

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1423**

*Modified*  
*Overpayment, Reduced Penalties*

**PROCEDURAL HISTORY:** On May 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that Willamette Valley Appliance Co. discharged claimant for misconduct on April 7, 2017 (decision # 133534). Claimant filed a timely request for hearing on decision # 133534. On June 5, 2017, ALJ Janzen conducted a hearing and issued Hearing Decision 17-UI-84926, affirming decision # 133534. On June 13, 2017, the Department served notice of an administrative decision assessing a \$14,988 overpayment, a \$4,496.40 monetary penalty and 52 penalty weeks based in part on decision # 133534. On June 26, 2017 Hearing Decision 17-UI-84926 became final without an application for review having been filed with the Employment Appeals Board (EAB). Claimant filed a timely request for hearing on the June 13, 2017 overpayment decision. On November 13, 2017, ALJ S. Lee conducted a hearing on the overpayment decision at which the employers did not appear, and on November 21, 2017 issued Hearing Decision 17-UI-97396 assessing a \$14,988 overpayment and 52 penalty weeks. On December 11, 2017 claimant filed an application for review with EAB.

**FINDINGS OF FACT:** (1) As of early 2014, claimant was working around forty hours per week for Wal-Mart Associates, Inc. and also working around forty hours per week for a second employer, Appliance and Refrigeration Hospital (ARH). Sometime before March 24, 2014, ARH laid claimant off. Despite this layoff, claimant continued working for Wal-Mart.

(2) On March 24, 2014, claimant phoned the Department to inquire about whether he was eligible to receive unemployment benefits based on his layoff from ARH when he was still working full-time for Wal-Mart. Claimant explicitly told the representative with whom he spoke that he was continuing to work full-time with Wal-Mart after his layoff from ARH. Claimant understood the Department

representative to have told him he could file a claim for benefits even if he was working full-time for Wal-Mart. Claimant interpreted the representative’s statement to mean that his claim for benefits based on the work separation from ARH would not take into account his employment with or earnings from Wal-Mart.

(3) On that same day, March 24, 2014, claimant filed a claim for unemployment benefits. That claim was determined valid with a weekly benefit amount of \$538. When claimant filed his claim, the maximum weekly benefit amount then in effect was \$538.

(4) Claimant claimed benefits under the claim he filed on March 24, 2014 for the weeks of March 23, 2014 through September 27, 2014 (weeks 13-14 through 39-14). When claimant filed his weekly claim reports, he did not disclose his earnings from Wal-Mart in response to the Department’s question asking him to set out the hours he worked and the pay he earned from work during the week for which he was claiming benefits. Based on the conversation he had with the representative when he filed his claim, claimant thought his earnings from Wal-Mart were not relevant to the benefits he would receive based on his work separation from ARH since his employment with Wal-Mart was a “separate job” from that with ARH. Transcript at 21. Had claimant reported his earnings from Wal-Mart, he would not have received any benefits in weeks he earned an amount equal to or greater than his weekly benefit amount, and depending on his earnings, he would have been paid reduced a benefit amount during any week in which he worked for Wal-Mart but earned less than his weekly benefit amount.

(5) For weeks 13-14 through 39-14, earnings that claimant reported, the earnings that Wal-Mart reported it had paid claimant and the benefits that claimant was paid are set out below:

<u>Week</u>	<u>Claimant Reported Earnings</u>	<u>Wal-Mart Reported Earnings</u>	<u>Benefits Paid</u>
13-14	\$0	\$652.53	\$0
14-14	\$0	\$740.93	\$538
15-14	\$0	\$969.31	\$538
16-14	\$0	\$744.98	\$538
17-14	\$0	\$627.07	\$538
18-14	\$0	\$769.48	\$538
19-14	\$0	\$672.97	\$538
20-14	\$0	\$664.05	\$538
21-14	\$0	\$631.28	\$538
22-14	\$0	\$875.39	\$538
23-14	\$0	\$677.51	\$538
24-14	\$0	\$777.91	\$538
25-14	\$0	\$678.32	\$538
26-14	\$0	\$724.54	\$538
27-14	\$0	\$930.87	\$538

<u>Week</u>	<u>Claimant Reported Earnings</u>	<u>Wal-Mart Reported Earnings</u>	<u>Benefits Paid</u>
28-14	\$0	\$653.18	\$538
29-14	\$0	\$532.99	\$538
30-14	\$0	\$648.64	\$538
31-14	\$0	\$738.82	\$538
32-14	\$0	\$605.49	\$538
33-14	\$0	\$696.81	\$538
34-14	\$0	\$702.00	\$538
35-14	\$0	\$926.65	\$538
36-14	\$0	\$959.41	\$538
37-14	\$0	\$537.04	\$538
38-14	\$0	\$683.19	\$538
39-14	\$0	\$771.26	\$538

Exhibit 1 at 4.

(6) Sometime after week 39-14, claimant began working around full-time hours for a new employer, Willamette Valley Appliance (WVA). Claimant continued working full-time for Wal-Mart. On April 7, 2017, WVA discharged claimant. Shortly after he was discharged, WVA’s owner told claimant he would report the separation to the Department as a layoff due to lack of work.

(7) On April 13, 2017, claimant filed an unemployment insurance claim by telephone. Although claimant knew WVA had discharged him, he told the representative that he had been laid off due to lack of work. As claimant had done in 2014, he told the representative that he was continuing to work full-time for Wal-Mart despite his layoff from WVA. This representative told claimant that he was not eligible to claim benefits in any week he worked 40 hours or more for Wal-Mart or his earnings from Wal-Mart equaled or exceeded his weekly benefit amount. That day, claimant filed a claim for benefits based on the work separation from WVA. Claimant’s claim was determined valid with a weekly benefit amount of \$590. When claimant filed his claim, the maximum weekly benefit amount then in effect was \$590.

(8) Claimant claimed benefits under the claim filed on April 13, 2017 for the weeks of April 9, 2017 through May 6, 2017 (weeks 15-17 through 18-17). During none of these weeks did claimant disclose that his work separation from WVA was the result of a discharge for misconduct. The Department would not have paid claimant benefits for weeks 15-17 through 18-17 if it had known WVA had discharged him due to misconduct. Despite what the representative told claimant on April 13, 2017, claimant did not report the earnings he had from Wal-Mart during weeks 15-17 through 18-17 when he filed his weekly claim reports since the representative he spoke with in 2014 had given him contrary advice, there had not been a problem with the benefits he claimed for the weeks in 2014 and he thought “maybe this guy [the representative with whom claimant spoke in 2017] just didn’t know what the devil he was talkin’ about for sure.” Transcript at 24.

(9) For weeks 15-17 through 18-17, claimant claimed and was paid benefits as follows:

<u>Week</u>	<u>Claimant Reported Earnings</u>	<u>Wal-Mart Reported Earnings</u>	<u>Benefits Paid</u>
15-17	\$0	\$408	\$0
16-17	\$0	\$637.50	\$590
17-17	\$0	\$603.50	\$590
18-17	\$0	\$603.50	\$0

Exhibit 1 at 5.

**CONCLUSIONS AND REASONS.** Claimant is assessed a \$14,988 overpayment and a \$295 monetary penalty, both of which he is liable to repay to the Department or to have deducted from any future benefits otherwise payable to her. Claimant is also assessed 12 weeks as a penalty disqualification from future benefits otherwise payable to him.

In Hearing Decision 17-UI-97396, the ALJ concluded claimant was overpaid 14,988 in benefits, with which we agree as discussed below. However, the ALJ further concluded claimant made willful misrepresentations to obtain benefits and assessed 52 penalty weeks, with which we disagree and assess only 12 penalty weeks, as discussed below. And although the ALJ noted in Hearing Decision 17-UI-97396 that claimant made five willful misrepresentations to obtain benefits to which he was not entitled, with which we agree, she failed to specify the amount of the monetary penalty assessed either in the body of or the order section of Hearing Decision 17-UI-97396. Accordingly, Hearing Decision 17-UI-97396 is further modified to set out that a monetary penalty of \$295 is assessed, as discussed below.

**Overpayment.** An individual who receives 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 misrepresentation of a material fact or failed to disclose a material fact, is liable to repay the amount of the benefits paid or to have that amount deducted from any future benefits otherwise payable to the individual. ORS 657.310(1). An individual is considered “unemployed” and is eligible to receive benefits in any week only if the individual works less than forty hours or if the remuneration paid or payable to the individual for services performed is less than the individual’s weekly benefit amount. ORS 657.100(1). An individual is eligible to receive benefits only if the individual is not otherwise disqualified from benefits, including as a result of a work separation caused by discharge for misconduct. ORS 657.155(1)(d); ORS 657.178(2)(a). Where, as in this case, the Department paid benefits to claimant, and a decision against claimant could result in the Department seeking to recover those benefits, the Department has the burden to prove by a preponderance of the evidence that claimant was not entitled to receive those benefits or that claimant made willfully false statements to receive them. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Claimant did not dispute that he earned from Wal-Mart the amounts set out the Department’s schedule of adjustments for each of the weeks at issue. As such, since claimant earned more from Wal-Mart than his weekly benefit amount of \$538 during the weeks 13-14 through 28-14, 30-14 through 36-14 and weeks 38-14 and 39-14, he was not considered unemployed in those weeks and was not eligible to

receive the benefits that he did. Since week 29-14 was claimant’s waiting week, he also was not eligible to receive any benefits for that week even if his earnings would otherwise have allowed him to be receive them. *See* ORS 657.155(d). As well, since claimant’s earnings in week 37-14 were marginally less than his weekly benefit amount, he was eligible to receive a reduced benefit payment under ORS 657.150(6). Further, claimant did not dispute that WVA discharged him on April 7, 2017 (during week 14-17), rather than having laid him off for misconduct. Because review of it was not sought, Hearing Decision 17-UI-84926, which affirmed decision # 133534, establishes as a matter of law that claimant was disqualified from benefits based on his work separation from WVA for the weeks beginning week 15-17. As a result of this disqualifying work separation, claimant was not eligible to receive benefits during weeks 15-17 through 18-17. ORS 657.176(2)(a).

The table below sets out the benefits claimant was paid for each of the weeks at issue, the benefits claimant was eligible to receive during each of those weeks and the amount of the benefits that claimant was overpaid.

<u>Week</u>	<u>Claimant Reported Earnings</u>	<u>Wal-Mart Reported Earnings</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Benefits Over/Under Paid</u>
13-14	\$0	\$652.53	\$0	\$0	\$0
14-14	\$0	\$740.93	\$538	\$0	\$538
15-14	\$0	\$969.31	\$538	\$0	\$538
16-14	\$0	\$744.98	\$538	\$0	\$538
17-14	\$0	\$627.07	\$538	\$0	\$538
18-14	\$0	\$769.48	\$538	\$0	\$538
19-14	\$0	\$672.97	\$538	\$0	\$538
20-14	\$0	\$664.05	\$538	\$0	\$538
21-14	\$0	\$631.28	\$538	\$0	\$538
22-14	\$0	\$875.39	\$538	\$0	\$538
23-14	\$0	\$677.51	\$538	\$0	\$538
24-14	\$0	\$777.91	\$538	\$0	\$538
25-14	\$0	\$678.32	\$538	\$0	\$538
26-14	\$0	\$724.54	\$538	\$0	\$538
27-14	\$0	\$930.87	\$538	\$0	\$538
28-14	\$0	\$653.18	\$538	\$0	\$538
29-14	\$0	\$532.99	\$538	\$0 <sup>1</sup>	\$538
30-14	\$0	\$648.64	\$538	\$0	\$538
31-14	\$0	\$738.82	\$538	\$0	\$538
32-14	\$0	\$605.49	\$538	\$0	\$538
33-14	\$0	\$696.81	\$538	\$0	\$538
34-14	\$0	\$702.00	\$538	\$0	\$538
35-14	\$0	\$926.65	\$538	\$0	\$538

<sup>1</sup> The Department assigned claimant’s waiting week to week 29-14. An otherwise eligible individual must be unemployed and may not receive benefits for a waiting period of one week to become eligible to receive benefits. ORS 657.155(1)(d). Week 29-14 is the first week during the weeks at issue that could be used as claimant’s waiting week since it is the first week in which claimant earned less than his weekly benefit amount of \$538 and would otherwise have qualified to receive at least some benefits, albeit at a reduced amount.

<u>Week</u>	<u>Claimant Reported Earnings</u>	<u>Wal-Mart Reported Earnings</u>	<u>Benefits Paid</u>	<u>Correct Benefit Amount</u>	<u>Benefits Over/Under Paid</u>
36-14	\$0	\$959.41	\$538	\$0	\$538
37-14	\$0	\$537.04	\$538	\$180	\$358 <sup>2</sup>
38-14	\$0	\$683.19	\$538	\$0	\$538
39-14	\$0	\$771.26	\$538	\$0	\$538
15-17	\$0	\$408	\$0	\$0 <sup>3</sup>	\$0
16-17	\$0	\$637.50	\$590	\$0	\$590
17-17	\$0	\$603.50	\$590	\$0	\$590
18-17	\$0	\$603.50	\$0	\$0	<u>\$0</u>
<b>Total</b>					<b>\$14,988</b>

Even if claimant thought he was not required to report his earnings from Wal-Mart when he filed his weekly claims for weeks 13-14 through 39-14, he was still not eligible to receive the benefits he was paid for those weeks. Even if claimant thought he was not required to report the true nature of the work separation that led him to claim benefits for weeks 15-17 through 18-17 since the employer’s owner had told claimant that he was not going to disclose it, it remains that claimant also was not entitled to receive any benefit payments for those weeks. Regardless of claimant’s knowledge or intent when he made the representations that led him to receive the benefits to which he was not entitled, under ORS 657.310(1), claimant is required to repay the \$14,988 in benefits he erroneously received to the Department or to have them deducted from any future benefits otherwise payable to him.

**Penalties.** ORS 657.310(2) and ORS 657.215, read together, provide that if an individual, has willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, the individual may be assessed a monetary penalty of between 15 to 30 percent of the amount of the benefits the individual received to which the individual was not entitled. In addition, an individual who has willfully made false statements to obtain benefits also may be assessed a period not to exceed 52 weeks of disqualification from future benefits. ORS 657.215.

For weeks 13-14 through 39-14, claimant contended his failure to report his earnings from Wal-Mart was due to the conversation he had with the Department’s representative when he filed his claim. While the Department did not dispute that the representative might have told claimant that working for Wal-Mart would not necessarily preclude him from claiming unemployment benefits based on his separation from ARH, it appeared to take the position that claimant could not plausibly or logically have

<sup>2</sup> Because the earnings claimant had from Wal-Mart were less than his weekly benefit amount in week 37-14,, he was eligible to receive some benefits as calculated under ORS 657.150(6). Because the state minimum wage in 2014 was \$9.10 per hour, one-third of claimant’s weekly benefit amount, which is \$179.33 (\$538/3) is greater than ten time times the state minimum wage at that time, or \$91.00. <http://www.olis.leg.state.or.us/liz/201511/Downloads/CommitteeMeetingDocument/81396>; ORS 657.150(6)(a). Performing the required calculation to determine claimant’s correct benefit amount for week 37-14, \$179.33 is subtracted from claimant’s earnings of \$537.04, which yields \$357.71. Subtracting \$357.71 from claimant’s weekly benefit amount of \$538, yields a correct benefit amount of \$180.29, which rounds to \$180. See ORS 657.155(6).

<sup>3</sup> For weeks 15-17 through 18-17, claimant was not eligible to receive any benefits due to the disqualifying work separation from WVA and it is therefore irrelevant that in those weeks he earned less than his weekly benefit amount of \$590 from Wal-Mart or would otherwise have been eligible to receive reduced benefits under ORS 657.155(6).

understood representative's limited statement to mean that he was not required to report his earnings from Wal-Mart when he claimed benefits. Transcript at 15-16. However, claimant vigorously contended otherwise at hearing and repeatedly stressed that he had not hidden from the representative that he was working for Wal-Mart when he filed his claim for benefits. Transcript at 20, 21. Claimant's testimony seemed sincere. While claimant's inference from the representative's comment that he did not need to report his earning from Wal-Mart might not have been that which many others would have drawn, there is nothing in the record suggesting or tending to suggest that claimant did not hold this belief in good faith. Absent evidence ruling out that claimant failed to report his earnings from Wal-Mart during weeks 13-14 through 39-14 based on misunderstanding the implications of the representative's statement to him when he filed his claim, the Department did not meet its burden to show that claimant willfully failed to report his earnings from Wal-Mart during those weeks. Claimant is not subject to penalties based on the claims he made for weeks 13-14 through 39-14.

However, claimant agreed that on April 13, 2017, immediately before he claimed benefits for weeks 15-17 through 18-17, a representative told him that he could not claim benefits for weeks in which he worked full-time for Wal-Mart or his earnings from Wal-Mart equaled or exceeded his weekly benefit amount. Transcript at 23-24. Based on this statement, which flatly contradicted claimant's interpretation of the advice he was given in 2014 as to reporting his earnings from Wal-Mart, claimant was put on notice either that the 2014 advice he was given, his interpretation of that advice, or both, were incorrect. Rather than determining whether what he was told in 2014 or 2017 was correct or incorrect, claimant continued not to report his earnings from Wal-Mart for weeks 15-17 through 18-17 because it was "never a problem [in 2014]" and claimant "thought maybe this guy [in 2017] didn't know the devil he was talkin' about for sure." Transcript at 24. By refusing under these circumstances to inquire into the legitimacy of failing to disclose his earnings from Wal-Mart when making his weekly claims, it appears most likely that claimant was deliberately not reporting those earnings since he did not want to risk reducing or eliminating the benefit amounts he would be paid for weeks 15-17 through 18-17. On this record, claimant willfully failed to report his earnings from Wal-Mart during weeks 15-17 through 18-17 to obtain the \$1,180 in benefits that he otherwise would not have entitled to for those weeks.

In addition, claimant also admitted he misrepresented to the Department the nature of his work separation from WVA before claiming benefits for weeks 15-17 through 18-17. Transcript at 23. While claimant stated he did so because the WVA's owner had told him he intended to report to the Department that claimant was laid off due to lack of work, rather than correctly stating that claimant was discharged for insubordination, claimant obviously knew the true facts surrounding the work separation and that he was not let go due to lack of work. By consciously and knowingly misrepresenting the nature of the work separation to the Department, claimant was willfully making a false statement when he represented to the Department that he was let go due to lack of work, regardless of what the owner had told him. The most likely explanation underlying claimant's misrepresentation about the work separation was that claimant feared being disqualified from benefits during weeks 15-16 through 18-17 if he disclosed the true nature of the work separation and that he was discharged for reasons that would arguably constitute misconduct. On this record, it appears likely that claimant willfully misrepresented the nature of the work separation to receive the \$1,180 in benefits that he otherwise would not have been entitled to for weeks 15-17 through 18-17.

When an individual has made willful misrepresentations to obtain benefits, the monetary penalty to be assessed shall be at a rate of between 15 and 30 percent of the amount of the benefits received to which he individual was not entitled, as prescribed by the director. ORS 657.310(2). OAR 471-030-0052(7) (February 23, 2014) provides that the monetary penalty to which an individual is subject is based on the number of occurrences of misrepresentation that the individual made to obtain benefits to which the individual was not entitled. An occurrence is counted each time an individual willfully makes a false statement or willfully fails to report a material fact to obtain benefits. OAR 471-030-0052(7). Here, claimant willfully misreported his earnings four times to obtain benefits for weeks 15-17 through 18-17. Claimant also willfully misrepresented the nature of his work separation to avoid a disqualification from benefits during those same weeks. Therefore, claimant had a total of five occurrences of willful misrepresentation. For the fifth and sixth occurrences of misrepresentation within five years of the occurrence for which a penalty is being assessed, the appropriate penalty to be assessed is 25 percent of the total amount of benefits the individual received to which the individual was not entitled. OAR 471-030-0052(7)(c). 25 percent of \$1,180, the total amount of the benefits that claimant received to which he was not entitled for weeks 15-17 through 18-17, is \$295. The amount of the monetary penalty which is assessed against claimant therefore is \$295.

Where an individual has willfully made misrepresentations to obtain benefits, the individual is also subject to a disqualification from benefits for period of up to 52 weeks as determined by the director. ORS 657.215. OAR 471-030-0052(a) sets out the manner in which the penalty disqualification period is to be calculated if the individual has made willful misrepresentations about his earnings when receiving benefits. OAR 471-031-0052(d) provides that if the willful misrepresentations involves a work separation under OAR 657.176 and failures to accurately report earnings, the disqualification is calculated in the same manner as under OAR 471-030-0052(a), plus four weeks.

The disqualification calculation set out at OAR 471-030-0052(d) is as follows: the total amount of benefits overpaid to the individual for the disqualifying acts (\$1,180) 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), rounded up to the nearest two decimal places (which yields a result of 2.00), multiplying that result by four (8), rounding that result up to the nearest whole number (8), plus four weeks (12). Accordingly, based on his willful misrepresentations to receive benefits, claimant is also subject to a penalty disqualification from future benefits for a period of 12 weeks.

**DECISION:** Hearing Decision 17-UI-97396 is modified, as outlined above

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

**DATE of Service:** January 18, 2018

**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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