

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1091

Affirmed
Overpayment Assessed

PROCEDURAL HISTORY: On July 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant underreported earnings and therefore was overpaid \$6,237 in benefits that he is liable to repay (decision # 194113). Claimant filed a timely request for hearing. On August 30, 2016, ALJ M. Davis conducted a hearing, and on September 14, 2016 issued Hearing Decision 16-UI-67485, affirming the Department's decision. On September 20, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On February 25, 2016, claimant filed an initial claimant for unemployment insurance benefits. His weekly benefit amount was \$567. Claimant claimed benefits for the weeks from February 21 through March 5, 2016 (weeks 08-16 and 09-16), the week of April 10 through 16, 2016 (week 15-16), the weeks from April 24 through June 4, 2016 (weeks 17-16 through 22-16), and the weeks from June 19 through July 16, 2016 (weeks 25-16 through 28-16).

(2) During the weeks at issue, claimant performed services for Washington County as an elected county commissioner, and earned \$874.50 each week. When claiming benefits for those weeks, claimant mistakenly believed he was not required to report those earnings, and therefore reported no earnings. Because claimant reported no earnings, the Department paid him \$567 per week for weeks 09-16, 17-16 through 22-16 and 25-16 through 28-16. The Department paid claimant a total of \$6,237 in benefits for those weeks.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant underreported earnings, and therefore was overpaid \$6,237 in benefits that he is liable to repay or have deducted from any future benefits otherwise payable to him under ORS chapter 657.

To qualify for benefits an individual must have worked in subject employment in the base year with total base year wages of \$1,000 or more and have total base year wages equal to or in excess of one and one-half times the wages in the highest quarter of his base year, and wages for subject employment in a qualifying individual's base year are used to determine the individual's weekly benefit amount. ORS

657.150(2)(a)(A), ORS 657.150(4). Subject employment does not include services that are performed in the employ of the state, or any political subdivision or instrumentality of the state, as an elected public official. ORS 657.065(2)(a).

However, unemployment insurance benefits are only payable to unemployed individuals. See ORS 657.155. 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 fulltime work if the remuneration paid or payable is less than the individual's weekly benefit amount. ORS 657.100.

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.*

In the present case, it is undisputed that claimant was overpaid \$6,237 in benefits because he reported no earnings for the weeks at issue, although he earned \$874.50 each of those weeks that he was required to report. Thus, under ORS 657.310(1), claimant is liable to either repay or have the \$6,237 deducted from any future benefits otherwise payable to him under ORS chapter 657, regardless of his knowledge or intent in failing to report his earnings. At hearing, however, claimant argued that he should not be held liable for the overpayment, or should only be held liable for half of the overpayment, and the Department held liable for the other half. Audio Record at 23:30. In support of that argument, claimant asserted he did not report his earnings because he mistakenly believed from a conversation with a Department employee shortly before filing his initial claim for benefits, documents mailed to him by the Department on March 24 and 28, 2016, and a conversation with Department employee on March 29, 2016, that his earnings were "excluded." Audio Record at 20:30-25:15.

We construe claimant's argument as that the Department therefore should be estopped from holding claimant liable for the overpayment, or at least half of the overpayment. The doctrine of equitable estoppel "requires proof of a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it." *Keppinger v. Hanson Crushing, Inc.*, 161 Or App 424, 428, 983 P2d 1084 (1999) (citation omitted). In addition, equitable estoppel will be applied against an agency only if it is shown that the person asserting it was misled by the agency and justifiably and detrimentally relied on the misleading conduct. *Employment Div. v. Western Graphics Corp.*, 76 Or App 608, 710 P2d 788 (1985).

Initially, we note that the Department has no record of claimant's conversation with a Department employee before he filed his initial claim for benefits,¹ and the documents claimant asserted were mailed to him by the Department on March 24 and 28 were not offered into evidence at the hearing. The Department's witness testified that Department's records showed that, on March 21, 2016, a Department employee determined that since claimant worked for Washington County as an elected county

¹ Audio Record at 28:45.

commissioner, the Department could not add the wages, which were excluded under ORS 657.065(2)(a). Audio Record at 13:50. The Department's witness further testified that Department records showed that, on March 29, 2016, a Department employee spent an extended amount of time explaining to claimant that his wages were not in subject employment for purposes of calculating benefits per ORS 657.065(2), but were reportable as income when claiming benefits. Audio Record at 16:35, 32:15. Our review of Department records shows that that was the third Department employee claimant spoke with on March 29, 2016, that the first Department employee claimant spoke to answered his questions regarding one of the documents the Department had mailed to claimant, that claimant asked the second Department employee for clarification as to why his wages as a county commissioner were not in subject employment, but were reportable, and the Department employee explained that because claimant was still serving as a county commissioner, he would not qualify for benefits because his earnings exceeded his weekly benefit amount.²

In sum, we find it unlikely that at a minimum of four Department employees, orally in and writing, falsely represented to claimant that he was not required to report his earnings when filing weekly claims for benefits, and that two of those employees then falsified Department records to show that they correctly represented to claimant that his wages were not in subject employment for calculating his benefit amount per ORS 657.065(2), but were reportable as income when claiming benefits, and that he would not qualify for benefits because his earnings exceeded his weekly benefit amount. We find it more likely that claimant simply misunderstood the Department employee he spoke to before filing his initial claim for benefits and the documents he received in late March 2016, and persisted in his mistaken belief that he was not required to report his earnings when filing weekly claims for benefits despite at least two Department employees' efforts to properly instruct him.

And, even if claimant had established that he justifiably relied on false representations made by the Department when filing his weekly claims for benefits, the record fails to show that he did so to his detriment, as required under the doctrine of equitable estoppel. During the weeks at issue, claimant's earnings exceeded his weekly benefit amount. Benefits therefore were not payable to claimant, regardless of whether he reported those earnings. Finally, with respect to claimant's assertion that he should be held liable for only half of the overpayment, there is no provision under ORS 657.310(1) for holding an individual only partially liable for benefits overpaid 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. Claimant therefore is liable to repay the \$6,237 in benefits he was overpaid, or have the \$6,237 deducted from any future benefits otherwise payable to him under ORS chapter 657.

DECISION: Hearing Decision 16-UI-67485 is affirmed.

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

DATE of Service: October 17, 2016

² We take notice of these facts, which are contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record.

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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