

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0313

Modified
Overpayment, No Penalties

PROCEDURAL HISTORY: On April 30, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$2,762 overpayment, an \$828.60 monetary penalty and 21 penalty weeks (decision # 195824). On January 6, 2017, claimant filed an untimely request for hearing. On January 11, 2017, ALJ Kangas issued Hearing Decision 17-UI-74495, dismissing claimant's request for hearing, subject to claimant's right to renew the request by responding to an appellant questionnaire by January 25, 2017. On January 25, 2017, claimant responded to the questionnaire. On February 2, 2017, the Office of Administrative Hearings (OAH) issued a letter order cancelling and vacating Hearing Decision 17-UI-74495 and returning that matter to the docket for purposes of scheduling a hearing on claimant's untimely request for hearing and, if appropriate, on the merits of decision # 195824. On February 21, 2017, ALJ Murdock conducted a hearing, at which the employer did not appear, and on February 22, 2017 issued Hearing Decision 17-UI-77477, allowing claimant's late request for hearing and affirming decision # 195824. On March 10, 2017, claimant filed an application for review of Hearing Decision 17-UI-77477 with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion allowing claimant's late request for hearing are **adopted**.

FINDINGS OF FACT: (1) On November 1, 2013, claimant filed an initial claim for benefits. That claim was determined valid with a weekly benefit amount of \$193. The maximum weekly benefit amount in effect at the time claimant filed his claim was \$538. Claimant claimed benefits for the weeks of November 3, 2013 through November 9, 2013, the weeks of December 1, 2013 through February 22, 2014 and the weeks of March 2, 2014 through April 5, 2014 (weeks 45-13, 49-13 through 08-14 and 10-14 through 14-14), the weeks at issue.

(2) During the weeks at issue claimant was homeless. When he was homeless, claimant's life was "chaotic." Transcript at 41. Claimant stopped "keeping on top of things" or paying close attention to the details of his personal and financial affairs. Transcript at 40.

(3) During the weeks at issue, Washington Inventory employed claimant to take inventories for its clients, which were various retail stores. Claimant travelled throughout Oregon, Washington and Idaho taking inventories. The employer paid claimant for his work according to differing pay scales that were dependent on the work activities in which claimant engaged. These pay scales included different hourly pay rates for the time claimant acted as driver when traveling to a job, the time he was a passenger in a vehicle traveling to a job, wait time when waiting for work at the job site and the time he spent performing the inventory itself. Claimant's hours of work during the weeks at issue were not fixed, and were often announced at the last minute and varied widely. On many jobs, a manager at the particular job site clocked claimant and the other employees in at the beginning of a shift and out at its conclusion and claimant did not know his actual clock in or clock out times. During the weeks at issue, claimant did not keep records of the time that he worked at each activity for which he was paid or the rates of pay for those activities. Homelessness, crises in his personal life and worry about his circumstances significantly distracted claimant from keeping careful track his earnings during the weeks at issue. When making his weekly claims for benefits, claimant roughly estimated, guessed his earnings for that week and reported that estimate to the Department. During the weeks at issue, the employer did not provide pay statements to claimant that would have allowed him to compare the earning he had reported in particular weeks with what the employer had actually paid him. During the weeks at issue, claimant did not often check his bank account into which his paychecks were directly deposited and was not aware that the earnings he was receiving were often greater than what he reported to the Department.

(4) During the weeks at issue, the amounts that claimant and the employer reported to the Department that claimant earned, the benefits that claimant was paid, the correct benefit amount based on the earnings reported by the employer and the amount of the benefits overpaid to claimant were as follows:

<u>Week</u>	<u>Claimant's Reported Earnings</u>	<u>Employer's Reported Earnings</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Amount Overpaid/ Underpaid</u>
45-13	\$150	\$239.38	\$132	\$0 ¹	\$132
49-13	\$150	\$418.78	\$132	\$0	\$132
50-13	\$130	\$416.18	\$152	\$0	\$152
51-13	\$120	\$225.95	\$162	\$0	\$162
52-13	\$120	\$277.24	\$162	\$0	\$162
01-14	\$130	\$301.66	\$154	\$0	\$154
02-14	\$140	\$298.97	\$144	\$0	\$144
03-14	\$140	\$438.43	\$144	\$0	\$144
04-14	\$130	\$568.98	\$154	\$0	\$154
05-14	\$130	\$413.08	\$154	\$0	\$154

¹ Because ORS 657.100(1) states that an individual is deemed "unemployed" during a week only if the remuneration paid or payable to the individual for services performed during that week is less than the individual's weekly benefit amount, claimant was not eligible to receive benefits for weeks when his earnings for that week were less than his weekly benefit amount of \$193. Since claimant's earnings for all of the weeks at issue exceeded \$193, claimant was not eligible to receive benefits during any of those weeks, and any benefits paid to him were overpaid.

<u>Week</u>	<u>Claimant's Reported Earnings</u>	<u>Employer's Reported Earnings</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Amount Overpaid/ Underpaid</u>
06-14	\$150	\$346.57	\$134	\$0	\$134
07-14	\$120	\$270.90	\$164	\$0	\$164
08-14	\$120	\$361.97	\$164	\$0	\$164
10-14	\$120	\$424.05	\$164	\$0	\$164
11-14	\$120	\$279.45	\$164	\$0	\$164
12-14	\$120	\$297.90	\$164	\$0	\$164
13-14	\$120	\$560.54	\$164	\$0	\$164
14-14	\$130	\$366.86	\$154	\$0	<u>\$154</u>
Total:					<u>\$2,762</u>

Exhibit 1 at 1; Exhibit 5 at 3.

CONCLUSIONS AND REASONS: Claimant received \$2,762 in benefits for the weeks at issue that he was not entitled to receive and is liable to repay those benefits or have them deducted from any future benefits otherwise payable to him. Claimant did not make a willful misrepresentation to the Department, and is not subject to a monetary penalty or penalty weeks.

Overpayment. ORS 657.100(1) states that an individual is deemed unemployed and eligible to receive benefits in a given week only if, among other things, the remuneration paid or payable to the individual for services performed during that week is less than the individual's weekly benefit amount. ORS 657.310(1) provides if an individual received benefits to which the individual was not entitled because the individual, *regardless of the individual's knowledge or intent*, made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, the individual is liable to repay the amount of the benefits or to have the amount of the benefits deducted from any future benefits otherwise payable to the individual.

Claimant was paid benefits during the weeks at issue because he reported to the Department that he had earnings in each of those weeks that were less than his weekly benefit amount of \$193. Claimant did not dispute that the earnings the employer reported for him correctly stated the amount of his earnings for each of the weeks at issue and he did not dispute that he was paid the benefit amounts shown on the Department's Schedule of Adjustments. Transcript at 26. Accordingly, the benefits that claimant was paid during the weeks at issue, totaling \$2,762, were benefits to which he was not entitled. Even if claimant did not know that the earnings he was reporting to the Department and on which the amount of the benefits he was paid were based, were incorrect, he is nevertheless liable to repay \$2,762 to the Department or to have that amount deducted from any future benefits otherwise payable to him.

Penalties. ORS 657.215 and ORS 657.310(2), read together, state that an individual who has willfully make a false statement or misrepresentation to obtain benefits is liable for the assessment of a monetary penalty and a period of disqualification from future benefits. In Hearing Decision 17-UI-77477, the ALJ determined that it was appropriate to assess a monetary penalty of \$828.60 and 21 penalty weeks against claimant. Hearing Decision 17-UI-77477 at 7. Although the ALJ found that claimant was homeless and

going through difficult times during the weeks at issue and that the employer's method of computing claimant's earnings was complex and confusing, the ALJ reasoned that she was "not persuaded that [claimant] was genuinely confused about the expectations for reporting his earnings or that he was significantly under-reporting his earnings amounts" during the weeks at issue. Hearing Decision 17-UI-77477 at 7. We disagree.

While claimant was obviously careless in calculating the amount of earnings he reported to the Department during the weeks at issue, that is not enough to infer, as the ALJ did, that he was making those reports with an intention to obtain benefits to which he was not entitled. At the time claimant was making the reports, his life was in significant disarray and it is plausible that he was too distracted to attend carefully to the hours he was working and to keep records of them or to keep track of what he was actually earning each week. Claimant's difficult circumstances were compounded by the uncertain hours that he worked, that he did not enter his own time in the employer's records and that his pay rates ever-changed depending on his work activities. Although claimant may not have taken what would be considered reasonable efforts to avoid being overpaid, in light of the chaos of his personal circumstances and the apparently intricate, if not convoluted, manner in which his pay was calculated by the employer, there is insufficient evidence from which it can be inferred that by the amounts he reported as earnings he intended to receive more in benefits than those to which he was entitled. On this record, claimant is not liable for the assessment of a monetary penalty or penalty weeks.

DECISION: Hearing Decision 17-UI-77477 is modified, as outlined above.

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

DATE of Service: April 19, 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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