

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0264

Affirmed
Disqualification
Overpayment and Penalties Assessed

PROCEDURAL HISTORY: On November 22, 2016, the Oregon Employment Department (the Department) served notice of the following two administrative decisions: decision # 135049 concluded that claimant voluntarily left work without good cause and decision # 133445 concluded that claimant was not available for work from September 18 through 24, 2016 (week 38-16). On December 1, 2016, the Department issued decision # 194193 which assessed a \$4,539 overpayment, a \$907.80 monetary penalty, and 35 penalty weeks, based on decisions #135049 and # 133445. Claimant filed timely hearing requests. On February 16, 2017, ALJ Murdock conducted hearings, and on February 23, 2017, issued Hearing Decision 17-UI-77606, which affirmed decision # 135049, and Hearing Decision 17-UI-77607, which affirmed decision # 133445. On February 24, 2017, ALJ Murdock issued Hearing Decision 17-UI-77698, which affirmed decision # 194193. On February 28, 2017, claimant filed applications for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-77606, 17-UI-77607, and 17-UI-77698. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2017-EAB-0263, 2017-EAB-0264, 2017-EAB-0265).

FINDINGS OF FACT: (1) On August 31, 2016, claimant filed an initial claim for unemployment benefits. A weekly benefit amount of \$487 was established. At the time claimant filed his initial claim, the maximum benefit amount was \$590.

(2) From September 13 through 22, 2016, Barrett Business Services, a temporary staffing agency, employed claimant in an assignment at Western Cascade Industries (the mill). Claimant was assigned to work Monday through Friday, on a day shift.

(3) When he worked at the mill, claimant's job duties involved processing sawed logs off a conveyor belt. Claimant found the work physically demanding and also believed it posed a hazard to his health because of the dust created by sawdust from the cut logs. Although the mill did not provide respirators to employees, claimant purchased and wore a respirator because he was worried about the health effects

of continued exposure to the sawdust. The respirator did not completely prevent claimant from ingesting sawdust, however.

(4) Claimant worked at the mill from September 13 through 16, and September 20, 2016. He did not work on September 19 or 21, 2016, however. Work at the mill was available to claimant on September 19 and 21. Barrett Business Services paid claimant \$397 for the week of September 13 through 16, and \$108 for his work on September 20.

(5) On September 22, 2016, claimant spoke to a manager at the mill and said he was quitting the job because of a death in the family. Claimant voluntarily left work at the mill because he found the work too physically demanding and because he believed the dusty work environment in which he was required to work would adversely affect his health. Claimant did not contact Barrett Business Services prior to telling the manager at the mill that he was quitting.

(5) Claimant claimed benefits for weeks 37-16 through 46-16, the weeks at issue. Claimant failed to report his earnings when he filed his claims for weeks 37-16 and 38-16, and also certified that he was available for work and had not quit a job during the week when he filed his claim for week 38-16. The Department paid claimant \$487 in benefits for week 37-16; claimant earned \$396 during that week, however, and he was overpaid \$234 in benefits for that week. For weeks 38-16 through 39-16 through 46-16, the Department paid claimant \$487 per week in benefits; claimant was overpaid \$3,896 in benefits for these weeks. For week 40-16, the Department overpaid claimant \$409 in benefits; claimant was overpaid \$409 for that week. The total amount of benefits claimant was overpaid was therefore \$4,539 ($\$234 + \$3,896 + \$409 = \$4,539$).

CONCLUSION AND REASONS: We agree with the ALJ. Claimant voluntarily left work for Barrett Business Service without good cause during week 38-16, and was not available for work during this week. Claimant failed to report his work and earnings when he filed his claims for weeks 37-16 and 38-16. Claimant was therefore disqualified from the receipt of benefits for weeks 38-16 through 46-16 and was overpaid \$4,539 in benefits for weeks 37-16 through 46-16. He must repay this amount to the Department or have it deducted from any future benefits otherwise payable. He is also liable for a \$907.80 monetary penalty, and as an additional penalty, is disqualified from receiving future benefits for a period of 35 weeks.

Credibility. During all three hearings, claimant displayed notable difficulty in remembering relevant events. For example, although he testified that he was seriously concerned about the hazardous conditions in which he was required to work, and spoke to the daytime foreman at the mill and a Barrett Business Services representative about these conditions, he could not remember the foreman's response to his complaint or to whom he spoke at Barrett Business Services. Hearing Decision 17-UI-77606, Audio recording at 13:44, 14:23. Although claimant testified that he spoke with his doctor about the hazardous conditions in the workplace, he was unable to remember when he spoke with his doctor. Hearing Decision 17-UI-77606, Audio recording at 20:38. Claimant's testimony was also internally inconsistent. He initially testified that he purchased and used three or four pairs of safety gloves during his employment at the mill. Hearing Decision 17-UI-77606, Audio recording at 23:14. When challenged on cross examination why he needed three to four pairs of gloves during his five days of work at the mill, claimant was unable to confirm his use of the multiple pairs of gloves and asserted only that he purchased a pair of garden gloves to wear under the gloves issued by the mill. Hearing Decision

17-UI-77606 at 23:16. When asked why he failed to work at the mill on September 19 and 21, 2016, he initially testified that he missed work because of the health hazards to which he was exposed. Hearing Decision 17-UI-77607 at 18:10. He subsequently asserted, however, that he could not remember why he did not report for work on those days. Hearing Decision 17-UI-77607, Audio recording at 24:35. For the foregoing reasons, claimant's testimony was unreliable. As a result, where facts are in dispute, we have found facts in accordance with the testimony of the Department and employer witnesses.

Voluntary Quit: A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time.

Claimant voluntarily left work for Barrett Business Services because he found the work he had been assigned was too physically demanding and also believed conditions in which he was required to work could adversely affect his health. Although the degree of health hazard to which claimant was exposed is somewhat questionable, especially given claimant's lack of credibility, we will accept without deciding that claimant faced a grave situation. Claimant failed, however, to demonstrate that he had no reasonable alternative other than leaving work. Claimant could have spoken to a Barrett Business Services representative about the working conditions he believed to be unsafe. Had he done so, the representative would have attempted to find claimant another assignment at the mill or with another business or industry. Audio Record at 26:42. A reasonable and prudent person would have contacted the employer about the possibility of changing an assignment which required him to perform difficult work in environment the person believed to be unhealthy before deciding that he had no reasonable alternative but to leave work.¹ Claimant voluntarily left work without good cause, and was disqualified from the receipt of benefits for weeks 38-16 through 46-16.

Availability for work: Under ORS 657.155(1)(c), an individual must be able to work, available for work, and actively seeking but unable to obtain suitable work in order to be eligible for unemployment benefits. To be considered "available for work" for purposes of this statute, an individual must be willing to work during all of the usual hours and days of the week customary for the work being sought, and not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time. OAR 471-030-0036(3) (February 23, 2014).

Claimant sought and accepted an assignment from the employer to work at a mill, where he was expected to work Monday through Friday, during the day shift. During week 38-16 (September 18

¹ Claimant asserted that he complained about his work environment and working conditions to the daytime foreman and the plant manager at the mill and that these individuals did nothing to address his concerns. Hearing Decision 17-UI-77606, Audio recording at 13:37. For the reasons discussed above, we find claimant's testimony not reliable. We find more credible the testimony of the Barrett Business Services representative, who concluded that claimant had not complained about safety issues to any of the mill managers, because had he done so, a mill manager would have contacted the representative to attempt to resolve the problem. Hearing Decision 17-UI-77606, Audio recording at 26:06. .

through 24, 2016), although work was available for claimant at the mill on Monday, September 19 and Wednesday, September 21, claimant did not report for work on these days. Because claimant was not willing to work during all of the usual hours and days of the week for the job he had accepted, he was not available to work during week 38-16.

We do not find credible claimant's assertion that he did not work on September 19 and 21 because he believed the work posed a risk to his health due to the environment in which he was expected to work.² As discussed above, although claimant initially asserted he did not report for work for two days because of health hazards, he subsequently contradicted himself by testifying that he could not remember why he "called out" and did not work on the two days in question. Audio Record at 18:10, 24:35. We conclude it more likely than not that claimant's failure to work on September 19 and 21 did not result from any concern about his health.

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 certifications to the Department that he had no earnings during weeks 37-16 and 38-16 and that he had not quit a job and was available for work during week 38-16, claimant received \$4,539 in benefits during the weeks at issue to which he was not entitled. With regard to claimant's benefit claims for those weeks, the Department established that he was disqualified from the receipt of benefits for weeks 37-16 and 38-16 because he was not available for work and did not accurately report his earnings for those weeks, and also established that he was disqualified from the receipt of benefits for weeks 38-16 through 46-16, because he voluntarily left work without good cause. Claimant's representations regarding his availability for work, his earnings, and his work separation 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 \$4,539 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).

² ORS 657.190 provides that among the factors to consider in determining whether work is suitable for an individual, the Department shall consider "the degree of risk involved to the health...of the individual."

When asked why he failed to accurately report his earning, claimant testified that he used public computers to file his claims for weeks 37-16 and 38-16, and, at times, may have left the computers unattended before he completed filing his claims. He asserted that it was possible that while he was away from the computers, someone changed the amount of earnings he reported on his weekly claims. Audio recording at 21:43. In regard to his failure to report that he had quit a job during week 38-16, he testified that he could not remember if he had done so. Audio recording at 22:25. Although he admitted that he had missed two days of work during week 38-16, he insisted that he was willing and able to work all available opportunities during that week; when the ALJ questioned him further about his availability for work, he responded that he found the question confusing. Audio recording 23:09, 23:20, 23:50. Given claimant's implausible, evasive, and confusing explanations for his failure to provide accurate information in his weekly claims for benefits, as well as for the reasons discussed above, we do not find him to be a credible witness. We conclude that he willfully misrepresented facts to the Department concerning his qualifications for unemployment benefits to obtain benefits and is liable for penalties under ORS 657.215

When the disqualifying acts under ORS 657.215 relate to the provisions of ORS 657.176 and a failure to accurately report work and earnings, the number of weeks of disqualification is calculated by dividing the total overpayment (\$4,539) by the maximum Oregon weekly benefit amount in effect during the first effective week of the initial claim of the individual's disqualifying act (\$590), rounding the result to the nearest two decimal places (7.69), multiplying the result by 14 (30.76), rounding the result up to the nearest whole number (31), and adding an additional four penalty weeks for a total of 35 penalty weeks. OAR 471-030-0052(1) (a) and (d) (February 23, 2014).

Claimant is also liable for a monetary penalty equal to 20 percent of the overpaid benefits because he twice falsely reported his earnings, falsely reported he was available for work, and falsely reported he had not quit a job; each of these actions counted as an "occurrence" for determining the penalty percentage for which is liable. Because claimant had four occurrences within five years, he is liable for a penalty of 20 percent of the total overpayment amount. Twenty percent of \$4,539 is \$907.80, making claimant's total repayment liability \$5,446.80 (\$907.80 + \$4,539).

In sum, claimant is disqualified from the receipt of benefits for weeks 38-16 through 46-16. He must repay the Department for \$4,539 in benefits he was overpaid for weeks 37-16 through 46-16, is liable for a \$907.80 monetary penalty, and is disqualified from receiving future benefits for 35 weeks.

DECISION: Hearing Decision 17-UI-77606 is affirmed.

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

DATE of Service: March 23, 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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