

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1189

Modified
Overpayment and Penalties

PROCEDURAL HISTORY: On June 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$3,116 overpayment, a \$934.80 monetary penalty and 26 penalty weeks (decision # 193633). Claimant filed a timely request for hearing. On September 25, 2017, ALJ Meerdink conducted a hearing, and on September 26, 2017 issued Hearing Decision 17-UI-93268, affirming the Department's decision. On October 10, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Before July 2016, claimant filed four valid unemployment insurance claims. While claimant was claiming benefits under some of those claims, claimant reported earnings he had from employment which had the result of reducing his weekly benefit payments. Claimant was aware that earnings he reported while receiving benefits could reduce the weekly benefits he would be paid.

(2) Sometime around 2016, claimant began to experience issues with memory and sometimes was not able to recall things. No physician ever diagnosed claimant's memory difficulties.

(3) On July 21, 2016, claimant filed an initial claim for unemployment insurance benefits. That claim was determined valid with a weekly benefit amount of \$253. The maximum weekly benefits amount in effect when claimant filed this claim was \$590.

(4) Claimant claimed and was paid benefits for the weeks of January 1, 2017 through January 28, 2017 and February 26, 2017 through May 20, 2017 (weeks 01-17 through 04-17 and 09-17 through 20-17), the weeks at issue. For periods during the weeks at issue, claimant was employed by 1800 Flowers Team Services (weeks 01-17 through 03-17), Personnel Source Inc. (week 04-17) and Highway Products, Inc. (weeks 09-17 through 20-17).

(5) During the weeks at issue, claimant reported earnings, employers reported earnings for claimant and claimant was paid benefits as set out below:

<u>Week</u>	<u>Employer</u>	<u>Claimant's Reported Earnings</u>	<u>Employer's Reported Earnings</u>	<u>Benefits Paid</u>
01-17	Flowers	\$88	\$170.50	\$253
02-17	Flowers	\$88	\$114.55 ¹	\$253
03-17	Flowers	\$110	\$203.50	\$240
04-17	PS	\$0	\$87.25	\$253
09-17	HP	\$0	\$0 ²	\$253
10-17	HP	\$0	\$297 ³	\$253
11-17	HP	\$0	\$297	\$253
12-17	HP	\$0	\$356.12	\$253
13-17	HP	\$0	\$356.12	\$253
14-17	HP	\$0	\$539	\$253
15-17	HP	\$0	\$539	\$253
16-17	HP	\$0	\$448.94	\$253
17-17	HP	\$0	\$448.94	\$253
18-17	HP	\$0	\$324.50	\$253
19-17	HP	\$0	\$324.50	\$253
20-17	HP	\$0	\$0 ⁴	\$253

¹ Although the earnings that 1800 Flowers Team reported for claimant for week 02-17 is shown on the Department's Schedule of Adjustments as \$144.55, a correct addition of the daily earnings figures supplied by that employer for that week shows that the correct earnings for claimant were \$114.55. *See* Exhibit 1 at 10.

² While the Department's Schedule of Adjustments shows that Highway Products reported that claimant earned \$216 for week 09-17, the earnings that it actually reported for that week were \$0. *See* Exhibit 1 at 5. Thereafter, Highway Products reported claimant's earnings on a bi-weekly basis, which we have allocated equally between both weeks included in that reporting period. *See* OAR 471-030-0017(3)(d) (July 12, 2007).

³ While the Department's Schedule of Adjustments shows that Highway Products reported \$378 for claimant's earnings for week 10-17, that employer actually reported that claimant earned a total of \$594 for weeks 10-17 and 11-17, which when allocated equally to each week is \$297 per week. There are similar discrepancies through many of the remaining weeks included in the Schedule of Adjustment and we have corrected them based on the actual earnings figures Highway Products reported for claimant. *See* Exhibit 1 at 5-6. For the sake of brevity, we do not point out all of those discrepancies or show the calculations undertaken to reach the correct earnings allocation for each week after week 11-17 since they were reached in the same manner as the allocations for weeks 10-17 and 11-17.

⁴ While the Department's Schedule of Adjustments shows that Highway Products reported \$377.44 as earnings for claimant for week 20-17, the earnings that Highway Products reported for claimant stopped at week 18-17, which we infer represented claimant's earnings for the two week period of weeks 18-17 and 19-17. Exhibit 1 at 6. There is no entry in the records that Highway Products submitted from which we can infer a basis for allocating any earnings amount to week 20-17.

(6) When claimant claimed benefits during the weeks at issue, he made all of the weekly claims from a computer at the same internet protocol (IP) address, except for week 19-17, which was claimed using a mobile phone. By the same computer at the same IP address, the method claimant used to receive his benefit payments was changed from ReliaCard to electronic deposit into claimant's bank account sometime after the end of week 04-17, which ended on January 28, 2017.

(7) On January 26, 2017 (during week 04-17), claimant worked one day for Personnel Source, which was an employee staffing agency. On that day, claimant was assigned to perform sanitation work at a restaurant. Claimant was not physically able to perform the sanitation work and did not continue working at that restaurant or for Personnel Source after that day. Claimant sought new work immediately after stopping work for Personnel Source. When claiming benefits, claimant never reported that he had separated from during or after week 04-17.

CONCLUSIONS AND REASONS: Claimant was paid \$2,713 in benefits to which he was not entitled and is liable to repay the amount of those benefits as well a \$759 monetary penalty to the Department or to have those amounts deducted from any future benefit otherwise payable to him. Claimant is also assessed 18 weeks of penalty disqualification from future benefits otherwise payable him.

Overpayment. ORS 657.310(1) provides that 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 the amount of those benefits to the Department or to have the amount of those benefits deducted from any future benefits otherwise payable to the individual. An individual is deemed "unemployed" and eligible to receive benefits in any week where the remuneration payable to the individual for services performed in that week is less than the individual's weekly benefit amount. ORS 657.100(1). An eligible unemployed individual who receives remuneration from employment in any week shall have the individual's weekly benefit amount reduced by the amount that remuneration exceeds ten times the state minimum wage or one-third of the individual's weekly benefit amount, whichever is greater. ORS 657.150(6).

During the weeks at issue, the amount of the weekly benefits that claimant received was based on the earnings he reported for each of those weeks. At hearing, claimant did not dispute the accuracy of the earnings that 1800 Flowers Team, Personnel Source and Highway Products reported for him. Based on the earnings reported by those employers and a correct calculation of the benefits to which claimant was entitled during each of the weeks at issue, claimant was overpaid benefits as follows:

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<u>Week</u>	<u>Employer</u>	<u>Employer's Reported Earnings</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Benefits Over/ Paid</u>
01-17	Flowers	\$170.50	\$253	\$180 ⁵	+\$73
02-17	Flowers	\$114.55	\$253	\$236	+\$17
03-17	Flowers	\$203.50	\$240	\$147	+\$93
04-17	PS	\$87.25	\$253	\$253	\$0
09-17	HP	\$0	\$253	\$253	\$0
10-17	HP	\$297	\$253	\$0 ⁶	+\$253
11-17	HP	\$297	\$253	\$0	+\$253
12-17	HP	\$356.12	\$253	\$0	+\$253
13-17	HP	\$356.12	\$253	\$0	+\$253
14-17	HP	\$539	\$253	\$0	+\$253
15-17	HP	\$539	\$253	\$0	+\$253
16-17	HP	\$448.94	\$253	\$0	+\$253
17-17	HP	\$448.94	\$253	\$0	+\$253
18-17	HP	\$324.50	\$253	\$0	+\$253
19-17	HP	\$324.50	\$253	\$0	+\$253
20-17	HP	\$0	\$253	\$253	<u>\$0</u>
TOTAL AMOUNT OVERPAID:					<u>\$2,713</u>

While the ALJ concluded in Hearing Decision 17-UI-93268 that claimant was overpaid \$3,118, we disagree and find the total overpayment to be \$2,713 for the reasons we have discussed. Because the amount of benefits that claimant was paid during the weeks at issue was the direct result of the amount of earnings he represented to the Department he had during each of those weeks then, regardless of claimant's intentions in making erroneous representations as to the amount of his earnings and whether or not he was aware that he had earned more than he was reporting to the Department, claimant is liable to repay the \$2,713 he was overpaid in benefits during the weeks at issue 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, provide that if an individual has willfully made a false statement or representation, or willfully failed to report a material fact to obtain benefits, the individual may be assessed a monetary penalty as well as a penalty period of disqualification from future benefits.

⁵ An example of the calculation undertaken under to determine claimant's correct benefit amount under ORS 657.150(6) when claimant had earnings less than his weekly benefit amount is as follows using week 01-17. Because the Oregon minimum wage during the period at issue was \$9.75 per hour, ten times the minimum wage was \$97.50 and one-third of claimant's weekly benefit amount of \$253 was \$84.33, ten times the minimum wage is the greater amount. See <https://www.oregon.gov/boli/WHD/OMW/pages/Minimum-Wage-Rate-Summary.aspx>. Subtracting \$97.50 from the earnings of \$170.50 that the employer reported for clamant, yields \$73, which is the amount to deduct from claimant's weekly benefit amount to determine the correct benefit amount. \$253 less \$73 yields \$180 as the correct benefit amount. Since claimant was paid \$253 in benefits for week 01-17, claimant was overpaid \$73 for that week (\$253 less \$180).

⁶ Because the earnings that the employer reported for claimant for weeks 10-17 through 19-17 were greater than his weekly benefit amount of \$253, claimant was not "unemployed" during those weeks, was not entitled to receive benefits for those weeks and any benefits that were paid to him were overpaid. ORS 657.100(1).

In Hearing Decision 17-UI-93268, the ALJ concluded claimant willfully under-reported his earning for all of the weeks at issue and that as a consequence claimant's penalty was assessed at \$934.80, or 30 percent of \$3,116, the total amount that the ALJ found claimant to have been overpaid. While we agree that claimant willfully misreported his earnings for weeks 04-17 and 09-17 through 19-17, we disagree that he did so for weeks 01-17 through 03-17 and 20-17 and disagree that he was paid a total of \$3,116 in benefits due to willful misrepresentations. However, we nevertheless agree that claimant should be assessed a penalty of 30 percent of the total amount he was overpaid due to his having willfully under-reported his earnings for the reasons explained below.

At hearing, claimant appeared to try to excuse his misreporting of his earnings during the weeks at issue by stating that he had a memory deficiency. Audio at ~27:20. Claimant also appeared to be trying to suggest that someone other than himself went online and, without his knowledge, fraudulently claimed his benefits after week 04-17. Audio at ~ 20:06, ~20:54, ~22:01, ~22:45, ~26:20, ~26:50, ~29:25. However, the Department presented persuasive evidence that the claims made for the weeks at issue after week 04-17, which were for weeks 09-17 through 19-17, were all made from the same computer at the same IP address where the weekly claims claimant agreed he made for weeks 01-17 through 04-17 originated. Audio at ~35:34. It is highly unlikely that some unknown person coincidentally commandeered the same computer that claimant had previously used to claim benefits on his own behalf, for the purpose of claiming benefits, not for that person's benefits, but that would be deposited in claimant's bank account without claimant's knowledge. In addition, while the memory problems to which claimant referred might explain some confusion he had in regard to the amount of his earnings or how to calculate them, they do not explain why claimant's would consistently report that he had no earnings after week 04-17 when, except for week 09-17, his actual earnings greatly exceeded his weekly benefit amount. Since claimant testified that he was aware that any earnings he had would reduce the weekly benefit amounts he was paid as a result of having filed four previous valid claims and reporting earnings he had while claiming benefits under those claims, there do not appear to be any likely reasons for so consistently stating that he had no earnings other than to obtain his full, unreduced weekly benefit amount. On this record, it is most likely that claimant willfully under-reported his earnings for weeks 04-17 and 09-17 through 19-17 to obtain benefits to which he was not entitled. Audio at ~19:26.

However, with respect to weeks 01-17 through 03-17, claimant agreed that he reported earnings when he made his weekly claims reports, although those earning were less than what the employer reported. Claimant contended that during those weeks he did not have access to the employer's records as to the time he worked, so he tried to "estimate" or "guess" the hours he worked. Audio at ~24:59, ~26:08. Claimant further remarked that he generally did not monitor or keep track of his finances or "make sure [they were] in order" and "sometimes I [was] running around like my head's chopped off." Audio at ~23:42. While it may be inferred that claimant was willfully under-reporting his earnings when he failed to report any earnings for weeks 04-17 and weeks 09-17 through 19-17, it is plausible that the discrepancy between what claimant and the employer reported for those weeks was due to claimant's careless errors in estimating the amount of his earnings rather than being the result of claimant's willful attempts to obtain benefits to which he was not entitled. On this record, there is insufficient reliable evidence showing that claimant willfully under-reported his earnings for weeks 01-17 through 03-17 or from which such an intention may be inferred.

For weeks 04-17 and 09-17 through 19-17, the amount of the monetary penalty to which claimant is subject is set out at OAR 471-030-0052(7) (February 23, 2014). OAR 471-030-0052(7) provides that

the penalty for willful misrepresentations to obtain benefits is based on the number of occurrences of misrepresentation, with an occurrence being counted each time the individual willfully made a false statement or misrepresentation or failed to report a material fact in order to obtain benefits. Over weeks 04-17 and 10-17 through 19-17, claimant made a willful misrepresentation each time he claimed benefits and reported he had no earnings, which totaled eleven occurrences. For seven or more occurrences of willful misrepresentations within five years of the occurrence for which a penalty is being assessed, the penalty is 30 percent of the total amount of benefits the individual received to which the individual was not entitled. OAR 471-030-0052(7)(d). The total amount of benefits claimant received to which he was not entitled for weeks 04-17 and 10-17 through 19-17, based on his willful under-reporting of his earnings, was \$2,530. Claimant is therefore assessed a penalty of 30 percent of \$2,530, or \$759, rather than the \$934.80 that the ALJ assessed in Hearing Decision 17-UI-93268.

OAR 471-030-0052(1)(a)(1)(a) sets out the calculation to determine the penalty weeks of disqualification to which a claimant is subject when, as here, the disqualification is based on a failure to report work or earnings. That calculation requires that the total amount of benefits overpaid to the individual for the disqualifying acts (\$2,530) 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 individual's disqualifying act (\$590), rounding off to the nearest two decimal places (4.28), multiplying that result by four (17.12), and rounding up that result to the nearest whole number (18). Claimant is assessed as an additional penalty, 18 weeks of disqualification from future benefits.

In Hearing Decision 17-UI-93268, the ALJ also assessed an additional 4 weeks of penalty disqualification under OAR 471-030-0052(1)(d) due to claimant having willfully failed to disclose that he voluntarily left work with Personnel Source during week 04-17. Audio at ~11:49, ~15:05. However, claimant testified during the hearing that he stopped working for Personnel Source after only one day of work because he was not physically able to perform the work and he did not think that his ceasing to work for that reason meant that he had quit that job or that it was as a work separation that needed to be reported to the Department because he had immediately sought new work. Audio at ~21:23, ~31:09, ~31:49. Claimant's testimony was plausible and appeared sincere. The preponderance of the evidence is that, while claimant did not report a work separation from Personnel Source during the week it occurred, his failure to do so was the result of failing to understand the Department's reporting requirements as opposed to having been motivated by a willful intent to obtain benefits to which he was not entitled. Accordingly, the ALJ erred in assessing against claimant an additional 4 weeks of penalty disqualification.

In sum, claimant was overpaid \$2,713 in benefits and is assessed a monetary penalty of \$759, both of which his liable to pay to the Department of to have deducted from any future benefits otherwise payable to him. Claimant is also assessed 18 weeks of penalty disqualification from future benefits.

DECISION: Hearing Decision 17-UI-93268 is modified, as outlined above.

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

DATE of Service: November 14, 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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