

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1138**

*Affirmed*  
*Overpayment and Penalties*

**PROCEDURAL HISTORY:** On June 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act because he voluntarily left work to avoid submitting to a drug test (decision # 124451). Claimant filed a timely request for hearing on decision # 124451. On June 20, 2017, the Department issued notice of an administrative decision assessing a \$9,652 overpayment, a \$1,447.80 monetary penalty and 52 penalty weeks based on decision # 124451 (decision # 194851). Claimant filed a timely request for hearing on decision # 194851. On July 25, 2017, ALJ Lohr conducted a hearing on decision # 124451, and on July 26, 2017 issued Hearing Decision 17-UI-88954, affirming decision # 124451 and concluding claimant committed a disqualifying act by leaving work to avoid taking a drug test. On August 15, 2017, claimant filed an application for review of Hearing Decision 17-UI-88954 with the Employment Appeals Board (EAB). On August 25, 2017, ALJ Shoemake conducted a hearing on decision # 194851, and on September 5, 2017 issued Hearing Decision 17-UI-91882 affirming decision #194851.<sup>1</sup> On September 7, 2017, EAB issued EAB Decision 2017-EAB-0975, affirming Hearing Decision 17-UI-88954. On September 25, 2017, claimant filed an application for review of Hearing Decision 17-UI-91882 with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) As of July 6, 2016, claimant worked for the employer, Dancer Logging, Inc. On that day, claimant was instructed to submit to a drug test. After receiving this instruction, claimant went home and did not return thereafter to the workplace or subsequently contact the employer. On or around July 6, 2016, no employer representatives told claimant that he was discharged or laid off or that his job was no longer available.

(2) On August 13, 2016, claimant filed an initial claim for unemployment benefits. When claimant filed this claim, he stated that he had been laid off from work with Dancer Logging, Inc. due to a lack of work. Claimant's claim was determined valid with a weekly benefit amount of \$508. The maximum

<sup>1</sup> Although Hearing Decision 17-UI-91882 at 4 stated that decision # 194581 was affirmed, an apparent typographical in the text of the hearing decision stated that the monetary penalty assessed was \$1,447 rather than the \$1,447.80 set out in the administrative decision. We hereby correct Hearing Decision 17-UI-91882 to state that the monetary penalty assessed was \$1,447.80.

weekly benefit amount in effect when claimant filed this claim was \$590. Claimant had filed ten valid claims prior to filing the claim on August 13, 2016.

(3) Claimant claimed benefits for the weeks of August 7, 2016 through December 24, 2016 and was paid benefits for the weeks of August 14, 2016 through December 24, 2016 (weeks 33-16 through 51-16), the weeks at issue. During the weeks at issue, claimant was paid \$508 for each week. Claimant was paid a total of \$9,652 in benefits for the weeks at issue.

**CONCLUSIONS AND REASONS:** Claimant is assessed a \$9,652 overpayment and a \$1,447.80 monetary penalty, both of 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 a penalty disqualification of 52 weeks from any future benefits otherwise payable to him.

**Overpayment.** 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). An individual who voluntarily leaves work without good cause or who commits a disqualifying act is disqualified from benefits and not is not entitled to receive benefits based on that work separation. *See* ORS 657.176(2)(c); ORS 657.176(2)(h).

Claimant sought a hearing on decision # 124451, which was affirmed in Hearing Decision 17-UI-88954, and sought review of the hearing decision, which also was affirmed in EAB decision 2017-EAB-0975. EAB decision 2017-EAB-0975 became final on October 7, 2017 without a petition for judicial review having been filed. These decisions establish as a matter of law that claimant's July 6, 2016 work separation was due to him having left work under circumstances that constituted a disqualifying act. Accordingly, claimant's certification to the Department that the work separation was the result of a layoff due to lack of work was also false as a matter of law. Claimant did not dispute the testimony of the Department representative that he would not have been paid benefits during the weeks 33-16 through 51-16 if he had accurately reported the nature of the work separation to the Department. Audio at ~9:33, ~24:10. Claimant also did not dispute that the Department paid to him \$9,652 in benefits for the weeks at issue. Regardless of claimant's intentions in certifying to the Department that he was laid off from work on July 6, 2016 due to a lack of work, claimant received benefits to which he was not entitled based on an erroneous representation to the Department. As a result, claimant is liable to repay those benefits to the Department or to have them deducted 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 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 admitted that the July 6, 2016 work separation was due to him leaving work to avoid taking a drug test, and also admitted that no employer representative told him that he was discharged, laid off or that no work was available to him. Audio at ~20:57, ~22:13, ~23:01, ~23:07. When asked to explain why he represented to the Department that the work separation was caused by his having been laid off

due to lack of work, claimant testified that he did so because the employer put him “back in the woods,” asked him to “take another UA” and he “just had enough.” Audio at ~21:53. None of these reasons suggests a plausible ground for him having innocently mistaken that the employer had laid him off due to lack of work, rather than him having left work to evade an impending drug test. Claimant was a very experienced recipient of unemployment benefits and presumably knew that if he accurately stated the nature of the work separation when he applied for benefits he likely would be disqualified from them. On these facts, the most likely explanation for why claimant misstated the nature of the work separation was to ensure he would receive benefits to which he was not entitled under the circumstances. It appears that claimant made a willfully false statement to obtain benefits that he would not otherwise receive.

Because claimant received benefits for weeks 33-16 through 51-16 based on the willful misrepresentation he made about the work separation when he applied for benefits, he made one willfully false statement 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 to obtain benefits. OAR 471-030-0052(7)(a) provides that the appropriate penalty for one occurrence of willful misrepresentation, as here, is 15 percent of the total amount of the benefits the individual received to which the individual was not entitled. Fifteen percent of \$9,652 is \$1,447.80. Claimant is assessed a monetary penalty of \$1,447.80 based on willfully misrepresenting the nature of the work separation to receive benefits to which he 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 also disqualified from benefits for a period not to exceed 52 weeks, as determined under the Department’s regulations. OAR 471-030-0052(1)(b) specifies that the period disqualification for a willful misrepresentation of a work separation to obtain benefits is calculated in the manner provided under OAR 471-030-0052(1)(a). In this case, the calculation is as follows: the total amount of benefits overpaid to the individual as a result of the disqualifying acts (\$9,652) 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 (\$590), which yields a result of 16.35 when rounded off to the nearest two decimal places, multiplying that result by four (65.4) and rounding that result up to the nearest whole number yields the result of 66. However, since the maximum number of weeks of disqualification is 52, claimant is disqualified from future benefits for a period of 52 penalty weeks based on willfully misrepresenting the nature of his work separation to obtain benefits.

**DECISION:** Hearing Decision 17-UI-91882 is affirmed.

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

**DATE of Service:** October 24, 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](http://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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