

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0760

Affirmed
Overpayment Assessed

PROCEDURAL HISTORY: On March 29, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 133739) concluding that claimant was not available for work from July 31 through September 3, 2016 (weeks 19-16 through 35-16) because he was engaged in self-employment. On March 30, 2017, the Department served notice of an administrative decision (decision # 193845) assessing a \$3,936 overpayment, a 33 week disqualification, and a \$1,180.80 monetary penalty based in part on decision # 133739. Claimant filed timely requests for hearing. On May 1, ALJ S. Lee conducted hearings, and on May 18, 2017, issued Hearing Decision 17-UI-83734, which reversed decision # 133739 and concluded that claimant was available for work during weeks 19-16 through 35-16. On June 7, 2017, Hearing Decision 17-UI-83734 became final without an application for review having been filed. The hearing regarding claimant's hearing request on decision # 193845 was continued to May 15 and June 1, 2017.¹ On June 9, 2017, ALJ S. Lee issued Hearing Decision 17-UI-85402, which modified decision # 193845 by assessing a \$3,936 overpayment but no monetary penalty or penalty weeks. On June 21, 2017, claimant filed an application for review of Hearing Decision 17-UI-85402 with EAB.

EAB considered claimant's written argument to the extent it was relevant and based on information received into evidence at the hearing.

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 conclusions that claimant is not liable for a disqualification from future weeks of unemployment benefits or a monetary penalty are **adopted**.

¹ During the May 15 hearing, the Employment Department representative conceded that claimant was not self-employed during the weeks at issue, weeks 19-16 through 35-16. The representative told the ALJ that the Department would issue an decision to amend decision # 193845 by finding that claimant did not misrepresent his availability for work when he filed his claims for the weeks at issue. 5/15/17 Hearing, Audio recording at 1:34. The Department never issued an amended decision, however.

FINDINGS OF FACT: (1) On May 8, 2016, claimant filed an initial claim for benefits. A weekly benefit amount of \$246 was established. Claimant received waiting week credit for week 19-16, and was paid \$246 in benefits per week for weeks 20-16 through 35-16; these are the weeks at issue.

(2) During the weeks at issue, claimant was the sole owner, officer and sole employee of Hyse Industries, a business that offered discounted shipping services to other businesses. Claimant's business was a franchise of InXpress, a global shipping service, and he paid franchise fees to InXpress for services he provided to customers. Claimant worked approximately 2-4 hours per day for his business, but paid himself no salary for his work. Claimant reinvested any earnings in the business.

(3) From January through May 2016, claimant worked as a sales representative for the Furniture Connexion. In May, claimant was laid off due to staffing issues, but returned to work for the Furniture Connexion in September 2016. Claimant earned \$8,309.35 from Furniture Connexion in 2016.

(4) In his tax return for 2016, claimant reported total earnings of \$64,508, which included both his wages from the Furniture Connexion and receivables, *i.e.*, amounts received from businesses for services provided by Hyse Industries. For the period September 24 through December 31, 2016, Hyse Industries reported receivables in the amount of \$32,896.50.

(5) When claimant filed his claims for benefits for each of the weeks at issue, he reported that he had not worked during the week and had no earnings. A Department representative with whom he had spoken told him that if his business was not making a profit, he did not need to report any work for or earnings from the business on his weekly claims.

CONCLUSION AND REASONS: We agree with the ALJ. Claimant received \$3,396 in unemployment benefits to which he was not entitled and is liable to repay that amount to the Department or have that amount deducted from future benefits otherwise payable under ORS Chapter 657.

Unemployment insurance benefits are payable only 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 full-time work if the remuneration paid or payable is less than the individual's weekly benefit amount. ORS 657.100. Where an employer-employee relationship exists, "remuneration" means the gross amount of compensation an individual receives for services, including wages, salaries, and bonuses. OAR 471-030-0017(1)(c) (July 1, 2016). "Where no employer-employee relationship exists, 'remuneration' means the gross amount of compensation for the product or service, less only the value of tangible components involved in producing or providing the product or service and limited to the tangible components that remain with the party receiving the service or product." OAR 471-030-0017(1)(d).

During the weeks at issue, claimant arguably had no employer-employee relationship with the business which he owned because he received no compensation for his services, such as a salary. He did, however, receive compensation for shipping services he provided to customers. Because the record fails to show that any "tangible component" was involved in the service claimant provided, the gross amount of the compensation he received for his services will be used to calculate the remuneration he received to determine if he was unemployed during any or all of the weeks at issue.

Remuneration received for services is allocated to the week in which the service is performed. OAR 471-030-0017(2)(a). When the dates of the service are not clearly established in the record, however, “the remuneration shall be allocated equally over the period during which the services were rendered...” OAR 471-030-0017(2)(d). Here, claimant was unable to provide information regarding remuneration he received for services provided during the weeks at issue. The record shows, however, that he reported earnings of \$64,508 in calendar year 2016; this amount includes wages from his work for Furniture Connexion and receivables from his business. Claimant earned \$8,309.35 from Furniture Connexion in 2016, and earned \$32,896.50 in receivables from his business for 14 weeks in 2016 – from September 24 through December 31, 2016. By subtracting these amounts from claimant’s total 2016 income, we then can determine the total amount of receivables from his business for the other 38 weeks of 2016.² (\$64,508 - \$8,309.25 - \$32,896.50 = \$23,302). That amount – \$23,202 – is then then divided by 38 to determine a weekly amount of \$613.21. We therefore allocate remuneration of \$613.21 to each of the weeks at issue. Because this amount is greater than claimant’s weekly benefit amount of \$246, claimant was not “unemployed” during the weeks at issue and not entitled to receive benefits for those weeks. Claimant was therefore overpaid \$3,926 in benefits.

Claimant, however, credibly testified that after he filed his claim, he spoke at length with a Department representative, who told him he did not need to report work for or earnings from his business because it was not profitable. Claimant asserts that the Department should be estopped from requiring him to repay unemployment benefits he received because his failure to report work and earnings resulted from his reliance on misinformation he received from a Department employee.

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, to establish estoppel against a state agency, a party “must have relied on the agency’s representations and the party’s reliance must have been reasonable.” *State ex rel SOSOC v. Dennis*, 173 Or App 604, 611, 25 P3d 341, *rev den*, 332 Or 448 (2001) (*citing Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995)).

The doctrine of equitable estoppel is inapplicable here because claimant’s reliance on the false advice given to him by a Department representative appears not to have been reasonable. Each week that he filed his claims for benefits, claimant was advised by the Department that he needed to report work he had performed, even if he was self-employed.³ It was unreasonable to rely on information provided by a Department employee that conflicted with other information received from the Department without taking additional action to resolve the contradiction, such as talking with another Department representative to clarify the situation.

² Claimant testified that the volume of his Hyse Industries business increased substantially in November 2016. June 1 Hearing, Audio recording at 43:37. As a result, the amount of receivables for the period September 23 through December 31, 2016 may not be indicative of the receivables claimant earned during the weeks at issue.

³ Each week that claimant filed for benefits, claimant was asked if he had worked during the week for which he was claiming benefits. The explanation to this question stated that “[y]ou also need to report self-employment, work that you do as your own boss.” Exhibit 2.

Claimant received \$3,926 in benefits he was not entitled to because he falsely reported to the Department that he had not worked during each of the weeks at issue. Because claimant's false statements caused the overpayment, and regardless of what claimant knew or intended at the time he made those false reports, he is liable either to repay the overpayment to the Department or have the amount deducted from any future unemployment benefits otherwise payable to him. ORS 657.310(1).

DECISION: Hearing Decision 17-UI-85402 is affirmed.

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

DATE of Service: July 20, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.