

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0594

Affirmed
Overpayment and Penalties

PROCEDURAL HISTORY: On April 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$409 overpayment, \$81.80 monetary penalty and 14 penalty weeks (decision # 195966). Claimant filed a timely request for hearing. On May 12, 2016, ALJ M. Davis conducted a hearing, and on May 13, 2016 issued Hearing Decision 16-UI-59480, affirming the Department's decision. On May 18, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision. For the reasons explained, below, claimant's request to reduce the penalty weeks in this matter must be denied.

FINDINGS OF FACT: (1) On September 25, 2009, the Department issued an administrative decision, under ORS 657.215, that found claimant willfully made a misrepresentation to obtain benefits by failing to report that she had earnings that affected her weekly benefit amount when she claimed benefits. As a result of the decision, the Department disqualified claimant from 15 weeks of future benefits and assessed a monetary penalty. That decision is final.

(2) On July 30, 2015, claimant filed an initial claim for unemployment insurance benefits. Her weekly benefit amount was \$281, and the maximum weekly benefit amount in effect at the time was \$567.

(3) During the weeks of October 18, 2015 to October 24, 2015 (week 42-15) and October 25, 2015 to October 31, 2015 (week 43-15), claimant was employed by Carla Properties, Ltd. She worked during each week. On October 27, 2015, the employer discharged claimant from employment.

(4) Claimant subsequently filed weekly claims for benefits for the weeks of October 18, 2015 to November 7, 2015 (weeks 42-15 to 44-15), the weeks at issue. Each time claimant filed a weekly claim for benefits, the Department required her to report whether she had been fired during the week being claimed, and required her to report any hours of work or earnings she had during the week being claimed.

(5) During the week of October 18, 2015 to October 24, 2015, claimant worked for the employer and had earnings totaling \$758.80. Claimant reported that she had not had a work separation that week, and reported to the Department that she did not have any work or earnings. Because claimant did not report a work separation, work or earnings, the Department paid claimant \$281 in unemployment insurance benefits.

(6) During the week of October 25, 2015 to October 31, 2015, claimant worked for the employer and had earnings totaling \$220.92. Claimant reported that she had not had a work separation that week, and reported to the Department that she did not have any work or earnings. Because claimant did not report a work separation, work or earnings, the Department paid claimant \$281 in unemployment insurance benefits.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant is liable to repay the \$409 overpayment and \$81.80 monetary penalty, and liable for 14 penalty weeks.

An individual is considered "unemployed" in any week during which the individual performs no services and with respect to which no remuneration is paid or payable, or in any week of less than full-time work if the remuneration paid or payable is less than the individual's weekly benefit amount. ORS 657.100. Benefits are only payable to unemployed individuals. *See* ORS 657.155.

During the week of October 18, 2015 to October 24, 2015 (week 42-15), claimant earned \$758.80, an amount that exceeded her weekly benefits amount. Claimant was, therefore, not unemployed, and benefits were not payable to her for that week. Claimant was overpaid \$281 for that week.

During the week of October 25, 2015 to October 31, 2015 (week 43-15), claimant earned \$220.92. That amount was less than her weekly benefit amount, therefore, claimant was unemployed. Because she had employment in that week, however, her weekly benefit amount must be reduced under ORS 657.150(6), which provides that the reduction total the amount of earnings that exceeds whichever is greater, ten times the Oregon minimum wage or one-third the weekly benefit amount. One-third of claimant's weekly benefit amount is \$93.66. Ten times the Oregon minimum wage is \$92.50.¹ In this case, claimant's weekly benefit amount must be reduced by the amount of her earnings that exceeds \$93.66. \$220.92 minus \$93.66 equals \$127.26. \$281 minus \$127.26 equals \$153.74. Under ORS 657.152, any amount of unemployment compensation payable for any week that is not an even dollar amount must be rounded down to the next lower full dollar amount. Therefore, the amount of benefits payable to claimant for the week of October 25, 2015 to October 31, 2015 was \$153. The Department paid claimant \$281. Claimant was, therefore, overpaid \$128 for week 43-15.

In sum, claimant received \$409 in unemployment insurance benefits she was not entitled to receive.²

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

¹ *See* http://www.oregon.gov/boli/TA/Pages/T_FAQ_Minimum-Wage.aspx

² Based on our conclusion that claimant is liable for a misrepresentation penalty, we note that claimant may also be overpaid for any subsequent week during the 14-week disqualification period for which the Department has paid claimant benefits.

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 received \$409 in benefits she was not entitled to because she falsely reported to the Department that she had not been fired from employment during either week, and that she did not work or have earnings in either week. Regardless what claimant knew or intended at the time she made those false reports, because claimant's false statements caused the overpayment, she is liable to repay the overpayment to the Department.

An individual who willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. ORS 657.215.

Claimant argued at the hearing and in her written argument that her false reports were not intentional, and that she was just confused about which week her work separation occurred and did not realize she had earnings in week 43-15. Claimant's argument was not plausible. If the reason claimant made false reports about her discharge and earnings was her alleged confusion about the dates they occurred, if she believed the discharge occurred in week 42-15, and believed her week 43-15 pay was earned during week 42-15, it is more likely than not that she would have reported her work separation when filing her claim for week 42-15 and over-reported her earnings report for week 42-15. In fact, claimant never reported her work separation in *any* of the weeks at issue, even though each week she claimed benefits the Department required her to answer "yes" or "no" to the question "Were you fired or suspended from a job last week." *See* Exhibit 1. Claimant did not report any hours of work or earnings to the Department in either week 42-15 or week 43-15, even though the Department required her to answer "yes" or "no" both weeks to the question of whether she worked the last week. *Id.* Because claimant did not report her discharge or any earnings to the Department in either week, it is more likely than not that confusion was not the reason for her false reports to the Department. It is more likely than not that her false reports were willful acts to obtain benefits. Because claimant willfully made false reports to obtain benefits, she is liable for misrepresentation penalties.

Under OAR 471-030-0052(1), the length of the penalty disqualification period is determined by dividing the total amount of benefits overpaid to the individual for the disqualifying act(s) by the maximum Oregon weekly benefit amount in effect during the first effective week of the initial claim in effect at the time, rounding off to the nearest two decimal places, multiplying the result by four, and rounding it up to the nearest whole number. $\$409$ (claimant's overpayment) \div $\$567$ (maximum weekly benefit amount) = $.72 \times 4 = 2.88$, rounded up = 3 weeks. Claimant is liable for an additional four week penalty under OAR 471-030-0052(1)(d) because she failed to report her work separation. $3 \text{ weeks} + 4 = 7 \text{ weeks}$. Claimant is also liable to have her penalty doubled under OAR 471-030-0052(2) because she was previously disqualified for benefits under ORS 657.215. $7 \text{ weeks} \times 2 = 14 \text{ weeks}$. Claimant's total penalty disqualification period is, therefore, 14 weeks.

In her written argument, claimant requested that the penalty disqualification period be reduced due to her difficult financial circumstances. However, there are no provisions in Oregon law that would allow the Department or EAB to reduce the number of penalty weeks from 14 to a lesser amount based on claimant's financial circumstances, or for any other reason.

Finally, an individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is also liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2). The percentage applied is based on the number of occurrences of misrepresentation occurred. An "occurrence" is "counted each time an individual willfully makes a false statement." OAR 471-030-0052(7). In this case, claimant made three willful false statements, first when she answered "no" to whether she had worked or had earnings for week 42-15, second when she answered "no" to whether she had been discharged in week 43-15, and third when she answered "no" to whether she had worked or had earnings for week 43-15. Under OAR 471-030-0052(7)(b), an individual with three misrepresentation occurrences is liable for a penalty totaling 20% of the total overpayment amount. 20% of \$409 equals \$81.80, which is claimant's total monetary penalty.

In sum, claimant is liable to repay the \$409 overpayment and the \$81.80 monetary penalty to the Department, and is disqualified from 14 weeks of benefits that are otherwise payable.

DECISION: Hearing Decision 16-UI-59480 is affirmed.

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

DATE of Service: June 21, 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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