

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0861**

*Modified*  
*Overpayment, No Penalties*

**PROCEDURAL HISTORY:** On June 6, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$336 overpayment, a \$67.20 monetary penalty and 3 penalty weeks (Decision # 195828). Claimant filed a timely request for hearing. On July 5, 2016, ALJ Menegat conducted a hearing, and on July 7, 2016, issued Hearing Decision 16-UI-63293, affirming the Department's decision. On July 22, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) On February 24, 2016, claimant filed an initial claim for unemployment insurance benefits. The Department determined he had a weekly benefit amount of \$476.

(2) Claimant claimed and was paid benefits for weeks in 2016 from March 6 through March 12, March 20 through March 26 and April 10 through April 16 (weeks 10-16, 12-16 and 15-16). These are the weeks at issue.

(3) Columbia Freight Systems LLC employed claimant as a part-time truck driver from at least January 2016 through the weeks at issue.

(4) During week 10-16, claimant received \$243.38 in wages from the employer. When claimant filed his claim for benefits for week 10-16, he reported to the Department that he had not received wages for work performed that week. The Department therefore paid claimant \$476 in benefits for week 10-16.

(5) When claimant filed his claim for benefits for week 12-16, he reported to the Department that he had not received any wages for work performed that week. The Department therefore paid claimant \$476 in benefits for week 12-16.

(6) During week 15-16, claimant performed 14 hours of work for the employer at \$16.50 per hour for which he later was paid \$231.00. When he filed his claim for benefits for that week, claimant had not yet been paid and estimated to a Department employee that he had worked 13 hours and had earned \$214.50. The Department therefore paid claimant \$420 in benefits for week 15-16.

**CONCLUSIONS AND REASONS:** We agree with the ALJ in part. Claimant was paid \$17 in regular benefits he was not entitled to receive for week 15-16 and is liable to repay that amount or have that amount deducted from future benefits otherwise payable to him. However, claimant did not receive benefits he was not entitled to receive for weeks 10-16 and 12-16, and is not subject to penalty weeks or a monetary penalty.

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 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.* An individual who willfully makes a false statement or misrepresentation, or willfully fails to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. ORS 657.215. In addition, an individual who has been disqualified from receiving benefits under ORS 657.215 is liable for a penalty imposed at a rate of at least 15, but not greater than 30, percent of the amount of benefits the individual wrongfully received. ORS 657.310(2).

In Hearing Decision 16-UI-63293, after finding, based on the Department's calculations and exhibits, that claimant "was overpaid" benefits for each of the weeks at issue, the ALJ concluded claimant received \$336 in benefits to which he was not entitled. Hearing Decision 16-UI-63293 at 2-3. The ALJ also found that claimant "willfully" underreported his earnings in order to obtain those benefits and imposed 3 penalty weeks and a monetary penalty of \$67.20. Hearing Decision 16-UI-63293 at 3-5. Here, because the Department originally paid claimant benefits it subsequently denied, the Department had the burden to establish by a preponderance of the evidence that claimant received benefits to which he was not entitled, and was subject to penalties because he willfully made false statements or misrepresentations to obtain those benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). We disagree, in part, with the ALJ's decision based on the Department's failure to meet its burden of proof.

When filing a claim for benefits, a claimant is responsible for furnishing the Department with the information required to correctly process the claim, including "current work activity and earnings." OAR 471-030-0025 (December 16, 1985). The information required may include the amount of time devoted to the work activity and the gross amount of remuneration or wages, including tips, received or expected to be received. *Id.*; OAR 471-030-0017 (1)(c) (July 12, 2007). Remuneration for services provided to an employer shall be allocated to the week in which the services were performed, or if the dates of service are not clearly established or reasonably estimated by the claimant, allocated equally over the period during which services were rendered. OAR 471-030-0017(3).

With regard to his claim for week 10-16, claimant asserted that he reported no earnings for that week because the \$243.38 he received from the employer represented wages for services performed in late January or early February for which he had not been paid. Transcript at 16-18. The employer's witness (Killam) who testified on the Department's behalf asserted at hearing that the \$243.38 was for 14.75 hours of work at \$16.50 per hour performed on March 11, 2016. Transcript at 12. However, that same witness told a Department investigator several weeks earlier that claimant had worked 12 hours that day at the same rate of pay. Exhibit 1. Because the Department's evidence regarding claimant's hours and earnings for that week was internally inconsistent, we find that claimant's explanation was at least as

credible as the Department's, and the evidence was no more than equally balanced. Where the evidence is equally balanced, the party with the burden of proof on a contested issue, here the Department, has failed to meet its burden. Accordingly, we found that the \$243.38 claimant received during week 10-16 was for services performed during another week, and that claimant did not underreport his earnings for that week by failing to report his receipt of \$243.38.

With regard to his claim for week 12-16, claimant asserted that he reported no earnings because he did not perform any work that week, while the Department reported that he performed 23.75 hours of work and earned \$391.88. Transcript at 18; Exhibit 1. Claimant testified that he would have remembered working almost 24 hours over a two day period on March 24-25 but could not recall doing so. Transcript at 18, 22. The employer utilized a time card system and required each employee to swipe their card when beginning and ending a work shift to keep track of employee work hours, but did not offer any documentary evidence from its system. Instead, Killam completed a Department form by hand based on information contained in an accounting system that was also transcribed by hand by another employee from the time card system. We conclude that claimant's denial and explanation was at least as credible as the Department's evidence, that the evidence was no more than equally balanced and that the Department failed to satisfy its burden proof. Accordingly, we find that claimant did not underreport earnings for week 12-16.

With regard to his claim for week 15-16, claimant performed work that week and reported \$214.50 in earnings to the Department because he had not yet received his paycheck and was advised to estimate his earnings by a Department employee. Transcript at 18-19. The employer reported that claimant's actual earnings for that week were \$231.00, meaning claimant's estimate was one hour off. Given claimant's admission that he estimated his earnings for week 15-16, and viewing the record as a whole, the employer's report of claimant's earnings for that week was more reliable. Accordingly, we agree with the ALJ that claimant underreported his earnings for week 15-16 and was overpaid benefits in the amount of \$17.00, which he is liable to either repay or have deducted from any future benefits otherwise payable to him under ORS chapter 657.

However, we disagree with the ALJ's conclusion that claimant willfully underreported his earnings to obtain benefits. Claimant's assertion that he was advised by a Department representative to estimate his earnings for week 15-16 and did so in good faith was credible. Transcript at 18-19. In that context, despite the fact that claimant underreported his earnings for that week at issue, the evidence that he did so willfully to obtain benefits was not persuasive, especially given the minimal amount of benefits involved. Consequently, the Department failed to establish that claimant is subject to any penalty weeks under ORS 657.215, or a monetary penalty under ORS 657.310(2).

**DECISION:** Hearing Decision 16-UI-63293 is modified, as outlined above.

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

**DATE of Service:** August 18, 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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