represent the gratuities he received that week. Since claimant did not keep records of the hours he worked or the gratuities he received, the earnings he provided to the Department were approximations.

(5) For weeks 45-14 and 46-14, HSNW reported to the Department that it paid claimant \$397.82 for 40.50 hours of work. Exhibit 1 at 15. Claimant reported to the Department that he earned \$240 for work he performed in week 45-14 and \$187 for work in week 46-14. Exhibit 1 at 2. The Department paid claimant \$370 in benefits for week 45-14 and \$423 in benefits for week 46-14. Exhibit 1 at 2. For weeks 47-15 and 48-15, HSNW reported that it paid claimant \$1,135.83 for 101.97 hours of work. Exhibit 1 at 15. Claimant reported he earned \$187 for work in week 47-14 and \$350 for work in week 48-14. Exhibit 1 at 2. The Department paid claimant \$423 in benefits for week 47-14 and \$260 in benefits for week 48-14. Exhibit 1 at 2. For weeks 49-14 and 50-14, HSNW reported that it paid claimant \$686.44 for 40.85 hours of work, and also paid him \$4.00 in week 49-14 for product sales commissions, presumably generated during the month of November 2014 (during part of week 44-14 through part of week 49-14). Exhibit 1 at 15. Claimant reported he earned \$224 for work performed in week 49-14 and \$200 for work performed in 50-14. Exhibit 1 at 2. The Department paid claimant \$386 in benefits for week 49-14 and \$410 in benefits for week 50-14. Exhibit 1 at 2. For weeks 51-14 and 52-14, HSNW reported that it paid claimant \$716.16 for 49.22 hours of work. Exhibit 1 at 15. Claimant reported that he earned \$220 for work in week 51-14 and \$200 for work in week 52-14. Exhibit 1 at 2. The Department paid claimant \$390 in benefits for week 51-14 and \$410 in benefits for week 52-14. Exhibit 1 at 2. For week 53-14, HSNW did not report any work by claimant. Exhibit 1 at 16. Claimant reported that he earned \$240 for work in week 53-14. Exhibit 1 at 2. The Department paid claimant \$370 in benefits for week 53-14. Exhibit 1 at 2.

(6) For weeks 01-15 and 02-15, HSNW reported it paid claimant \$923.53 for 69.87 hours of work. Exhibit 1 at 15. Exhibit 1 at 16. Claimant reported earnings of \$336 for work in week 01-15 and \$280 in earnings for work in week 02-15. Exhibit 1 at 2. The Department paid claimant \$274 in benefits for week 01-15 and \$340 in benefits for week 02-15. Exhibit 1 at 2. For weeks 03-15 and 04-15, HSNW reported it paid claimant \$544.17 for 30.60 hours of work, and also paid him \$15.00 in week 03-15 product sale commissions, presumably generated during the month of December (part of week 49-15 through part of week 53-15). Exhibit 1 at 16. Claimant reported he earned \$180 for work in week 03-15 and \$280 for work during week 04-15. Exhibit 1 at 2. The Department paid claimant \$430 in benefits for week 03-15 and \$330 in benefits for week 04-15. Exhibit 1 at 2. For weeks 05-15 and 06-15, HSNW reported that it paid claimant \$598.35 for 90.92 hours of work. Exhibit 1 at 16. Claimant reported that he earned \$240 for work during week 05-15 and \$340 for work during week 06-15. Exhibit 1 at 2. The Department paid claimant \$370 in benefits for week 05-15 and \$270 in benefits for week 06-15. Exhibit 1 at 2. For weeks 07-15 and 08-15, HSNW reported that it paid claimant \$740.64 for 32.53 hours of work, and also paid claimant \$10.00 in commissions during week 07-15, presumably for the month of January (part of week 53-14 through week 04-15). Exhibit 1 at 16. Claimant reported he earned \$280 for work during week 07-15 and \$280 for work in week 08-15. Exhibit 1 at 2. The Department paid claimant \$330 in benefits for week 07-15 and \$330 in benefits for week 08-15. Exhibit 1 at 2. For week 09-15 and week 10-15, HSNW reported that it paid claimant \$969.47 for 54.35 hours of work. Exhibit 1 at 16. Claimant reported he earned \$260 for work performed in week 09-15 and \$300 for work in week 10-15. Exhibit 1 at 2. The Department paid claimant \$350 in benefits for week 09-15 and \$310 in benefits for week 10-15. Exhibit 1 at 2. For week 11-15 and 12-15, HSNW reported it paid claimant \$917.46 for 58.35 hours of work. Exhibit 1 at 16. Claimant reported he earned \$280 for work in week 11-15 and \$350 for work in week 12-15. Exhibit 1 at 2. The Department paid claimant \$330 in benefits for week 11-15 and \$260 in benefits for week 12-15. Exhibit 1 at 2.

(7) For week 13-15 and 14-15, HSNW reported it paid claimant \$1,285.26 for 72.28 hours of work, as well as \$32.50 in commissions during week 13-15, presumably for the month of March (weeks 09-15 through part of week 13-15). Exhibit 1 at 16. Claimant reported he earned \$260 for work in week 13-15 and \$300 for work in week 14-15. Exhibit 1 at 2. The Department paid claimant \$350 in benefits for week 13-15 and \$310 in benefits for week 14-15. Exhibit 1 at 2. For weeks 15-15 and 16-15, HSNW reported it paid \$779.31 to claimant for 48.58 hours of work. Exhibit 1 at 16. Claimant reported he earned \$300 for work during week 15-15 and \$280 for work during week 16-15. Exhibit 1 at 2. The Department paid claimant \$310 in benefits for week 15-15 and \$330 in benefits for week 16-15. Exhibit 1 at 2. For weeks 17-15 and 18-15, HSNW reported it paid \$819.94 to claimant for 33.0 hours of work as well as \$11 in commissions during week 17-15, presumably for the month of April (part of week 13-15 through part of week 17-15). Exhibit 1 at 16. Claimant reported he earned \$260 for work in week 17-15 and \$300 for work in week 18-15. Exhibit 1 at 2. The Department paid claimant \$350 in benefits for week 17-15 and \$310 in benefits for week 18-15. Exhibit 1 at 2. For weeks 19-15 and 20-15, HSNW reported it paid claimant \$899.23 for 39.53 hours of work. Exhibit 1 at 16. Claimant reported he earned \$300 for work performed during week 19-15 and \$260 for work in week 20-15. Exhibit 1 at 3. The Department paid claimant \$310 in benefits for week 19-15 and \$350 in benefits for week 20-15. Exhibit 1 at 3. For weeks 21-15 and 22-15, HSNW reported it paid claimant \$967.38 for 37.48 hours of work as well as paying claimant \$12.00 in commissions during week 22-15, presumably for sales generated during the month of May (part of week 17-15 through part of week 22-15). Exhibit 1 at 16. Claimant reported he earned \$240 for work performed during week 21-15 and \$220 for work performed

during week 22-15. Exhibit 1 at 3. The Department paid claimant \$370 in benefits for week 21-15 and \$188 in benefits for week 22-15. Exhibit 1 at 3.

CONCLUSIONS AND REASONS: Claimant was overpaid \$4,822.00 in benefits for the weeks at issue. Claimant is liable to repay the amount of those overpaid benefits or to have it deducted from any future benefits otherwise payable to him. Claimant is not liable to pay a monetary penalty or to have penalty weeks assessed against him based on the overpaid benefits.

The Overpayment. ORS 657.155(1)(a) states that unemployed individuals are eligible to receive benefits in any benefit week if they claim benefits and are otherwise eligible to receive them under ORS Chapter 657. ORS 657.100(1) provides that individuals are considered “unemployed” and are eligible to receive benefits in any week in which they worked if the remuneration paid or payable to the individual for services performed in that week is less than the individual’s weekly benefits amount. ORS 657.150(6) states that eligible unemployed individuals who work during a benefit week shall have their weekly benefit amount reduced by the amount the earnings paid or payable to them exceeds ten times the state minimum wage or one-third of the individual’s weekly benefits amount, whichever is the greater amount. ORS 657.310(1) provides that if an individual received benefits during any benefit week to which the individual is not entitled because the individual, regardless of the individuals’ knowledge or intent, made or cause to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, the individual is liable to repay the amount of the benefits overpaid to the individual, or to have the amount of overpaid benefits deducted from any future benefits otherwise payable to the individual under Chapter 657.

In Hearing Decision 16-UI-53929, the ALJ concluded claimant was overpaid \$6,236 in benefits during the weeks at issue because he did not accurately report his earnings to the Department, and his erroneous reports caused him to receive benefits to which he was not entitled. Hearing Decision 16-UI-53929 at 9. Since claimant was liable to repay these overpaid amounts under 657.310(1), even if claimant did not know his income reports were erroneous when he made them and did not intend to obtain benefits to which he was not entitled, we agree with the ALJ that claimant must repay any benefits he was overpaid during the weeks at issue. Hearing Decision 16-UI-53929 at 6. However, we disagree with the ALJ about the amount of the overpayment.

Claimant contended at hearing that the earnings amounts reported to the Department by HSNW were inaccurate, and that since the Department prorated the earnings reported by HSNW to determine if claimant was overpaid benefits during each of the benefit weeks at issue, this resulted in a distortion of the amounts that he was actually overpaid for particular weeks. Audio at ~40:50, ~46:32. Despite claimant’s contentions about these inaccuracies and distortions, claimant conceded that he did not have any figures to offer that more accurately estimated his earning for the weeks at issue in lieu of the Department’s proration of HSNW’s reported earnings for him. Audio at ~41:48, ~44:46, ~46:35, ~47:19. Therefore, under OAR 471-030-0017(3) (July 7, 2007), claimant’s earnings, including bonuses must be allocated equally over the period in which the services were rendered.¹

¹ OAR 471-030-0017(3)(d) states that if the dates during which claimant provided services for which he received remuneration are not clearly established an allocation shall be made to the reported earnings figures provided based on a reasonable estimate provided by claimant, and if claimant cannot or will not provide a reasonable estimate, the remuneration received shall be divided equally over the period during which the services were rendered. OAR 471-030-0017(3)(c)

Here, HSNW reported as claimant’s “gross wages” a combination of tips, commissions and hourly wages that he accrued over two week pay periods. Exhibit 1 at 8. It also reported as “bonuses” the commissions that claimant accrued each calendar month on product sales. Exhibit 1 at 8; Audio at ~28:47, ~29:25, ~29:46. The “gross wages” that HSNW provided for claimant covered two week increments, from a Sunday through Saturday period spanning two of the Department’s benefit weeks. Audio at ~14:42; Exhibit 1 at 15-16.² In lieu of prorating the earnings figures that HSNW reported to match the Department’s benefit weeks, claimant was unable to provide an alternative reasonable estimate of his earnings for the benefit weeks at issue, or an alternative method of reliably calculating his earnings for work performed for HSNW during the Department’s benefits weeks. While claimant asserted he provided his reported earnings to the Department based on after-the-fact, unrecorded estimates of his hours worked multiplied by his hourly wage and adding to that amount some amount representing the gratuities or tips he received during the week, he agreed he “had no idea exactly” of the correct earnings figures to report to the Department. Audio at ~27:22. As well, claimant ultimately testified that HSNW paid him commissions as “wages” during at least some unspecified weeks of the weeks at issue, which he apparently did not include in the earnings figures he reported to the Department. Audio at ~32:18. Based on claimant’s own testimony indicating the uncertainty of his reported earnings estimates and his belated admission that some commissions should have been included in the earnings he reported, the earnings figures that he reported when he made his weekly claims reports were not a reliable or reasonable estimate within the meaning of OAR 471-010-0017(3)(d). Of necessity, the most reliable methods of determining of determining claimant’s earnings for each of the weeks at issue was by prorating the earnings figures that HSNW reported for claimant to match those earnings to the Department’s claim weeks for purposes of determining if claimant was overpaid benefits in each claim week and if so, how much he was overpaid.

The following table sets out claimant’s reported earnings, a proration of claimant’s earnings as reported by HSNW, the benefits the Department paid to claimant, the correct benefit amount based on HSNW’s prorated earnings and the amount of benefits that claimant was overpaid or underpaid during each of the weeks at issue:

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provides that bonuses (including apparently the commissions HSNW paid monthly to claimant) shall be allocated equally during the weeks for which the individual worked that gave rise to the bonuses (or the commissions).

² Although HSNW submitted two earnings report to the Department setting forth different earnings figures for some of the same weeks, the first prepared on August 27, 2015 by HSNW’s owner (including weeks 14-15 through 23-15) and the second prepared on October 16, 2015 by HSNW’s payroll supervisor (including weeks 45-14 through 22-15), EAB has chosen to rely on the second as likely the more accurate report since it was prepared later in time, was prepared by the person likely to be most knowledgeable about claimant’s earnings and it covered all of the weeks at issue rather than only some of them. Exhibit 1 at 9-10, 15-16.

<u>Emplr</u>	<u>Benefit Week</u>	<u>Claimant Reported Earnings</u>	<u>Employer Reported Earnings</u>	<u>Employer Reported Hours</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Benefits Over/ Under Paid</u>
WW ³	42-14	0	0	0	458	0 ⁴	+458
HSNW	45-14		198.91 ⁵				
	Earnings		<u>0.91⁶</u>				
	Commn	240	199.82	20.25 ⁷	370	410 ⁸	-40
HSNW	46-14		198.91				
	Earnings		<u>0.91</u>				
	Commn	187	199.82	20.25	423	410	+13
HSNW	47-14		567.91				
	Earnings		<u>0.91</u>				
	Commn						

³ Waiting week.

⁴ A clamant is not entitled to receive benefits during the waiting week. See ORS 657.155(1)(d).

⁵ For the two benefit weeks of 45-14 and 46-14, HSNW reported it paid earnings to claimant of \$397.82. Exhibit 1 at 15. Prorating that amount over two weeks, yields earnings of \$198.91 for each of those weeks. The prorated amounts that follow in the table for each subsequent week were similarly calculated from the earnings figures in Exhibit 1 at 15-16.

⁶ In week 49-14, claimant was paid commission of \$4.00. Exhibit 1 at 15. The commission was for the month of November 2014, which included one day in benefit week 44-14, seven days in benefit weeks 45-14, 16-14 and 46-14 and two days in benefit week 49-14. Audio at ~27:50, ~28:47, ~29:19, ~29:46, ~30:20. \$4.00/30 days in November yields \$0.13 per day in prorated commissions or \$0.91 for the seven days in week 45-14. In week 49-14, the two days in that week in November yielded \$0.26 for the allocation of the November commission which was added to the prorated commission for the five days in that week that was from December (\$15.00 total commission/31 days in December yields \$0.483 per day, or \$2.41 for 5 days). Claimant’s prorated commission in week 49-14 was the sum of \$0.26 and \$2.41 or \$2.67. The proration of commissions shown in the table for subsequent benefit weeks were calculated in the same manner from the commissions shown at Exhibit 1 at 15-16.

⁷ For the two benefit weeks of 45-14 and 46-14, HSNW reported that claimant worked 40.50 hours. Prorating that amount over two benefit weeks, yields an average of 20.25 hours worked for each of those benefit weeks. The prorated hours shown in the table for subsequent weeks were calculated in a similar manner from the information HSNW provided in Exhibit 1 at 15-16.

⁸ The correct benefit amount was determined by applying ORS 657.150(6)(a). Since the state minimum wage in 2014 was \$9.10 per hour, ten times that rate was \$91, which was less than 1/3 claimant’s \$458 weekly benefit amount, \$152.66. http://www.oregon.gov/boli/WHD/docs/oregonminimumwage_eng_2014.pdf. To calculate the correct benefit amount in week 45-14, \$152.66 was subtracted from the \$199.82 in prorated earnings that HSNW reported for claimant, with the result that those earnings exceeded one-third of claimant’s weekly benefit amount by \$47.16. Subtracting \$47.16 from claimant’s weekly benefit amount of \$458 results in a correct benefit amount of \$410. The correct benefit amounts for the subsequent weeks shown in the table were calculated in a similar manner based on a proration of claimant’s reported earnings for each week.

<u>Emplr</u>	<u>Benefit Week</u>	<u>Claimant Reported Earnings</u>	<u>Employer Reported Earnings</u>	<u>Employer Reported Hours</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Benefits Over/ Under Paid</u>
	187		568.82	50.98	423	0 ⁹	+423
HSNW 48-14			567.91				
Earnings			<u>0.91</u>				
Commn	350		568.82	50.98	260	0	+260
HSNW 49-14			343.22				
Earnings			<u>2.67</u>				
Commn	224		345.87	20.42	386	264	+122
HSNW 50-14			343.22				
Earnings			<u>3.38</u>				
Commn	200		346.60	20.42	410	264	+146
HSNW 51-14			358.08				
Earnings			<u>3.38</u>				
Commn	220		361.46	24.61	390	249	+141
HSNW 52-14			358.08				
Earnings			<u>3.38</u>				
Commn	200		361.46	24.61	410	249	+161
HSNW 53-14			0 ¹⁰				
Earnings			<u>0.96</u>				
Commn	240		0.96	0	370	458	-458
HSNW 01-15			461.75				
Earnings			<u>2.25</u>				
Commn	336		464.01	34.93	274	0	+274
HSNW 02-15			461.76				
Earnings			<u>2.25</u>				
Commn	280		464.01	34.93	330	0	+330
HSNW 03-15			272.08				
Earnings			<u>2.25</u>				
Commn	180		274.33	15.30	430	336	+94

⁹ ORS 657.100(1) provides that in any week in which an individual earns more than the individual's weekly benefit amount the individual is not considered "unemployed" and is not entitled to receive benefits. Since the allocation of the \$568.82 in earnings HSNW reported for claimant exceeded claimant's weekly benefit amount of \$458 in week 47-14, claimant was not entitled to receive benefits during week 47-14. Claimant's earnings similarly exceeded his weekly benefit amount in weeks 48-14, 01-15, 02-15, 09-15, 11-15, 12-15, 13-15, 14-15 and 21-15 and he was entitled to receive no benefits in those weeks.

¹⁰ HSNW did not report any earnings for this week, so claimant's only earnings were the proration of commissions from December 2014. See Exhibit 1 at 15.

<u>Emplr</u>	<u>Benefit Week</u>	<u>Claimant Reported Earnings</u>	<u>Employer Reported Earnings</u>	<u>Employer Reported Hours</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Benefits Over/ Under Paid</u>
HSNW 04-15							
			272.08				
			<u>2.25</u>				
	280		274.33	15.30	330	336	-6
HSNW 05-15							
			299.17				
			<u>0</u>				
	240		299.17	25.56	370	311	+59
HSNW 06-15							
			299.17				
			<u>0</u>				
	340		299.17	25.56	270	311	-41
HSNW 07-15							
			370.42				
			<u>0</u>				
	280		370.42	16.26	330	240	+90
HSNW 08-15							
			370.42				
			<u>0</u>				
	280		370.42	16.26	330	240	+90
HSNW-09-15							
			484.73				
			<u>7.33</u>				
	260		492.06	27.17	350	0	+350
HSNW 10-15							
			484.73				
			<u>7.33</u>				
	300		492.06	27.17	310	0	+310
HSNW 11-15							
			458.71				
			<u>7.33</u>				
	280		466.04	29.22	330	0	+330
HSNW 12-15							
			458.71				
			<u>7.33</u>				
	350		466.04	29.22	260	0	+260
HSNW 13-15							
			642.62				
			<u>4.48</u>				
	260		647.10	36.14	350	0	+350
HSNW 14-15							
			642.62				
			<u>2.56</u>				
	300		645.18	36.14	310	0	+310

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<u>Emplr</u>	<u>Benefit Week</u>	<u>Claimant Reported Earnings</u>	<u>Employer Reported Earnings</u>	<u>Employer Reported Hours</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Benefits Over/ Under Paid</u>
HSNW 15-15							
			389.65				
			<u>2.56</u>				
	300		392.21	24.14	310	305	+5
HSNW 16-15							
			389.65				
			<u>2.56</u>				
	280		392.21	24.14	330	305	+25
HSNW 17-15							
			409.97				
			<u>2.70</u>				
	260		412.67	16.5	350	198	+152
HSNW 18-15							
			409.97				
			<u>2.70</u>				
	300		412.67	16.5	310	198	+112
HSNW 19-15							
			249.61				
			<u>2.70</u>				
	300		252.31	19.76	310	358	-48
HSNW 20-15							
			249.61				
			<u>2.70</u>				
	260		252.31	19.76	350	358	-8
HSNW 21-15							
			483.69				
			<u>2.70</u>				
	240		486.39	18.74	370	0	+370
HSNW 22-15							
			483.69				
			<u>0.38</u>				
	220		484.07	18.74	188	0	<u>+188</u>
TOTAL OVERPAYMENT:							\$4,822.00

Exhibit 1 at 15-16.

Based on a proration of the earnings that HNSW reported for claimant, claimant's misreported earnings caused the Department to overpay him \$4,822.00 in benefits. Regardless of the cause of claimant's incorrect earnings reports, and regardless of claimant's intentions, he caused the overpayment by inaccurately reporting his earnings and is therefore liable to repay this overpaid amount to the Department or to have it deducted from future benefits that might otherwise be payable to him. See ORS 657.310(1). Hearing Decision 16-UI-53929 is therefore modified to reflect EAB's calculation of the amount that claimant was overpaid.

Misrepresentation and Penalties. Read together, ORS 657.215 and ORS 657.310(2) state that a claimant who has willfully made a false statement or misrepresentation or who willfully failed to report a material fact to obtain benefits is, as appropriate, assessed both a monetary penalty and penalty period of disqualification from future benefits that would otherwise be payable to him. In Hearing Decision 16-UI-53929, the ALJ assessed penalties against claimant based principally on her view that the earnings he reported were “substantially lower” than HSNW reported, her view that he conceded at hearing that he knew the earnings figures he was reporting were “likely not correct” and she did not accept his testimony that he was not aware that he would receive no benefits for any week in which the earnings he reported exceeded his weekly benefit amount. Hearing Decision 16-UI-53929 at 9. We disagree.

While we agree with the ALJ that for certain of the weeks at issue, the earnings claimant reported were lower than the prorated amounts of his earnings from HSNW, for other of the weeks at issue the amount he reported was fairly close to the prorated earnings amounts (weeks 46-14, 15-15) or exceeded the proration (weeks 45-14, 53-14, 04-15, 06-15, 19-15, 20-15). Viewed in sum and based on correctly calculated prorations, no clear pattern of under-reporting his earnings emerged from which claimant’s willful misrepresentation may reliably be inferred. Although claimant conceded at hearing that the earnings figures he reported to the Department might not have been punctiliously accurate he did so in the context of explaining the impact of the many variables in estimating his earnings for each of the weeks at issue, including the hours he worked, his tips and the various types of commissions he could earn and the employers’ tiered commission structure. Audio at ~27:01, ~27:52, ~28:20, ~29:28, ~29:46. From this statement, alone, it appears unsound to infer that claimant was willfully under-reporting his earnings. As well, because HSNW did not report claimant’s earnings to the Department in a way that was consistent with the Department’s methods and calendar of benefit weeks, and a method of proration was required to reasonably estimate claimant’s earnings by benefit week. The evidence appears to support claimant’s contention that in an unknown, but possibly significant number of the weeks at issue, the prorated amounts could be substantially different from what he actually earned in a particular week, and if he accurately reported his earnings in those benefit weeks, his report would seem to be highly inaccurate when compared against the prorated earnings for that week. Audio at ~40:50. In this event, the fact that claimant made a report of his earnings that varied from the prorated amount of his earnings, is also not a reliable basis to infer that he was willfully misrepresenting his earnings. For these reasons, we disagree with the ALJ’s conclusion that claimant willfully misreported his earnings to obtain benefits to which he was not entitled. It is more likely than not that, due to the variables previously mentioned, claimant’s failure to accurately report his earnings was the result of confusion, poor record keeping and calculation errors on his part, and not due to any willful misrepresentations on his part.

For the reasons explained, Hearing Decision 16-UI-53929 must be modified to reduce the overpayment to \$4,822 and to eliminate the assessment of a \$1,870.80 monetary penalty and 46 penalty weeks.

DECISION: Hearing Decision 16-UI-53929 is modified, as outlined above.

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

DATE of Service: April 19, 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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