

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0776**

*Affirmed*  
*Overpayment, No Penalties*

**PROCEDURAL HISTORY:** On February 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant willfully misrepresented earnings to obtain \$12,380 in benefits to which he was not entitled and must repay, disqualifying claimant for 52 weeks of future benefits, and assessing a \$3,714 monetary penalty (decision # 192848). Claimant filed a timely request for hearing. On May 9 and June 1, 2016, ALJ Wiperman conducted a hearing, and on June 13, 2016 issued Hearing Decision 16-UI-61588, concluding that claimant underreported earnings and therefore was overpaid \$12,380 that he must repay, but that he did not willfully misrepresent his earnings, and therefore is not disqualified for future benefits or subject to a monetary penalty. On June 30, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

No party applied for review of that portion of Hearing Decision 16-UI-61588 concluding that claimant did not willfully misrepresent his earnings, and therefore is not disqualified for future benefits or subject to a monetary penalty. EAB therefore limited its review to whether claimant underreported earnings and therefore was overpaid \$12,380 that he must repay. EAB considered the entire hearing record and claimant's written argument. In his argument, claimant asserts that the ALJ erred in allocating his remuneration equally over the periods at issue under OAR 471-030-0017(3) (July 1, 2016), which states:

Allocating Remuneration: For purposes of ORS 657.100 and 657.150(6) remuneration or an applicable pro-rata share thereof shall be allocated as follows:

- (a) In the case of services, allocated to the week in which the service was performed;
- (b) In the case of products, allocated to the week in which the product was sold;

(c) In the case of bonuses, allocated equally to the weeks during which the individual worked within the period being rewarded;

(d) If the dates of sale or service are not clearly established, allocation shall be made upon a reasonable estimate provided by the claimant. If the individual cannot or will not provide a reasonable estimate, the remuneration shall be allocated equally over the period during which services were rendered or products were sold.

Claimant argues that the ALJ should have allocated the remuneration he received working for Precision Heating & Indoor Air Quality Inc. (Precision Heating) based on the information Precision Heating provided the Department, which was received into evidence as Exhibit 2. Claimant also complains that the Department did not provide the ALJ a complete copy of the information Precision Heating provided the Department, although the ALJ left the record open for the Department to do so. Finally, claimant argues that the ALJ erred in allocation the remuneration he received working for P & L Johnson Mechanical Inc. (P & L Johnson) because, “Unemployment payment is based on a weekly Bias week, not a monthly average, averaged out by month and divided by days in the month for a more accurate daily average,” and the remuneration P & L Johnson reported to the Department included a \$300 auto stipend and a \$40 cell phone stipend.

However, we agree with the ALJ that the information Precision Heating provided the Department does not provide a reasonable estimate of claimant’s remuneration for services performed and products sold during any of the weeks at issue. Precision Heating’s information does not state the hours claimant worked for wages on any specific date, only during weeks that began on Fridays and ended on Thursdays, which therefore do not correspond to claimant’s benefit weeks, which began on Sundays and ended on Saturdays. Nor does the information state the weeks during which claimant sold products for which he was paid commissions. Because Precision Heating’s information does not provide a reasonable estimate of claimant’s remuneration for services performed and products sold during the benefits weeks at issue, the Department’s failure to provide a complete copy of the information did substantially prejudice claimant’s rights, and the ALJ did not err in allocating claimant’s remuneration equally over the period during which services were rendered or products were sold. *See* OAR 471-040-0025(5) (August 1, 2004).

Nor did the ALJ err in allocating the remuneration claimant received working for P & L Johnson equally, given that claimant worked entirely on commission, and no party provided a reasonable estimate of the specific weeks during which he sold products. We also note that the Department and the ALJ deducted the \$300 auto stipend and \$40 cell phone stipend before allocating claimant’s remuneration equally over the period during which products were sold. *See* Transcript (June 1, 2016 hearing) at 10.

On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted**.

**DECISION:** Hearing Decision 16-UI-61588 is affirmed.

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

**DATE of Service: August 8, 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](http://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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