

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1129

Affirmed
Overpayment and Penalties

PROCEDURAL HISTORY: On August 8, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision assessing an overpayment of \$1,181, a monetary penalty of \$295.25 and 9 penalty weeks (decision # 195432). Claimant filed a timely request for hearing. On September 6, 2017, ALJ S. Lee conducted a hearing, and on September 11, 2017 issued Hearing Decision 17-UI-92308, affirming the Department's decision. On September 19, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On May 13, 2016, claimant filed an initial claim for unemployment insurance benefits. That claim was determined valid with a weekly benefit amount of \$308. The maximum weekly benefit amount in effect when claimant filed her initial claim was \$568. Claimant had filed eight claims prior to the filing of this claim.

(2) As of January 2017, claimant had worked for the Home Care Workers (HCW) program for approximately ten years. Claimant provided in-home care for clients of Home Care Workers. Home Care Workers usually issued a voucher in advance of claimant's work for a particular client authorizing claimant to work a set number of hours for that client during a two week period. Claimant would later complete the voucher setting out the specific hours she had worked, return that voucher to Home Care Workers and would be paid for those hours. Home Care Worker paid claimant \$14.25 per hour for her work.

(3) In January 2017, claimant did not receive any income from Home Care Workers. As a result, claimant experienced difficulties in paying her monthly bills and many of them became past due. Claimant was unable to catch up financially in subsequent months. Sometime later, claimant's regular client traveled out of state and was hospitalized for several months. During that time, claimant did not have any income from caring for the regular claimant.

(4) On March 19, 2017, during week 12-16, claimant began working for a new client. Home Care Workers did not immediately provide vouchers to claimant authorizing her to receive payment for work with that client. Absent having received a voucher, claimant was unable to promptly bill Home Care Workers and to promptly receive payment for her work. Claimant needed funds and was concerned about delays in being paid. Claimant was also concerned that she might not ultimately receive payment for her work with the new client if there were irregularities in the voucher submission process. Claimant did not contact the Department for advice on how she should report her earnings for the new client given her concerns.

(5) Claimant claimed benefits for the weeks of March 19, 2017 through March 25, 2017 and April 2, 2017 through May 6, 2017 (weeks 12-17 and 14-17 through 18-17), the weeks at issue. For each of the weeks at issue, claimant and Home Care Workers reported claimant’s hours worked and earnings as set forth below and claimant received benefits as set forth below:

<u>Week</u>	<u>Claimant Reported Hours</u>	<u>Claimant Reported Earnings</u>	<u>HCW Reported Hours</u>	<u>HCW Reported Earnings</u>	<u>Benefits Paid</u>
12-17	6	\$87	36	\$522	\$308
14-17	7	\$98	24	\$348	\$308
15-17	7	\$98	30.5	\$442.25	\$308
16-17	20	\$190	25	\$362.50	\$220
17-17	20	\$190	25.5	\$369.75	\$220
18-17	30	\$285	4	\$58	\$125

(6) In mid-April 2017 (during approximately week 16-16), Home Care Workers provided vouchers to claimant retroactively authorizing her work with the new client from March 19, 2017 as well as authorizing subsequent work for that client. Claimant received payment from Home Care Workers for all hours she had worked for that client in May 2017. Claimant did not contact the Department to inform it she had been paid for hours that she had not previously reported during the weeks at issue

(7) On July 22, 2017, claimant responded in writing to a Department inquiry about whether the earnings Home Care Workers had reported for her during the weeks at issue were accurate. In her response, claimant noted that she had experienced financial difficulties during the weeks at issue, she asserted she had not known if or when Home Care Workers would pay her for work she performed during those weeks and that “without the [un]employment benefits, I would of lost everything.****I couldn’t go another month with nothing. [A]t this point[,] I had nothing to get me and my family through, and I don’t now.” Exhibit 1 at 15.

CONCLUSIONS AND REASONS: Claimant was overpaid \$1,181 in benefits and is also assessed a \$295.25 monetary penalty which she is liable to repay to the Department or to have deducted from any future benefits otherwise payable to her. Claimant is also assessed nine penalty weeks of disqualification from future benefits.

Overpayment. An individual is deemed “unemployed” in any week during which the individual works less than full-time if the remuneration *paid or payable* to the individual for the services performed during the week is less than the individual’s weekly benefit amount. ORS 657.100(1) (emphasis added).

Only “unemployed” individuals are eligible to receive benefits in any week. ORS 657.155(1). An otherwise eligible individual who has employment in any week shall have the individual’s weekly benefit amount reduced by the amount of earnings *paid or payable* to the individual that exceeds ten times the state minimum wage or one-third of the individual’s weekly benefit amount. ORS 657.155(6) (emphasis added). If an individual receives 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 or a misrepresentation of a material fact or failed to disclose a material fact, the individual is liable to repay those benefits or to have them deducted from any future benefits otherwise payable to the individual. ORS 657.310(1) (emphasis added).

Claimant did not dispute the accuracy of the earnings figures that the employer reported for her during each of the weeks at issue and those figures are accepted as accurate. Claimant’s principal contention was that since she was not assured of receiving payment for at least some of the services she performed for her new client during the weeks at issue, she did not think she should report those earnings in her weekly claim reports. Audio at ~19:50, ~21:19, ~23:16, ~24:22. However, the statute addressing the reporting of earnings requires that earnings be reported during the weeks the work was performed, whether or not payment for them is made during that week, and does not distinguish between earnings that an individual is certain he or she will be paid and those that the individual is not. *See* ORS 657.155(6). Claimant did not dispute that she knew she was required to report in her weekly claim reports earnings from work which she had performed during that claim week, but for which she had not yet received payment, and stated affirmatively that she received ultimately received payment from Home Care Workers for all of the hours she had worked for the new client and about which she contended she was initially uncertain of receiving. Audio at ~22:09, ~24:10, ~31:55.

Had claimant accurately reported her hours and earnings to the Department she would not have been paid any benefits during weeks 12-16 and 14-17 through 17-17 because her earnings exceeded her weekly benefit amount. *See* ORS 657.100(1). Regardless of whether claimant knew she was under-reporting her earnings to the Department, she is liable to repay the amount of the benefits she was overpaid for the weeks at issue since those overpayments were based on false statements she made to the Department about her earnings. The amounts claimant was overpaid during the weeks at issue are set out below:

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<u>Week</u>	<u>HCW Reported Earnings</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Benefits Overpaid</u>
12-17	\$522	\$308	\$0	\$308
14-17	\$348	\$308	\$0	\$308
15-17	\$442.25	\$308	\$0	\$308
16-17	\$362.50	\$220	\$0	\$220
17-17	\$369.75	\$220	\$0	\$220
18-17	\$58	\$125	\$308 ¹	<u>-\$183</u>
Total Overpayment				\$1,181

Taking into account week 18-17 in which claimant was underpaid benefits, claimant was overpaid a net amount of \$1,181 in benefits as a result of under-reporting her earnings to the Department during the weeks at issue. Claimant is liable to repay the amount of those benefits to the Department or to have them deducted from any future benefits otherwise payable to her.

Penalties. ORS 657.215 and ORS 657.310(2), read together, provide that if an individual has willfully made a false statement or misrepresentation of a material fact to obtain benefits to which the individual is not entitled, the individual is liable for a penalty as prescribed under the Department’s regulations of at least 15, but not greater than 30 percent of the benefits the individual received to which the individual was not entitled.

Claimant cited several reasons to explain her under-reporting of her earnings to the Department during the weeks at issue, including that she “must” have made “calculator error[s]” and “typo errors” when reporting her earnings to the Department. Audio at ~27:45, ~29:25. However, such explanations are not persuasive in light of claimant’s pattern of very substantially under-reporting her earnings week after week, reporting earnings that were between one-sixth and one-half of what she actually earned during all of the weeks at issue other than week 18-17. Claimant’s explanations also are not plausible in light of the lack of relationship between the number of hours that claimant reported working and the earnings she reported for some of the weeks at issue given her acknowledgement that she earned \$14.25 per hour. For example, in weeks 16-17 and 17-17, claimant reported that she worked 20 hours and, accepting claimant’s hours as accurate, she would have earned \$290, not the \$190 she reported during each of those weeks, and it is highly unlikely claimant would have made identical errors in arithmetic during both of those weeks. In addition to citing innocent errors that she might have made, claimant appeared to concede that she failed to report at least some of her earnings during the weeks at issue because she was not certain she would ultimately be paid those earnings or when, and her immediate need for money, by way of unemployment benefits during the weeks at issue, was pressing. Audio at ~31:10, ~32:58, ~33:43, ~34:20; Exhibit 1 at 15. Based on claimant’s repeated statements about her financial exigencies during the weeks at issue to explain why she might have under-reported her earnings during

¹ For week 18-17, the \$58 in earnings that Home Care Workers reported for claimant did not exceed ten times the state minimum wage of \$9.75 per hour, which was \$97.50, and did not exceed one-third of claimant’s weekly benefit amount of \$308, which was \$102. See <https://oregon.gov/boli/WHD/OMW/Pages/Minimum-Wage-Rate-Summary.aspx>. As such, the amount that claimant earned did not operate to reduce the benefits to which she was eligible below her full weekly benefit amount of \$308. See ORS 657.155(6).

that period, the preponderance of the reliable evidence in this record shows, most likely, that claimant did not report all earnings she had accrued with the intention of ensuring she received her full benefit amount. Although what claimant did was understandable in light of her described financial position, it appears that she knew what she was doing, intended to under-report her earnings with the intention of obtaining benefits to which she was not entitled, and her under-reporting of earnings was therefore willful.

Because claimant most likely willfully failed to accurately report earnings during weeks 12-17 and 14-17 through 17-17, claimant intentionally misrepresented her earnings five times in order to receive benefits. OAR 471-030-0052(7) (February 23, 2014) provides that the penalty amount for willful misrepresentations is assessed based the number “occurrences,” with an occurrence being counted each time an individual made a willfully false statement in order to obtain benefits. OAR 471-030-0052(7)(c) provides that the appropriate penalty for five occurrences of willful misrepresentation, as here, is 25 percent of the total amount of the benefits the individual received to which the individual was not entitled. 25 percent of \$1,181 is \$295.25. Claimant is assessed a monetary penalty of \$295.25 based on willfully under-reporting her earnings during the weeks at issue to receive benefits to which she was not entitled.

ORS 657.215 provides that if an individual, such as claimant, has willfully made false statements to obtain benefits, the individual is disqualified from 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 manner in which the period of disqualification is calculated when a claimant a willfully failed to accurately report earnings. In this case, the calculation is as follows: the total amount of benefits overpaid to the individual for the disqualifying acts (\$1,181) 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 disqualifying acts (\$568), which yields a result of 2.07 when rounded off to the nearest two decimal places, multiplying that result by four (8.28) and rounding that result to the nearest whole number, which yields the result of 9. Based on willfully failing to accurately report her earnings during the weeks at issue, claimant is disqualified from future benefits for a period of 9 penalty weeks.

DECISION: Hearing Decision 17-UI-92308 is affirmed.

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

DATE of Service: October 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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