

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1028

Affirmed
Overpayment and Penalties Assessed

PROCEDURAL HISTORY: On March 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$690 overpayment, a \$172.50 monetary penalty and 5 penalty weeks (decision # 194919). Claimant filed a timely request for hearing. On August 4, 2017, ALJ S. Lee conducted a hearing at which the employer did not appear, and on August 15, 2017 issued Hearing Decision 17-UI-90463, affirming the Department's decision. On August 25, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Between 1999 and 2017, claimant filed several claims for unemployment insurance benefits that were determined to be valid. Claimant received benefits on these claims. While receiving these benefits, claimant sometimes also worked and needed to report his hours and earnings to the Department. Claimant did so accurately.

(2) On February 21, 2016, while receiving benefits, claimant took a "basic review test" that the Department required. Audio at ~16:32. During that test, claimant responded correctly that, when reporting earnings, gross and not net pay should be reported and that earnings needed to be reported even if a paycheck had not yet been received for that work.

(3) On December 29, 2016, claimant filed an initial claim for unemployment insurance benefits. Claimant's claim was determined valid with a weekly benefit amount of \$138. The maximum weekly benefit amount at the time claimant filed his claim was \$590.

(4) On January 21, 2017, BJ's Pizzeria hired claimant as a sauté cook. The hours claimant worked during any shift depended on the employer's business volume.

(5) Claimant claimed and was paid benefits for the weeks of January 22 through February 18, 2017 and February 26 through March 4, 2017 (weeks 04-17 through 07-17 and 09-17), the weeks at issue. During week 04-17, claimant earned \$274.78 from BJ's; during week 05-17, claimant earned \$154.45 from BJ's; during week 06-17, claimant earned \$141.54 from BJ's; during week 07-17, claimant earned \$139.86 from BJ's; and during week 09-17, claimant earned \$227.85 from BJ's. For each of the weeks

at issue, claimant reported to the Department that he worked no hours and had no earnings. For each of the weeks at issue, the Department paid claimant \$138 in benefits, or a total of \$690 for all of the weeks at issue.

CONCLUSIONS AND REASONS: Claimant is assessed a \$691 overpayment and a \$172.50 monetary penalty which he is liable to repay to the Department or to have deducted from any future benefits otherwise payable to him. Claimant is also assessed 5 weeks of penalty disqualification.

Overpayment. ORS 657.100(1) states that an individual is deemed “unemployed” in any week if, among other things, the amount that the individual earned from work during that week is less than the individual’s weekly benefit amount. ORS 657.155(1) provides that only “unemployed” individuals may receive benefits. ORS 657.310(1) provides that if an individual has received any benefits to which the individual is not entitled because the individual, *regardless of the individual’s knowledge or intent*, made or caused to be made a false statement of 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 them deducted from any future benefits otherwise payable to the individual.

Claimant did not contest that he had the earnings set out in the findings of fact during the weeks at issue, nor that, when he made his weekly claim reports, he reported that he had worked no hours and had no earnings. Audio at ~26:29. Because claimant earned more than his weekly benefit amount of \$138 during each of the weeks at issue, he was not considered “unemployed,” and was not eligible to receive any benefits for those weeks. The Department would not have paid the \$690 in benefits to claimant during the weeks at issue had he accurately reported that he had earnings the exceeded his weekly benefit amount. Regardless of claimant’s knowledge or intent, he received \$690 in benefits to which he is not entitled because the earning figures he provided to the Department were not accurate. Claimant therefore is liable to repay the \$690 he received to the Department or to have that amount deduced from any future benefits otherwise payable to him.

Penalties. ORS 657.215 and ORS 657.310(2), read together provide that, if an individual has received any benefits to which the individual is not entitled because the individual has willfully made a false statement or misrepresentation or willfully failed to report a material fact to obtain benefits, the individual is liable to pay a monetary penalty and to have a penalty period of benefit disqualification imposed.

At hearing claimant contended he reported no hours worked or earnings during the weeks at issue since he had been advised by an unknown Department representative, whose position he did not recall, at an unknown time, that he was not required to report either if they were less than a “certain amount.” Audio at ~23:20. Claimant’s explanation does not have sufficient detail from which the credibility of it may be reliably inferred, including the vagueness of the circumstances under which the advice was given, the unspecified “certain amount” of earnings or hours, and the implausibility that claimant would not think to seek more specific information about the cut-off value for a “certain amount,” and would not have neglected to state that value at the hearing. In addition, given that claimant was an experienced recipient of benefits, and presumably familiar with the rules governing reporting of earnings, it is also highly implausible that he would have accepted as accurate the vague statement he contended that the Department representative made to him at face value, without some corroboration since it would have represented a dramatic departure from prior Department practice. Finally, while claimants are often told

that they may still receive benefits for a week if they earn less than their weekly benefit amount, it is highly unlikely that a representative would have made a mistake of the magnitude of telling claimant that he need not report his hours or earnings during the weeks at issue. On this record, it does not appear at all likely that claimant was told that he need not report his earnings to the Department, and it does not appear that claimant's misreporting was inadvertent or accidental. Based on claimant's experience as a recipient of benefits, and the implausible nature of his explanation, it appears most likely that claimant willfully failed to report his earnings during the weeks at issue to receive benefits to which he was not entitled. Accordingly, claimant is subject to the assessment of penalties.

ORS 657.310(2) provides that the period of penalty disqualification for willful misrepresentations to obtain benefits shall be between 15 and 30 percent of the benefits the individual received to which the individual was not entitled as prescribed by the director. OAR 471-030-0052(7) (February 23, 2014) specifies that the monetary penalty assessed for a willful misrepresentation that is made to obtain benefits is a function of the number of occurrences of misrepresentation. An "occurrence" is counted as having occurred each time the individual willfully made a misrepresentation of obtain benefits. OAR 471-030-0052(7). There are five weeks constituting the weeks at issue, and for each week, claimant willfully did not accurately report his actual earnings, instead reporting no earnings. OAR 471-030-0052(7)(c) states that for five occurrences of misrepresentation, the penalty to be assessed is 25 percent of the total amount of the benefits the individual received to which the individual was not entitled. 25 percent of the \$690 in benefits that claimant received to which he was not entitled is \$172.50. Claimant is assessed a penalty assessment of \$172.50.

OAR 471-030-0052(1)(a) sets out the formula for calculating the weeks of penalty disqualification if the individual willfully failed to report work or earnings to receive benefits. It provides that the total amount of benefits overpaid to the individual based on the disqualifying acts (\$690) shall be 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 disqualifying act (\$590), which yields a result of 1.169, then rounding that number off to two decimal places (1.16), multiplying that result by 4 (4.64), and rounding that number up to the nearest whole number, which yields the final result of 5. Claimant is assessed 5 penalty weeks of disqualification from future benefits.

DECISION: Hearing Decision 17-UI-90463 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 25, 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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