

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1147

Affirmed

*Ineligible – Weeks 28-15 through 31-15, 34-15 through 37-15 and 40-15 through 51-15
Ineligible – Weeks 09-16 through 12-16 and 19-16 through 21-16
Overpayment and Penalties Assessed*

PROCEDURAL HISTORY: On August 23, 2016, the Oregon Employment Department (the Department) served five notices of five administrative decisions, one concluding claimant did not actively seek work from July 12, 2015 to August 8, 2015 (decision # 120822), a second concluding claimant did not actively seek work from August 23, 2015 to September 9, 2015 (decision # 120309), a third concluding claimant did not actively seek work from October 4, 2015 to December 26, 2015 (decision # 115436), a fourth concluding claimant did not actively seek work from February 28, 2016 to March 26, 2016 (decision # 114421) and a fifth concluding claimant was not able to work or available for work from May 8, 2016 to May 28, 2016 (decision # 122916). On August 24, 2016, the Department served notice of an administrative decision assessing a \$1701 overpayment, a \$340.20 monetary penalty and 24 penalty weeks (decision # 193261) based on decision # 122916.

On August 31, 2016, claimant filed timely requests for hearing on decisions # 120822, 120309, 115436, 114421, 122916 and 193261. On October 4, 2016, ALJ Shoemake conducted a consolidated hearing on decisions # 120822, 120309, 115436, 114421 and 122916, and on October 7, 2016, issued Hearing Decisions 16-UI-68817, 16-UI-68818, 16-UI-68819, 16-UI-68820 and 16-UI-68828, affirming the Department's decisions, respectively. On October 4, 2016, ALJ Shoemake conducted a separate hearing on decision # 193261, and on October 7, 2016, issued Hearing Decision 16-UI-68815, affirming decision # 193261.

On October 13, 2016, claimant filed timely applications for review of all six hearing decisions with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-68817, 16-UI-68818, 16-UI-68819, 16-UI-68820, 16-UI-68828 and 16-UI-68815. For case-tracking purposes, this decision is being issued in sextuplicate (EAB Decisions 2016-EAB-1147, 2016-EAB-1148, 2016-EAB-1149, 2016-EAB-1150, 2016-EAB-1146 and 2016-EAB-1145, respectively).

FINDINGS OF FACT: (1) Claimant filed an initial claim for unemployment benefits on March 2, 2015 (BYE 08-16). He claimed and received benefits under BYE 08-16 for the weeks including July 12 through August 8, August 23 through September 19 and October 4 through December 26, 2015 (weeks 28-15 through 31-15, 34-15 through 37-15 and 40-15 through 51-15). Claimant filed a second initial claim for unemployment benefits February 29, 2016 (BYE 08-17). His weekly benefit amount for that claim was \$567 which was the maximum weekly benefit amount available at that time. He claimed and received benefits under BYE 08-17 for the weeks including February 28 through March 26 and May 8 through May 28, 2016 (weeks 09-16 through 12-16 and 19-16 through 21-16). These are the weeks at issue.

(2) Claimant's regular employment during the weeks at issue was as a crew member on commercial fishing boats owned by his employer, Bandon Pacific Seafood - the Miss Pacific, LLC and the Pacific Hooker, LLC. His labor market included the Oregon coast. In claimant's labor market, work as a commercial fisherman customarily was performed all days and all shifts.

(3) When claimant filed his initial claims on March 2, 2015 and February 29, 2016, a Department representative verbally advised him of his weekly work-search requirements to be eligible for benefits – that he actively seek work by performing at least five work search activities each week with two of those being direct contacts with potential employers. On or about those dates, the Department also mailed to claimant at his address of record a UI Handbook (UI Pub 350) which set forth the same Department work search requirements for benefit eligibility. The handbook also set forth the requirements that he be physically and mentally able to work and be available for work during each week claimed. On March 31, April 30, May 29, June 30, July 31, August 31 and October 30, 2015 the Department also mailed to claimant at his address of record another publication regarding his work search requirements (UI Pub 195), which specifically set forth his work search requirements for benefit eligibility. None of the Department's mailings were returned to the Department as undeliverable and claimant received the mailings in question.

(4) When claimant filed each of his weekly claims for the weeks including July 12 through August 8, August 23 through September 19 and October 4 through December 26, 2015 (weeks 28-15 through 31-15, 34-15 through 37-15 and 40-15 through 51-15) as well as for the weeks including February 28 through March 26, 2016, claimant reported a single work search activity - that he contacted his employer. However, he certified that he actively sought work during each of those weeks. Based on claimant's certification, the Department paid claimant benefits.

(5) On May 8 and 9, 2016, during week 19-16, claimant was hospitalized for stroke symptoms. On May 10, 2016, claimant contacted the captain of the fishing boat on which he had been working and told him that he had been hospitalized, that he "wasn't doing very good", intended to follow his doctor's orders and stay off work for a while. Transcript, October 4, 2016, 9:30 hearing at 43. On May 20, 2016, during week 20-16, claimant's mother had surgery, and on May 26, 2016, during week 21-16, she passed away, following which claimant took her remains to Portland for cremation and a memorial service. On May 29, 2016, claimant returned to work for the employer. When claimant filed each of his weekly claims by phone for the weeks including May 8 through May 28, 2016 (weeks 19-16 through 21-16) he certified that he was physically able to work and available for work during each of those weeks. Based on claimant's certification, the Department paid claimant benefits.

(6) After benefits were paid, the Department performed an audit of claimant's weekly claims for the weeks at issue and determined that he had made only one contact seeking work during the weeks including July 12 through August 8, August 23 through September 19, October 4 through December 26, 2015 and February 28 through March 26, 2016. On August 12, 2016, claimant told a Department investigator that he was not able to provide any other work search activities for those weeks. Transcript, October 4, 2016, 9:30 hearing at 5. When asked about the weeks including May 8 through May 28, 2016, claimant explained that he had been hospitalized May 8 and 9, had told his employer on May 10 that he "wasn't doing very good" and was following his doctor's orders to not work for a while, that his mother had undergone surgery on May 20 and had passed away on May 26, and that he had been responsible to travel to Portland to arrange for her cremation. Transcript, October 4, 2016, 9:30 hearing at 43. He stated to the investigator, "I felt I was able and available to return to work three weeks after getting out of the hospital." Transcript, October 4, 2016, 9:30 hearing at 43.

(7) Claimant understood that he was required to answer questions truthfully when filing a claim for benefits and knew, based on his doctor's advice, statements to his employer, mother's surgery, passing and cremation that he was not able to work or available for work during weeks 19-16 through 21-16. His false certifications to the Department that he was were willful and made to obtain benefits. As a result of claimant's certifications that his answers were truthful when he filed his claims for those weeks, claimant received \$1701 in regular benefits to which he was not entitled.

(8) Prior to the misrepresentation disqualification decision issued by the Department in this case, specifically on October 27, 2005, the Department mailed to claimant a decision assessing a separate misrepresentation disqualification under ORS 657.215. That decision became final on November 16, 2005, when claimant failed to appeal the decision.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant was ineligible for benefits for each of the weeks at issue. In addition, claimant was overpaid \$1701 in regular benefits, must repay the Department that amount or have it deducted from any future benefits otherwise payable, is liable for a \$340.20 monetary penalty, and as an additional penalty, is disqualified from receiving future benefits for a period of 24 weeks.

Where, as here, the Department paid a claimant benefits for weeks claimed, and then subsequently denied that he or she was eligible for those benefits, the Department has the burden to establish by a preponderance of evidence that the claimant was not entitled to the benefits paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Credibility. Claimant did not dispute that he received the Department's mailings regarding the weekly requirements for benefit eligibility or that he understood that he was required to answer questions truthfully. However, the Department and claimant disagreed on whether he actively sought work or was able and available to work during the weeks at issue, and claimant's testimony about matters at issue was internally inconsistent. For example, at hearing, after asserting "I really don't know what happened in 2015 to be honest with you", claimant testified that during each of the weeks at issue, most of which occurred in 2015, he looked for work in the newspaper, contacted the employer's fleet manager regarding potential work on its boats, contacted each boat individually and went down to the waterfront "to talk to the people." Cf. Transcript, October 4, 2016 9:30 hearing at 15 and 33, 19-27. Similarly, after stating that if there had been work

available to him on May 20, 2016 when his mother had surgery or on May 26, 2016, when his mother passed away and he travelled to Portland for her cremation and subsequent memorial service, he would not have chosen to work, he later testified that he was available for work during each of those weeks. Cf. Audio Record, October 4, 2016 10:45 hearing ~ 20:45 to 22:300 and 23:40 - 24:15. Because claimant's hearing testimony was internally inconsistent, we concluded that the Department's hearsay evidence of the August 12, 2016 conversation between claimant and its investigator, based on the investigator's contemporaneous notes taken of their conversation¹, was more persuasive than claimant's testimony and based our findings on the Department's evidence. Transcript, October 4, 2016, 9:30 hearing at 5, 42-43.

Active Work Search. To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). To actively seek work, an individual must do what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a) (February 23, 2014). OAR 471-030-0036(5)(a) states that the minimum requirements for an individual to be considered to be "actively seeking work" are the performance of at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual.

Here, the Department alleged that claimant failed to actively seek work during the weeks including July 12 through August 8, August 23 through September 19 and October 4 through December 26, 2015 (weeks 28-15 through 31-15, 34-15 through 37-15 and 40-15 through 51-15) as well as for the weeks including February 28 through March 26, 2016 (weeks 09-16 through 12-16) because he performed only one work search activity. On August 12, 2016, the Department investigator requested, and claimant failed to provide, any information showing otherwise. At hearing, claimant provided inconsistent testimony regarding his work search activities during those weeks, first stating he remembered nothing regarding what had occurred and then essentially speculating regarding what activities he had performed. He ultimately admitted he had no records of his work search activities during those weeks and was unable to provide a credible account of his work search activities during the weeks at issue. Accordingly the preponderance of the credible evidence shows that claimant did not actively seek work during weeks 28-15 through 31-15, 34-15 through 37-15, 40-15 through 51-15 and 09-16 through 12-16.

¹ Contemporaneous notes of claimant's statements taken by investigator on August 12, 2016:

"I didn't keep track of my work searches before [April 10, 2016]... So I can't provide a work search for you... On May 10th or May 12th 2016... I contacted [the captain of the employer fishing boat on which he had been working] and told him what had happened. I told him what the doctor told me. I told [him] because I wasn't doing very good and I was following the doctor's orders. He said okay. I don't think there was work available with Pacific Hooker during that time because I was just filling in and none of his crew wanted to take time off... Then on May 20th my Mom had cancer surgery and she passed away on May 26th. I had to deal with that, too. I took the remains to Portland for cremation. I felt I was able and available to return to work three weeks after getting out of the hospital." Transcript, October 4, 2016, 9:30 hearing at 11, 42-43.

Claimant's statements, as memorialized by the investigator, are more reliable than his later, inconsistent statements because were made closer in time to the events in question, were consistent with other statements he made around the same time, and were made before claimant understood that the statements could render him ineligible for benefits, whereas claimant's testimony was internally inconsistent, inconsistent with his prior statements, and was self-serving.

Able and Available to Work. For the purposes of ORS 657.155(1)(c), an individual shall be considered able to work in a particular week only if physically and mentally capable of performing the work he or she actually is seeking during all of the week except an occasional and temporary disability for less than half of the week shall not result in a finding that the individual is unable to work for that week. OAR 471-030-0036(5)(a). An individual also must meet certain minimum requirements to be considered “available for work” for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3). Among those requirements are that the individual be willing to work full time, part time and accept temporary work opportunities during all of the usual hours and days of the week customary for the work being sought, be capable of reporting for any suitable work opportunities within their labor market and refrain from imposing conditions that limit the individual’s opportunities to return to work at the earliest possible time.

Here, the Department alleged that claimant was not able to work or available for work during the weeks including May 8 through May 28, 2016. It based its allegations on claimant’s statements to its investigator on August 12, 2016 that claimant told his employer on May 10 that he was “following [his] doctor’s orders” to stay off work for awhile following his hospitalization and his additional statement to the investigator that considering his mother’s surgery, passing and cremation, “I felt I was able and available to return to work three weeks after getting out of the hospital”, which was approximately May 29, 2016, the day he returned to work. Considering that evidence, and claimant’s statement at hearing that if he had been offered work during the weeks including May 20 and May 26, 2016 he would not have accepted it considering his mother’s circumstances, we agree with the ALJ that claimant was not able to work or available for work during the weeks including May 8 through May 28, 2016 (weeks 19-16 through 21-16).

Overpayment. 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.*

Based upon claimant’s weekly certifications to the Department that he was able and available for work for the weeks including May 8 through May 28, 2016, claimant received \$1701 (\$567 x 3) in regular benefits to which he was not entitled. With regard to claimant’s benefit claims for those weeks, the Department established that he was not able to work or available for work during those weeks due to both his and his mother’s health issues, including her surgery and passing. Claimant’s reports to the Department that he was able to work and available for work were, therefore, false. Regardless of claimant’s knowledge or intent in making those false reports to the Department, he is liable under ORS 657.310(1) to either repay the \$1701 in regular benefits or have that amount deducted from any future benefits otherwise payable to him under ORS chapter 657.

Misrepresentation and Penalties. An individual who willfully makes a false statement or misrepresentation, or willfully fails to report a material fact to obtain benefits, may be disqualified from benefits for a period not to exceed 52 weeks. ORS 657.215. The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052 (February 23, 2014). In addition, an individual who has been disqualified from benefits under ORS 657.215 for making a willful

misrepresentation, and who has three or four “occurrences” within five years, is liable for a penalty in an amount equal to 20 percent of the total amount of benefits the individual received but was not entitled to receive. ORS 657.310(2); OAR 471-030-0052(7). An "occurrence" shall be counted each time an individual willfully makes a false statement or representation, or willfully fails to report a material fact to obtain benefits. OAR 471-030-0052(7).

At hearing, claimant asserted that the reason he certified to the Department that he was able to work and available for work during the weeks including May 8 through May 28, 2016 (weeks 19-16 through 21-16) was that his doctor had told him to “take it easy,” but did not instruct him not to work during those weeks, which is what he asserted told his employer, and that “the wind was blowing” on the ocean those weeks which meant there was no work anyway despite his attendance at his mother’s surgery, passing and memorial. Audio Record, October 4, 2016 10:45 hearing ~ 16:30 to 18:00. However, claimant did not dispute, because he could not “remember what happened in August [2016]”, that when he was interviewed by a Department investigator on August 12, 2016, he told the investigator he was following doctor’s orders by not working during those weeks and that he did not consider himself able and available for work until “three weeks after his hospitalization”, approximately May 29, 2016. Transcript, October 4, 2016, 9:30 hearing at 33. As explained above, because claimant’s assertions were internally inconsistent we did not consider him to be a credible witness. Accordingly, because we conclude that he misrepresented facts concerning his benefits eligibility to the Department when he filed his claims, we further conclude that he did so willfully to obtain benefits, and is liable for penalties under ORS 657.215.

When the disqualifying acts under 657.215 relate to the provisions of ORS 657.155 (other than falsely reporting work or earnings), the number of weeks of disqualification shall be the number of weeks calculated in the manner set forth in subsection (a) or the number of weeks in which a disqualifying act occurred, whichever is greater. OAR 471-030-0052(1)(c). OAR 471-030-0052(1)(a) provides that the number of penalty weeks is calculated by dividing the total overpayment (\$1,701) by the maximum Oregon weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the individual’s disqualifying acts (\$567) and rounding the result to the nearest two decimal places (3.00), multiplying the result by four (12), and rounding the result up to the nearest whole number (12). Under OAR 471-030-0052(2), the number of weeks of disqualification assessed under OAR 471-030-0052(1) shall be doubled, but not to exceed 52 weeks, if the individual has one previous disqualification under ORS 657.215, and that prior disqualification determination has become final. Because claimant had a previous disqualification under ORS 657.215, which decision became final on November 16, 2005, the number of penalty disqualification weeks is doubled to 24 weeks.

Claimant is also liable for a monetary penalty equal to 20 percent of the overpaid benefits because, each time he falsely certified to the Department that he was able and available for work (3 times) that counted as an “occurrence” for purposes of determining the penalty percentage for which he is liable. Because claimant had three occurrences within five years, he is liable for a penalty of 20 percent of the total overpayment amount. Twenty percent of \$1,701 is \$340.20, making claimant’s total repayment liability \$2,041.20 (\$1,701 + \$340.20).

In sum, claimant is ineligible for benefits for each of the weeks including July 12 through August 8, August 23 through September 19 and October 4 through December 26, 2015 (weeks 28-15 through 31-15, 34-15 through 37-15 and 40-15 through 51-15) as well as for the weeks including February 28

through March 26 and May 8 through May 28, 2016 (weeks 09-16 through 12-16 and 19-16 through 21-16). In addition, claimant was overpaid and must repay the Department \$1,701 in regular benefits, is liable for a \$340.20 monetary penalty, and is disqualified from receiving future benefits for 24 weeks.

DECISION: Hearing Decisions 16-UI-68815, 16-UI-68817, 16-UI-68818, 16-UI-68819, 16-UI-68820 and 16-UI-68828 are affirmed.

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

DATE of Service: November 16, 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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