

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0473

Late Application for Review Allowed
Modified
Overpayment and Penalties Assessed

PROCEDURAL HISTORY: On December 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant made willful misrepresentations to obtain benefits and assessing a \$5,309 overpayment, a \$1,592 monetary penalty and 40 penalty weeks. Claimant filed a timely request for hearing. On March 17, 2016, ALJ M. Davis conducted a hearing, and on March 22, 2016 issued Hearing Decision 16-UI-55521, affirming the Department's decision. That decision stated a timely application for review needed to be filed on or before April 11, 2016. On April 20, 2016, claimant filed an untimely application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he explained why his application for review was not timely filed, but did not certify that the argument was served on the other parties as required by OAR 471-041-0080 (October 29, 2006). EAB considered claimant's explanation about why the application for review was untimely since it is relevant to EAB's inquiry about allowing it under OAR 471-041-0070 (March 30, 2012), but did not otherwise consider it due to claimant's failure to comply with OAR 471-041-0080.

FINDINGS OF FACT: (1) Claimant held a doctorate in psychology and had taught psychology as a visiting professor at colleges for a number of years. Before June 11, 2014, claimant had filed three valid claims for unemployment benefits. When claimant received benefits under these claims, he usually had earnings from working as a visiting professor.

(2) On December 1, 2005, at a time when claimant was working and also receiving benefits, he called the Department to inquire about how he should report his earnings each week when he claimed benefits because he was paid a gross contract amount of \$1,470 for teaching 11 weeks of classes. A representative told claimant he should divide the \$1,470 by 11 to determine how much in earnings he should report for each of the 11 weeks in which he worked. Exhibit 1 at 14.

(3) On June 11, 2014, claimant filed a fourth claim for unemployment benefits. That claim was valid, with a weekly benefit amount of \$485. The maximum weekly benefit amount in effect when claimant filed this claim was \$538. When claimant filed his initial claim, the Department mailed to him a claimant handbook which stated in bold-faced type, **“You must report all work and gross earnings for the weeks in which you work even if you have not been paid. Gross earnings are your earnings before taxes or any other deductions have been taken out. Failure to report all earnings correctly, including part-time or temporary work, could result in an overpayment and penalties.”** Audio at ~18:48. Claimant also received copies of the handbook when he filed his three previous claims.

(4) Claimant claimed and was paid benefits for the weeks of June 8, 2014 through June 28, 2014 (weeks 24-14 through 26-14), July 6, 2014 through October 4, 2014 (weeks 28-14 through 40-14), October 12, 2014 through October 18, 2014 (week 42-14), December 21, 2014 through December 27, 2014 (week 52-14) and January 4, 2015 through March 28, 2015 (weeks 01-15 through 12-15), the weeks at issue.

(5) During some of the weeks at issue, claimant was working for DeVry University and for Clackamas Community College. From DeVry, claimant received a contract amount of \$4,800 for teaching 8 weeks of classes during summer term 2014 (part of week 26-14 through part of week 34-14), fall term 2014 (part of week 35-14 through part of week 43-14), winter term 2014 (part of week 45-14 through part of week 53-14) and spring term 2015 (part of week 09-15 through part of week 17-15). From Clackamas County Community College, claimant received \$222.74 in remuneration for weeks 40-14 and 42-14. When claimant filed his claims, he was advised in the weekly claims questions, “Enter your total gross earnings, [or the] vacation or holiday pay [you received], before deductions even if you have not been paid.” Audio at ~ 17:30. For weeks 24-14 through 26-14 and 28-14 through 40-14, claimant reported he earned \$450. For week 42-14, claimant reported he earned \$250, and for week 52-14, he reported he earned \$450. For weeks 01-15 through 08-15 and weeks 10-15 through 11-15, claimant reported he earned \$480, for week 09-15, he reported he earned \$450, and for week 12-15, he reported he earned \$240. The earnings that claimant reported during these weeks were based on the net amounts the employers actually deposited into his bank account, without taking into account that he was reporting his earnings after deductions of taxes and other withholdings.

(6) On January 18, 2015, when claimant filed his weekly claim, he was selected to participate in the Department’s “UI Basics Review Test,” which required him to answer certain questions before he was allowed to claim benefits for week 02-15. In response to the question, “If you worked during a week that you claimed benefits, do you report gross or net pay?”, claimant chose the correct multiple choice response, “Gross pay before deductions.” Audio at ~22:35. Claimant did not select “net pay after deductions” or express he was uncertain about his answer by selecting the choice, “Show me the correct answer.” Audio at ~22:40.

(7) During the weeks at issue, the Department paid claimant benefits based on the net earnings he reported. The Department paid claimant \$196 in benefits for weeks 25-14 through 40-14, \$396 in

benefits for week 42-14, \$196 in benefits for week 52-14, \$166 in benefits for week 52-14, 01-15 through 08-15, \$196 for week 09-15, \$166 for weeks 10-15 and 11-15 and \$406 in benefits for week 12-15.

CONCLUSIONS AND REASONS: Claimant's late application for review is allowed. Claimant willfully misreported his earnings for weeks 24-14 through 26-14, weeks 28-14 through 40-14, week 42-14 and weeks 01-15 through 12-15. As a result of this misreporting, claimant is liable to repay \$5,628 in benefits he was overpaid, is liable to pay a monetary penalty of \$1,688.40 and is disqualified from receiving future benefits for which he would otherwise qualify for 42 weeks.

Late Application for Review. OAR 471-041-0070(1) (March 20, 2012) provides that an application for review is timely if it is filed within 20 days of the date the hearing decision is mailed and that it must be dismissed if it is later filed unless the filing period is extended in accordance with that rule. OAR 471-041-0070(2) further provides that the 20 day filing period may be extended a reasonable time upon a showing of good cause, which means that the applicant provides satisfactory evidence that factors or circumstances beyond the applicant's reasonable control prevented a timely filing and a reasonable time to extend is seven days after the circumstances that prevented the timely filing ceased to exist.

Although Hearing Decision 16-UI-55521 was mailed on March 22, 2016 and by its terms stated that a timely application for review needed to be filed on or before April 11, 2016, claimant did not file an application for review until April 20, 2016, which was nine days late. In support of this untimely application, claimant stated he did not receive the hearing decision until April 14, 2016 when his neighbor brought it to him since it was wrongly delivered to the neighbor's address. Claimant's Written Argument at 1. That the hearing decision was mis-delivered to claimant's neighbor rather than to claimant was a factor or circumstance beyond claimant's reasonable control that prevented him from timely filing the application for review. That claimant filed the application for review on April 20, 2016, within six days after he first became aware that the hearing decision was wrongly delivered, was also within the seven day window that constituted a reasonable time after the circumstances that prevented the timely filing ceased to exist. Based on this evidence, claimant's late application for review is allowed since he showed good cause for its late filing and he acted within a reasonable time after he knew of it to remedy it.

Overpayment. ORS 657.155 states that only unemployed individuals are eligible to receive benefits. ORS 657.100(1) states that individuals are deemed unemployed in any week in which the individual receives remuneration if the remuneration paid or payable to the individual is less than the individual's weekly benefit amount. ORS 657.150(6) states that if an eligible unemployed individual has employment in any week the individual's weekly benefit amount shall be reduced by the amount that the individual's earnings exceed ten times the state minimum hourly wage or one-third the individual's weekly benefit amount, whichever is greater. ORS 657.310 states that if an individual has received benefits to which the individual was not entitled because the individual, regardless of the individual's knowledge or intent, made or caused to be made a false statement or misrepresentation of a material fact, the individual must repay the overpaid amount or have the overpaid amount deducted from any future benefits otherwise payable to the individual.

Because claimant was paid a contractually agreed upon lump sum amount for his teaching services during the weeks at issue, his earnings for each of the weeks at issue must be apportioned in a manner

that is consistent with the Department’s benefit weeks. Since claimant did not provide a reasonable estimate for his earnings during each benefit week, it is appropriate to allocate the lump sum he was paid equally over the period during which his teaching services were rendered or, in other words, to divide the contract amount by the number of weeks in the school term to determine his earnings during each benefit week. For example, claimant’s contracts with DeVry during the weeks at issue provided that he would receive \$4,800 for 8 weeks of teaching work, which would result in earnings of \$600 during each complete benefit week that he taught classes. Exhibit 1 at 21; Audio at ~13:43.

The earnings claimant reported, the allocations of claimant’s earnings based on claimant’s contracts with the employers, the benefits the Department paid to claimant, the correct benefit amounts and the benefit amounts claimant was overpaid or underpaid for each of the weeks at issue are set forth below:

| <u>Week</u> | <u>Claimant Reported Earnings</u> | <u>Allocation Of Contract Amount</u> | <u>Benefits Paid</u> | <u>Correct Benefit Amount</u> | <u>Benefits Overpaid/ Underpaid</u> |
|-------------|-----------------------------------|--------------------------------------|----------------------|-------------------------------|-------------------------------------|
| 24-14 | \$450 | \$600 ¹ | \$0 | \$0 | \$0 |
| 25-14 | \$450 | \$600 | \$196 | \$0 ² | \$196 |
| 26-14 | Waiting Week | | \$196 | \$0 ³ | \$196 |
| 28-14 | \$450 | \$600 ⁴ | \$196 | \$0 | \$196 |
| 29-14 | \$450 | \$600 | \$196 | \$0 | \$196 |
| 30-14 | \$450 | \$600 | \$196 | \$0 | \$196 |
| 31-14 | \$450 | \$600 | \$196 | \$0 | \$196 |
| 32-14 | \$450 | \$600 | \$196 | \$0 | \$196 |
| 33-14 | \$450 | \$600 | \$196 | \$0 | \$196 |
| 34-14 | \$450 | \$600 | \$196 | \$0 | \$196 |
| 35-14 | \$450 | \$600 | \$196 | \$0 | \$196 |
| 36-14 | \$450 | \$600 | \$196 | \$0 | \$196 |
| 37-14 | \$450 | \$600 | \$196 | \$0 | \$196 |
| 38-14 | \$450 | \$600 | \$196 | \$0 | \$196 |

¹ Unless specifically noted in the table, the earnings reported were from DeVry.

² During this week, the allocation of earnings for claimant was \$600, which exceeded his weekly benefit amount of \$485. Under ORS 657.100(1), because his earnings exceeded his weekly benefit amount, he was not considered unemployed and was not eligible to receive benefits. Other weeks in which his earnings exceeded his weekly benefit amounts were similarly weeks in which claimant’s correct benefit amount was determined to be \$0.

³ Unless it is waived, an individual is not paid benefits during the waiting week. ORS 657.155(1)(d).

⁴ Although the ALJ determined that the allocated contract amount for claimant’s earnings during the week was \$514.29, based on the Department’s Schedule of Adjustments in Exhibit 1 at 4, it appears that a correct allocation of DeVry’s contract amount was, in fact, \$600. Exhibit 1 at 21, 38. We note that \$514.29 represents six days of work at an allocated amount of \$600 for a week of seven days, but week 28-14 (from July 6, 2014 through July 12, 2014) is a complete week of allocated work since summer term 2014 ran from June 30, 2014 through August 25, 2014, and encompassed all of week 28-14. We also note that when DeVry provided information about claimant’s earnings for teaching during summer term 2014, it apparently erroneously identified the year as 2015 rather than 2014. See Exhibit 1 at 21 and compare Exhibit 1 at 38.

| <u>Week</u> | <u>Claimant Reported Earnings</u> | <u>Allocation Of Contract Amount</u> | <u>Benefits Paid</u> | <u>Correct Benefit Amount</u> | <u>Benefits Overpaid/ Underpaid</u> |
|-------------|-----------------------------------|--------------------------------------|----------------------|-------------------------------|-------------------------------------|
| 39-14 | \$450 | \$600 | \$196 | \$0 | \$196 |
| 40-14 | | \$600 | | | |
| DeVry | | <u>\$222.74⁵</u> | | | |
| CCC | \$450 | \$822.74 | \$196 | \$0 | \$196 |
| 42-14 | | \$600 | | | |
| DeVry | | <u>\$222.74</u> | | | |
| CCC | \$250 | \$822.74 | \$396 | \$0 | \$396 |
| 52-14 | \$450 | \$600 ⁶ | \$196 | \$0 | \$196 |
| 01-15 | \$480 | \$600 ⁷ | \$166 | \$0 | \$166 |
| 02-15 | \$480 | \$600 | \$166 | \$0 | \$166 |
| 03-15 | \$480 | \$600 | \$166 | \$0 | \$166 |
| 04-15 | \$480 | \$600 | \$166 | \$0 | \$166 |
| 06-16 | \$480 | \$600 | \$166 | \$0 | \$166 |
| 07-15 | \$480 | \$600 | \$166 | \$0 | \$166 |
| 08-15 | \$480 | \$600 | \$166 | \$0 | \$166 |
| 09-15 | \$450 | \$600 | \$196 | \$0 | \$196 |
| 10-15 | \$480 | \$600 | \$166 | \$0 | \$166 |
| 11-15 | \$480 | \$600 | \$166 | \$0 | \$166 |
| 12-15 | \$240 | \$600 | \$406 | \$0 | <u>\$406</u> |

Total Overpayment

\$5,628

At hearing, claimant did not dispute that he was teaching classes during the weeks at issue for which he received payments on a lump sum contract amount. Claimant did not appear to dispute that dividing the lump sum contract amount he received by the number of weeks he was obligated to provide teaching services was an appropriate way to determine his earnings for benefit weeks falling with that teaching period. Claimant also did not dispute that the earnings he reported in his weekly claims reports to the Department, and on which his benefit amounts were based, were his net earnings, after taxes and other

⁵ CCC reported claimant earned \$222.74 during this week and week 42-14. Exhibit 1 at 33.

⁶ While the ALJ determined that the allocated amount for claimant’s earnings for this week was \$85.21 based on the Schedule of Adjustments in Exhibit 1 at 4, it appears that a correct allocation of DeVry’s contract amount was, in fact, \$600. Exhibit 1 at 21, 38. We note that \$85.21 represents one day of work at an allocation of \$600 per a seven day week. However, week 52-14 (from December 21, 2014 through December 27, 2014) is constitutes a complete seven day week of allocated earnings since winter term 2014 ran from November 3, 2014 through December 28, 2014), which encompassed all of week 52-14. See Exhibit 1 at 21.

⁷ While the ALJ determined that the allocated amount for claimant’s earnings for this week was \$514.26 based on the Schedule of Adjustments in Exhibit 1 at 4, it appears a correct allocation of DeVry’s contract amount was, in fact, \$600. Exhibit 1 at 21, 38. We note that \$514.26 is an allocation of \$600 per a seven day week to a six day week. However, week 01-15 ran from January 4, 2015 through January 10, 2015, and there does not appear to be any reason to prorate claimant’s earnings for that week to a six day week rather than a seven day week. See Exhibit 1 at 24, 25, 38.

amounts were deducted, which was a significantly lower amount than his gross earnings. Audio at ~36:30, ~40:48, ~41:35. While at times during his testimony claimant implied he did not understand he was expected to report his gross earnings for purposes of his weekly claim reports, at other times he seemed well aware of the difference between gross and net earnings. Audio at ~ 36:30. Whatever the state of claimant's understanding about the earnings he was obligated to report, he did not contend that the net amounts he reported objectively satisfied his reporting duties, or that, as a result of reporting these net figures, he was not paid more in benefits than he was entitled to receive. Even if claimant thought he was accurately reporting his earnings to the Department when he made those reports, under ORS 657.310, he remains liable to repay the amounts he was overpaid.

Claimant also appeared to contend, in part, that he reported the net amounts he did to the Department during his weekly claims reports because he understood that to have been what he was advised by a Department representative from the North Portland Office. Audio at ~39:50, ~50:26. In essence, claimant appears to be invoking the doctrine of estoppel, arguing that, based on the representative's alleged statements to him, the Department should be precluded from assessing an overpayment against him due to his underreporting of his earnings. Invoking estoppel against a governmental entity requires a finding that an agency or its representative made a false or misleading statement of an existing material fact to an individual, and the individual justifiably relied on that false or misleading statement to his detriment. *Employment Division v. Western Graphics Corporation*, 76 Or App 608, 710 P2d 788 (1985).

As claimant described what the representative actually allegedly said to him and from which he supposedly concluded he needed to report only his net earnings in his weekly claims reports, it was that he should take an average of his earnings for purposes of reporting his earnings per benefit week. Audio at ~39:50, ~50:01. Claimant did not contend that the representative specifically stated that he should report his net earnings during the weeks at issue or that there was any discussion between them about reporting net earnings as opposed to gross earnings. Since the representative gave him accurate advice about allocating the lump sum earnings he received to particular benefit weeks during the weeks at issue, it is difficult to see how the representative made a false or reasonably misleading statement to claimant, or that claimant was reasonably justified in inferring that the representative was referring his net earnings. Moreover, claimant had received consistent advice from Department representatives and publications since 2005 that the earnings he should report were gross earnings and not net earnings after deductions. Given that claimant's alleged understanding of the advice of the North Portland representative was so contrary to what was consistently communicated to him over ten years, he was not justified in relying on that representative's advice absent further inquiry with the Department. Claimant did not allude to ever seeking clarification of that representative's advice or confirmation of its accuracy. For these reasons, claimant did not justifiably rely on erroneous advice from the representative, and the doctrine of estoppel does not prevent the Department from assessing this overpayment against him.

Claimant was overpaid \$5,628 in benefits due to his misreporting of earnings during the weeks at issue. Regardless of whether claimant knew he was reporting incorrect earnings amounts to the Department, he is liable to repay the amount he was overpaid or to have that overpaid amount deducted from any future benefits otherwise payable to him.

Monetary Penalty. Read together, ORS 657.215 and ORS 657.310(2) provide that an individual who willfully made a false statement or misrepresentation to obtain benefits is liable to pay a monetary

penalty of at least 15, but not greater than 30, percent of the benefits received to which the individual was not entitled.

Claimant's contention that he did not understand he was expected to report his gross earnings during the weeks at issue, and that his erroneous reporting of net income was an innocent mistake rather than a willful underreporting of his earnings is dubious. First, the Department's published advisements about how to report earnings for purposes of claim reporting were written in clear and straightforward language that was drafted to enable a claimant with only a sixth-grade reading level to understand them, not be confused, and correctly report his or her earnings. Audio at ~54:33. Claimant holds a doctorate degree, is highly educated and apparently accustomed to comprehending highly complex materials. It is unlikely he did not understand that he was required to report his gross earnings in his weekly claims reports. Moreover, as early as 2005, claimant was advised by a representative on another claim about how to report his earnings, and that advice was based on claimant's gross earnings. Furthermore, the three claimant handbooks that claimant received for his previous claims and the one he received for this claim clearly stated that he needed to report his gross earnings rather than his net earnings, and further defined what gross earnings were and were not. As well, the claims questions that preceded claimant's earnings reports for all of the weeks at issue were clear and unequivocal as to reporting gross earnings rather than net earnings, and in the "UI Basics Review Test" that was randomly administered to claimant on January 18, 2015, he was not apparently confused about the fact that he needed to report his gross earnings and not his net earnings.

Moreover, while claimant contended he was merely following his understanding of the advice he received in 2014 from the North Portland representative when he reported his net earnings during the weeks at issue, that claim is suspect. As previously discussed, his understanding of that advice - a single statement from a single representative - was completely contrary to the instructions previously given to claimant about reporting his earnings, starkly contradicted the instructions he was given each week when he made his claims reports and contradicted the understanding he showed when he took the "UI Basics Review Test." At a minimum, if claimant truly and innocently based the earnings he reported on the supposed advice of that representative he would have been expected to confirm its accuracy in light of how discrepant it was from all other instructions he had received. It is implausible claimant blindly and innocently relied on the advice of that representative, and that claimant did not comprehend after the Department communications he received that he was obliged to report his gross earnings rather than his net earnings. For all of those reasons, we conclude that the preponderance of the evidence in this record shows claimant willfully disregarded the Department's instructions when he reported his net earnings, which would increase the benefits he was paid during the weeks at issue. Consequently, claimant is liable to pay a monetary penalty for his misreported earnings.

The monetary penalty to which claimant is subject is set out in OAR 471-030-0052(7) (February 23, 2014). The appropriate percentage of the overpaid amount assessed as a monetary penalty is based on the number of occurrences in which an individual willfully made false statements or misrepresentations to obtain benefits to which he was not entitled, with an occurrence being each time such false statements or misrepresentations were made. OAR 471-030-0052(7). Here, claimant willfully misreported his earnings 31 times during the weeks at issue. The penalty when an individual has seven or more occurrences of willful misrepresentations is 30 percent of the total amount of benefits the individual received to which the individual was not entitled. 30 percent of \$5,628 is \$1,688.40. Claimant is assessed a monetary penalty of \$1,688.40

At hearing, claimant argued it was not fair to assess a monetary penalty against him for his willful misrepresentations because such an assessment was, among other things, “cruel and unusual punishment.” Audio at ~58:40. However, EAB’s authority is limited by the statutes and regulations governing unemployment insurance matters, and they do not allow EAB, in its discretion, to ignore their plain meaning. Since the statutes and regulations are clear as applied to claimant’s situation, he must seek the remedy he desires from those responsible for their enactment.

Penalty Weeks. ORS 657.215 provides that an individual who has willfully made false statements or misrepresentations to obtain benefits is subject to disqualification from benefits for a period not to exceed 52 weeks as determined according to the Department’s regulations. OAR 471-030-0052(1)(a) sets out the manner in which the period of disqualification is calculated when an individual has failed to accurately report the individual’s earnings for weeks during which he obtained benefits.

Applying OAR 471-030-0052(1)(a), the period for which claimant will be disqualified from future benefits otherwise payable to him is determined by dividing the total amount of overpaid benefits (\$5,628) by the maximum weekly benefit amount in effect at the time claimant made his claim (\$538) and rounding that off to the nearest two decimal places (which yields 10.46), multiplying the result by four (41.84) and rounding up to the nearest whole number, which yields 42. Due to his willful misrepresentations in reporting his earnings, claimant is disqualified from receiving future benefits otherwise payable to him for 42 weeks.

DECISION: Hearing Decision 16-UI-55521 is modified, as set out above.

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

DATE of Service: June 7, 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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