

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0552

Affirmed
Overpayment Assessed

PROCEDURAL HISTORY: On March 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision assessing claimant a \$242 overpayment. Claimant filed a timely request for hearing. On April 19, 2016, ALJ Logan conducted a hearing, and on April 25, 2016 issued Hearing Decision 16-UI-58035, affirming the Department's decision. On May 10, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but failed to certify that a copy of it was provided to the other parties as required by OAR 471-041-0080 (October 29, 2006). For this reason, EAB did not consider claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Sometime on or before August 7, 2015, Vince Williams Car Corner reduced claimant's hours to part-time. On August 7, 2015 (during week 31-15), claimant filed an initial claim for unemployment insurance benefits. Claimant's claim was determined valid with a weekly benefit amount of \$242. Claimant claimed benefits during the weeks of August 2, 2015 through August 15, 2015.

(2) When claimant worked for the employer his pay was based on the commissions he earned or the hours he worked at minimum wage, whichever was higher. Claimant earned commissions from car sales he made. Sometimes when a customer wanted to purchase a car that was financed, the customer signed a contract in which the employer's salesperson made a "judgment call" about the terms the financing bank would make available to the customer. Audio at ~14:39. That preliminary contract was "not cashable" because the bank might not agree to make a loan at the interest rate, for the length of time, in the amount the customer wanted financed, or any of the other loan terms about which the salesperson had made the "judgment call." In this event, the loan terms in the preliminary contract needed to be modified and a final contract needed to be signed by the customer. Audio at ~15:00. The employer's records showed that a salesperson earned his commission on a sale when the final "cashable" contract was signed and not when the first contract was signed.

(3) On August 1, 2015, before claimant filed his initial claim for benefits, a customer signed a preliminary contract to purchase a vehicle that he wanted a bank to finance. Claimant was the salesperson for the sale. On this sale, the bank did not agree to the “judgment call” terms for the loan and the August 1, 2015 contract was “not cashable.” The loan terms were modified, and the customer signed a new contract on August 2 or 3, 2015, which was “cashable.”

(4) When claimant claimed benefits for the week of August 2, 2015 through August 8, 2015 (week 31-15), he reported that he earned \$157.25 in that week, which he calculated based on the number of hours he worked at minimum wage. Although the customer had signed a final cashable sale contract on August 2 or 3, 2015, claimant did not report that he earned the commission from that sale in week 31-5 because he thought that he had earned that commission when the non-cashable contract was signed on August 1, 2015 (in week 30-15). Based on claimant’s reported earnings for week 31-15, the Department assigned that week as claimant’s waiting week and did not pay claimant any benefits during that week.

(5) When claimant claimed benefits for the week of August 9, 2015 through August 15, 2015 (week 32-15), he did not report any earnings for that week. The Department paid claimant \$242 in benefits for that week.

(6) Sometime after August 15, 2015, the employer reported to the Department that claimant had earned \$354.73 during week 31-15. Those earnings, different from the \$157.25 that claimant had reported for that week, exceeded claimant’s weekly benefit amount of \$242. Because claimant was not eligible to receive benefits or waiting week credit during week 31-15 based on the amount of earnings that the employer reported, the Department reassigned claimant’s waiting to week 32-15, the first week his earnings were less than his weekly benefit amount.

CONCLUSIONS AND REASONS: Claimant was not eligible for benefits or waiting week credit during the week of August 2, 2015 to August 8, 2015 (week 31-15). He was overpaid \$242 in benefits for the week of August 9, 2015 through August 15, 2015 (week 32-15) and is liable to repay those benefits or to have them deducted from any future benefits otherwise payable to him.

ORS 567.100(1) provides that an individual is not considered unemployed and is not eligible to receive unemployment insurance benefits in any week in which his earnings exceed his weekly benefit amount. ORS 657.155(1)(d) states that to be eligible to receive benefits, an individual must have been unemployed for a waiting week of one week. The waiting week, during which the individual does not receive benefits, is the first week of a claim when the individual otherwise meets of eligibility requirements to receive benefits. ORS 657.310 provides that if an individual received benefits to which the individual was not entitled because the individual, regardless of the individual’s knowledge or intent, made or cause to be made a false statement or misrepresentation of a material fact, the individual is liable to repay the amount of the overpaid benefits or to have the amount deducted from any future benefits otherwise payable to the individual.

Claimant’s waiting week was initially assigned to week 31-15, and he was paid \$242 in benefits for week 32-15, because he represented that his earnings during week 31-15 were \$157.25, which did not exceed his \$242 weekly benefit amount. If claimant’s earnings during week 31-15 exceeded \$242, then he was not eligible for benefits for the week and week 31-15 was not properly considered his waiting week. If claimant’s waiting week was reassigned to week 32-15, the first week he was otherwise

eligible to receive benefits, he was not entitled to receive any benefits during that week and is liable to repay the benefits paid to him in week 32-15, regardless of his knowledge or awareness that his earnings in week 31-15 were more than \$242, since the assignment of his waiting week to week 31-15, rather than week 32-15, was based on the earnings he reported to the Department for week 31-15.

Claimant contended he did not earn commissions during week 31-15, but in week 30-15, based on his assumption that commissions were earned when the customer signed a preliminary, non-cashable contract to purchase a vehicle. Audio at ~10:39, ~11:10, ~11:49. However, claimant agreed the employer's records did not show that he had earned a commission until a final cashable contract was agreed to by the financing bank and the customer had signed by that final contract. Audio at ~11:32. Indeed, claimant accepted the accuracy of the employer's determination of when the commissions were earned when he took the employer's computer generated commissions report, which showed he earned the commissions when the final contract was signed, to the employer's witness in week 31-15 to ensure he was paid the commission he earned. Audio at ~16:17, ~18:26. Further, it appears most reasonable and sound to conclude that a commission is not earned when the non-cashable contract is signed, but only considered earned when the final, cashable contract is executed, since it is only after the final contract is signed that no further work is needed to be done to perfect the sale. That claimant actually earned the commission when the first, preliminary contract was signed (in week 30-15) is far less likely than that he earned it when the final contract was signed (in week 31-15). Since it appears most likely that claimant earned the commissions for the sales contracts first negotiated in week 30-15 in week 31-15 when they were memorialized in a final cashable contract, his waiting week was properly reassigned to week 32-15 as a result of his representations about his earnings in week 31-15. As a result of this reassignment, claimant was overpaid \$242 in benefits during week 32-15, which he is liable to repay or to have deducted from any future benefits otherwise payable to him.

DECISION: Hearing Decision 16-UI-58035 is affirmed.

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

DATE of Service: June 17, 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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