

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1313

Modified
Overpayment and Penalties

PROCEDURAL HISTORY: On September 16, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was overpaid benefits and assessing a \$2,118 overpayment, a \$635.40 monetary penalty and 15 penalty weeks. Claimant filed a timely request for hearing. On October 27, 2016, ALJ Murdock conducted a hearing, and on November 3, 2016 issued Hearing Decision 16-UI-70503, modifying the Department's decision and assessing a \$2,011 overpayment, a \$603.30 monetary penalty and 15 penalty weeks. On November 21, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching his decision.

FINDINGS OF FACT: (1) On March 6, 2015, claimant filed an initial claim for unemployment insurance benefits. That claim was determined valid, with a weekly benefit amount of \$134. That claim was claimant's ninth valid unemployment insurance claim.

(2) When claimant filed this claim and after she filed her previous claims, the Department sent a claimant handbook to her. Claimant read the handbook. The handbook stated that claimant needed to accurately report her earnings to the Department during each week she claimed benefits to allow the Department to determine the correct amount of benefits she was entitled to receive for that week. The handbook further stated that the earnings she needed to report included the wages she earned for working as well as all tips, bonuses or commissions she earned.

(3) On February 11, 2016, A-1 Hotels, LLC hired claimant as a nail and facial technician. Claimant claimed and was paid benefits for the weeks of February 27, 2016 through March 19, 2016 (weeks 08-16 through 11-16). On March 21, 2016, claimant filed another claim for benefits. This claim was claimant's tenth claim for benefits and it was determined valid with a weekly benefit amount of \$303. The maximum weekly benefit amount at the time claimant filed this second claim was \$567. Claimant claimed and was paid benefits for the weeks of March 20, 2016 through May 14, 2016 (weeks 12-16 through 19-16). Weeks 08-16 through 19-16 are referred to collectively as the weeks at issue.

(4) During the weeks at issue, claimant worked for the employer. Claimant was paid \$9.25 per hour for her services and received tips and commissions as additional remuneration during the weeks at issue. Between February 21, 2016 and April 30, 2016 (weeks 08-16 through 17-16), claimant earned a total of \$1,428 in commissions. During the weeks at issue, claimant reported earnings based only on her hourly wage and did not report the tips or commissions she earned. The earnings that claimant reported, the hourly earnings and tips that the employer reported for claimant and the benefits claimant was paid during the weeks at issue were as follows:

<u>Week</u>	<u>Claimant's Reported Earnings</u>	<u>Employer's Reported Earnings</u>	<u>Benefits Paid</u>
08-16	120.25	Wages 126.07 Tips <u>28.00</u> 154.07	106
09-16	175.75	Wages 186.67 Tips <u>78.00</u> 264.67	0
10-16	259.00	Wages 265.75 Tips <u>92.00</u> 357.75	145
11-16	74.00	Wages 77.05 Tips <u>45.50</u> 122.55	303
12-16	240.00	Wages 235.44 Tips <u>130.00</u> 365.44	163
13-16	129.50	Wages 138.57 Tips <u>62.00</u> 200.57	274
14-16	194.25	Wages 191.01 Tips <u>119.00</u> 310.01	209
15-16	74.00	Wages 81.68 Tips <u>62.00</u> 143.68	303

<u>Week</u>	<u>Claimant's Reported Earnings</u>	<u>Employer's Reported Earnings</u>	<u>Benefit Paid</u>
16-16	166.50	Wages 165.11 Tips: <u>35.00</u> 200.11	237
17-16	27.75	Wages 43.94 Tips <u>18.00</u> 61.94	303
18-16	203.50	Wages 222.00 Tips <u>79.00</u> 301.00	200
19-16	212.75	Wages 218.95 Tips <u>146.00</u> 364.95	191

Exhibit 1 at 1, 9; Transcript at 24-25.

CONCLUSIONS AND REASONS: Claimant made willful misrepresentations in order to obtain benefits. Claimant is assessed \$2,013 in overpaid benefits and \$603.90 as a monetary penalty. Claimant is liable to repay those amounts to the Department or to have them deducted from any future benefits otherwise payable to her. Claimant is also disqualified from future benefits otherwise payable to her for 15 weeks.

Overpayment. ORS 657.310(1) states that if an individual has received unemployment benefits to which the individual was not entitled because the individual made a false statement or misrepresentation of material fact then, *regardless of the individual's knowledge or intent*, the individual is liable to repay the amount of the overpaid benefits to the Department or to have that amount deducted from future benefits otherwise payable to the individual (emphasis added). ORS 657.100(1) states that an individual who works during any week is not considered "unemployed" and is not entitled to receive benefits during that week unless the remuneration payable to the individual for that work is less than the individual's weekly benefit amount. ORS 657.150(6) states that if an otherwise eligible individual has employment in any week, the individual's weekly benefit amount shall be reduced by ten times the state minimum wage or one-third of the individual's weekly benefit amount, whichever is the greater.

While claimant contended that she did not accurately report her earnings during the weeks at issue because a Department representative told her she did not need to report the tips and commissions she earned, that excuse does not relieve her from repaying any benefits she was overpaid under ORS 657.310(1). Transcript at 8. The amount of benefits claimant was paid during the weeks at issue was based on the earnings she reported for those weeks. *See* ORS 657.100(1), ORS 657.150(6). Wages, tips and commissions are all considered reportable earnings. ORS 657.115(1); OAR 471-030-0017(c) (July 12, 2007). Even if claimant believed she was accurately reporting her income and did not know she was underreporting it, it is enough for purposes of ORS 657.310(1) that she received benefits to which she was not entitled based on incorrect representations she made about her earnings.

Claimant did not dispute that she earned tips and commissions in addition to wages during the weeks at issue, and agreed she did not report those amounts to the Department when she made her weekly claim reports. Transcript at 8, 10. Claimant did not challenge the information the employer gave to the Department or at hearing about the amount of the wages, tips and commissions that she earned during the weeks at issue. Although the employer provided information about the wages and tips claimant earned for each of the weeks at issue, the only information it supplied about claimant’s commissions was that they were in a total amount of \$1,428 and they were earned between February 21 and April 30, 2016, or during weeks 08-16 through 17-16. Exhibit 1 at 11; Transcript at 17. When the particular dates remuneration was earned are not clearly known, cannot be reliably established and no reasonable estimate is available, the total remuneration is allocated equally over the period during which it was earned for purposes of determining claimant’s earnings during particular benefit weeks. OAR 471-030-0017(d). Seventy days comprised the period between February 21 through April 30, 2016, which yields an allocation of \$20.40 per day and \$142.80 per week for the commissions claimant earned in addition to her wages and tips during that period.

Based on the wages, tips and commissions the employer reported for claimant, the correct amount of benefits to which claimant was entitled and the amount claimant was overpaid are set out below:

<u>Week</u>	<u>Employer’s Reported Earnings</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Over/ Under Paid</u>
08-16	w&t 154.07 comm <u>142.80¹</u> 296.87	106	0 ²	+106
09-16	w&t 264.67 comm <u>142.80</u> 407.47	0	0	0
10-16	w&t 357.75 comm <u>142.80</u> 500.55	145	0	+145
11-16	w&t 122.55 comm <u>142.80</u> 265.35	303	0	+303

¹ With respect to the earnings reported for claimant by the employer, “w&t” refers to wages and tips and “comm” refers to commissions.

² For this week as well as week 09-16 through 11-16, claimant’s earnings exceeded her weekly benefit amount of \$134 and applying ORS 167.100(1), she was not “unemployed” during those weeks and was not eligible to receive benefits.

<u>Week</u>	<u>Employer's Reported Earnings</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Over/ Under Paid</u>
12-16	w&t 365.44 comm <u>142.80</u> 508.24	163	0 ³	+163
13-16	w&t 200.57 comm <u>142.80</u> 343.37	274	0	+274
14-16	w&t 310.01 comm <u>142.80</u> 452.81	209	0	+209
15-16	w&t 143.68 comm <u>142.80</u> 286.48	303	118	185 ⁴
16-16	w&t 200.11 comm <u>142.80</u> 342.90	237	0	+237
17-16	w&t 61.94 comm <u>142.80</u> 204.74	303	\$200	103 ⁵

³ For this week as well as weeks 13-16, 14-16, 16-16 and 19-16, claimant's earnings exceeded her weekly benefit amount of \$303 and applying ORS 657.100(1), she was not "unemployed" during those weeks and was not eligible to receive benefits.

⁴ Claimant's correct benefit amount and the amount she was overpaid for this week were calculated as follows under ORS 657.150(6) since her earnings did not exceed her applicable weekly benefit amount of \$303. First, the minimum wage in effect during week 15-16 was \$9.25, and ten times that amount was \$92.50, which is less than one-third of claimant's weekly benefit of \$303, which was \$101 ($\$303 \div 3 = \101). Claimant's earnings of \$286.48 - \$101 yields \$185.48, which is the amount by which claimant's earnings exceeded one-third of her weekly benefit amount. \$303 less \$185 yields a correct benefit amount of \$118. The benefits paid to claimant of \$303 less the correct benefit amount of \$118 results in an overpayment of \$185.

⁵ Claimant's correct benefit amount and the amount she was overpaid for this week were calculated as follows under ORS 657.150(6) since her earnings did not exceed her applicable weekly benefit amount of \$303. First, the minimum wage in effect during week 15-16 was \$9.25, and ten times that amount was \$92.50, which is less than one-third of claimant's weekly benefit of \$303, which was \$101 ($\$303 \div 3 = \101). Claimant's earnings of \$204.74 - \$101 yields \$103.74, which is the amount by which claimant's earnings exceeded one-third of her weekly benefit amount. \$303 less \$103 yields a correct benefit amount of \$200. The benefits paid to claimant of \$303 less the correct benefit amount of \$200 results in an overpayment of \$103.

<u>Week</u>	<u>Employer's Reported Earnings</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Over/ Under Paid</u>
18-16	w&t 301.00 ⁶	200	103	97 ⁷
19-16	w&t 364.95	191	0	<u>+191</u>
TOTAL OVERPAYMENT				+2,013

Based on the calculations set out above, claimant was overpaid \$2,013 in benefits for the weeks at issue. Because this overpayment to claimant resulted from the incorrect earnings she reported to the Department, she is liable to repay it or to have it deducted from future earnings otherwise payable to her even if she thought she was correctly reporting her earnings to the Department during the weeks at issue.

Penalties. Read together, ORS 657.215 and ORS 657.310(2) provide that an individual who has willfully made false statements or misrepresentations of material fact to obtain benefits is subject to the assessment of a monetary penalty of between fifteen and thirty percent of the amount of benefits that the individual received to which the individual was not entitled as prescribed in the Department's rules. OAR 471-030-0052(7) (February 23, 2014) makes the assessment of the monetary penalty a function of the number of occurrences of misrepresentation during the weeks at issue, with each time the individual made a false representations to obtain benefits being counted as a separate occurrence. If the individual has seven or more occurrences of willful misrepresentations within five years of the occurrence for which the penalty is being assessed, the appropriate penalty is thirty percent of the total amount of benefits the individual received to which the individual was not entitled. OAR 471-030-0052(7)(d).

At hearing, claimant contended that her failure to report earnings to the Department was an innocent mistake that resulted from bad advice she received from a Department representative in 2015. Claimant alleged she called the Department for advice about how to report the tips and commission she earned when she made her weekly claim report because, although she had read the claimant handbook, she was confused about the reporting requirements and the representative to whom she spoke told her that she did not need to report her tips and commissions and she only needed to report as earnings her hourly wages based on the hours she worked. Transcript at 8, 9, 10, 13. However, claimant was unable to identify the representative to whom she spoke and the Department's records, which in the usual course

⁶ The employer did not report any commissions that claimant earned during weeks 18-16 and 19-16.

⁷ Claimant's correct benefit amount and the amount she was overpaid for this week were calculated as follows under ORS 657.150(6) since her earnings did not exceed her applicable weekly benefit amount of \$303. First, the minimum wage in effect during week 15-16 was \$9.25, and ten times that amount was \$92.50, which is less than one-third of claimant's weekly benefit of \$303, which was \$101 ($\$303 \div 3 = \101). Claimant's earnings of \$301 - \$101 yields \$200, which is the amount by which claimant's earnings exceeded one-third of her weekly benefit amount. \$303 less \$200 yields a correct benefit amount of \$103. The benefits paid to claimant of \$200 less the correct benefit amount of \$103 results in an overpayment of \$97.

should have noted such a contact, did not show that claimant made any such call. Transcript at 29, 30. Given that claimant was an experienced claimant, having filed nine claims before the ones at issue here, she was presumably very familiar with the instructions in the claimant handbook. The language in the handbook was very specific about the necessity of reporting tips and commissions in addition to wages as earnings for particular weeks, and it does not make sense the claimant would have called the Department for clarification of such clear language or that, if claimant received the advice she alleged she did from the representative, she would not have sought further clarification from the Department since the advice she allegedly received was so glaringly discrepant from the plain and easily understood instructions in the handbook. Finally, assuming the claimant actually called the Department about reporting her tips and commission sometime in 2015, it is implausible that the representative told her she did not need to report tips and commissions as earnings since such an instruction would be in fundamental conflict with the Department's definition of earnings and wages. *See e.g.*, ORS 657.105(1) (wages means all remuneration from employment); OAR 471-030-0017(1) (earnings means remuneration, which includes wages, bonuses, tips and commissions). Based on the implausibility that claimant called the Department and received the advice she alleged she did from the Department representative, she was not innocently misled by anyone about the need to report tips and commissions in addition to wages as her weekly earnings. On this record, it can only be inferred that claimant did not disclose the tips and commissions that she earned in order to underreport her earnings and thereby receive more benefits than those to which she was entitled. Claimant's failure to report the tips and commissions she earned to the Department was a willful failure to disclose a material fact in order to obtain benefits. Claimant is liable for the assessment of a monetary penalty under ORS 657.215 and ORS 657.310(2).

Applying OAR 471-030-0052(7) to determine the rate of the penalty to be levied against claimant, claimant willfully underreported her earnings when she made weekly claim reports during twelve of the weeks at issues, which constituted twelve occurrences of willful misrepresentation. Consequently, claimant is assessed a monetary penalty of thirty percent of the \$2,013 she was overpaid during the weeks at issue. OAR 471-030-0052(7)(d). The amount of the monetary penalty is \$603.90 ($\$2,013 \times 0.30$), which she is liable to repay or have deducted from any future benefits otherwise payable to her.

In addition, ORS 657.215 provides that when an individual has willfully made false statements or failed to report material facts to obtain benefits, the individual is disqualified from future benefits for a period not to exceed 52 weeks as determined under the Department's regulations. OAR 471-030-0052(1)(a) sets out the method for determining the weeks of benefit disqualification when, as here, a claimant has failed to accurately report earnings. Applying this regulatory provision, the total amount of benefits that claimant was overpaid (\$2,013) is divided by the maximum weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the individual's disqualifying act(s) (\$549), rounding up to the nearest two decimal places (3.66), multiplying that result by four (14.64), and rounding that result up to the nearest whole number, which yields 15. Based on her willful failure to report earnings during the weeks at issue, claimant is disqualified from receiving any future benefits otherwise payable to her for 15 weeks.

Claimant is assessed \$2,013 in overpaid benefits and \$603.90 as a monetary penalty. Claimant is liable to repay those amounts to the Department or to have them deducted from any future benefits otherwise payable to her. Claimant is also disqualified from future benefits otherwise payable to her for 15 weeks.

DECISION: Hearing Decision 16-UI-70503 is affirmed.

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

DATE of Service: January 4, 2017

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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