

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0228**

*Modified*  
*Overpayment and Reduced Penalties*

**PROCEDURAL HISTORY:** On December 29, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$2,950 overpayment, \$737.50 monetary penalty and 24 penalty weeks (decision # 195964). Claimant filed a timely request for hearing. On February 9, 2018, ALJ Amesbury conducted a hearing, and on February 14, 2018 issued Hearing Decision 18-UI-103209, affirming the Department's decision. On February 27, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) On April 3, 2017, claimant filed an initial claim for unemployment insurance benefits. His weekly benefit amount was \$590, the maximum weekly benefit amount in effect at the time.

(2) Sometime on or prior to August 30, 2017, claimant attended a nine hour orientation with J B Hunt Transport, Inc. Claimant decided not to pursue work with J B, and did not know he had been hired.

(3) Claimant filed a weekly claim for benefits for the week of August 27, 2017 through September 2, 2017 (week 35-17). He did not report to the Department that he had a work separation from J B that week. He had not received his \$361 earnings and did not believe J B planned to pay him for attending orientation, so he did not report to the Department that he had worked or had earnings.

(4) Claimant filed weekly claims for benefits for the weeks of September 3, 2017 through September 23, 2017 (weeks 36-17 through 38-17). During each of those four weeks he worked for Willow Express. During week 36-17, claimant worked 8.35 hours and earned \$141.95; during week 37-17, claimant worked 38.65 hours and earned \$657.05; and during week 38-17, claimant worked 46.20 hours and earned \$785.40. Each week claimant claimed benefits, the Department asked him to report the number

of hours he worked and his gross earnings from work during the week claimed. Claimant responded to the Department that he had not worked or had earnings, and did not report any of the work or earnings to the Department. Claimant filed a weekly claim for benefit during the week of September 24, 2017 to September 30, 2017 (week 39-17). During that week claimant worked 38.30 hours for Willow, and earned \$651.10. He reported to the Department that he had worked 16 hours and earned \$160.00. Claimant's hourly wage was \$17.00; had he worked 16 hours he would have earned \$272.00.

(5) Based upon claimant's report to the Department that he had not had a work separation during week 35-17, the Department concluded that claimant was not disqualified from receiving benefits because of a work separation. Based upon claimant's report to the Department that he had no earnings during weeks 35-17 through 38-17, and earned only \$160.00 from part-time work during week 39-17, the Department determined that claimant was entitled to receive his full weekly benefit amount each week. Because of claimant's reports to the Department, he received \$2,950 in unemployment insurance benefits.

(6) On September 30, 2017, the Department learned that claimant had worked for J B. On November 14, 2017, J B notified the employer that claimant declined a job at J B. On November 22, 2017, Willow reported claimant's hours and earnings to the Department.

(7) On December 29, 2017, the Department issued notice of decision # 174203, concluding claimant voluntarily left his job with J B Hunt Transport, Inc., and was therefore disqualified from receiving unemployment insurance benefits from August 27, 2017 through September 30, 2017 (weeks 35-17 through 39-17). On January 9, 2018, claimant filed a timely request for hearing on that decision. The Office of Administrative Hearings subsequently scheduled a hearing, at which claimant failed to appear; the ALJ who held the hearing dismissed claimant's hearing request for failure to appear.<sup>1</sup>

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant was overpaid \$2,950 in unemployment insurance benefits that he is liable to repay or have deducted from future benefits. We agree with the Department and the ALJ that claimant made willful misrepresentations to obtain benefits; however, we conclude that the monetary penalty and penalty weeks should be reduced.

**Overpayment.** ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.*

The Department paid claimant \$2,950 in unemployment insurance benefits during weeks 35-17 through 39-17. Pursuant to decision # 174203, however, claimant was disqualified from benefits throughout that period and therefore was not entitled to receive any of those payments. Claimant also had earnings in

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<sup>1</sup> On February 27, 2017, claimant filed a request to reopen the hearing; however, decision # 174203 is final unless and until claimant proves that he had good cause to reopen the hearing. Claimant's request to reopen is currently pending at the Office of Administrative Hearings (OAH). If claimant has any questions about the reopen request, pending hearing, or any other matter related to the request to reopen or the voluntary leaving matters, claimant should direct those inquiries to OAH.

week 35-17 that reduced the amount of benefits he would have been entitled to receive had he not been disqualified, and his earnings in weeks 37-17 through 39-17 exceeded his weekly benefit amount making him ineligible to receive any amount in those weeks. For those reasons, claimant was overpaid \$2,950. Because his receipt of benefits during all the weeks at issue was the result of his failure to disclose his work separation, work and earnings, all of which were material facts, and regardless of his knowledge or intent in failing to disclose the information, he is liable to repay the benefits or have them deducted from any future benefits otherwise payable to him.

**Penalty weeks.** An individual who willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. ORS 657.215. The length of the penalty disqualification is calculated by dividing the total overpayment by the maximum weekly benefit amount, rounding off to the nearest two decimal places, multiplying the result by four, and rounding it up to the nearest whole number. OAR 471-030-0052(1) (a). Four additional penalty weeks may be added if the disqualification is imposed because of a work separation issue and failure to report work or earnings. OAR 471-030-0052(1) (d).

The ALJ concluded that “claimant did not disclose his work separation” from J B “although he knew it had taken place,” making that a “willful misrepresentation that he did not quit a job.” See Hearing Decision 18-UI-103209 at 5. The ALJ also concluded that claimant’s failure to report his work and earnings from J B during week 35-17 were willful misrepresentations. *Id.* We disagree. Claimant consistently reported to the Department throughout its investigation and testified at hearing that he never reported that he quit his job, and never reported his hours and earnings, because he did not think he worked for J B, he was never hired, and he was never paid, but just attended an orientation. Likewise, J B reported to the Department that claimant’s employment period was brief, that wages were “not available,” and that “claimant has declined [] the job.” Exhibit 1. Although the J B ultimately reported to the Department that claimant had quit his job, claimant appears to have been genuinely confused about his employment status and earnings from J B, making his failure to report the work, earnings and work separation the result of an error rather than a willful misrepresentation. We therefore conclude that claimant should not be subject to penalties for failing to disclose material facts about his employment with and separation from J B.

The ALJ also concluded that claimant failed to report his work for and earnings from Willow because, although he was working full time or nearly full time and his earnings from work generally exceeded his weekly benefit amount, “he needed the cash (from unemployment benefits) to pay his expenses.” See Hearing Decision 18-UI-103209 at 5. We agree with the ALJ that the record shows claimant willfully failed to disclose the hours he worked for Willow, and the earnings he received from that work, to obtain benefits he was not entitled to receive. Claimant is therefore liable for penalties based upon those misrepresentations. Although the total amount of claimant’s overpayment was \$2,950, he is only liable for penalties based upon the total amount of benefits overpaid to the individual for the disqualifying act(s). The disqualifying acts in this case were claimant’s failure to disclose his work and earnings for Willow during weeks 36-17 through 39-17. The overpayment that resulted from claimant’s disqualifying acts therefore totaled \$2,360. Applying the penalty week calculation set forth at OAR 471-030-0052(1) (a),  $\$2,360$  (the total benefits overpaid to claimant because of his disqualifying act(s))  $\div$   $\$590$  (the maximum weekly benefit amount in effect at the time) =  $4 \times 4 = 16$  weeks. Claimant is subject to 16 weeks of disqualification from benefits otherwise payable to him.

**Monetary penalty.** An individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2). OAR 471-030-0052(7) provides that the monetary penalty is calculated as a percentage based upon the number of occurrences of misrepresentation that occurred. In this case, claimant had four occurrences of misrepresentation because he failed to report his hours and earnings from work with Willow four times, once each week during weeks 36, 37, 38 and 39. OAR 471-030-0052(7) (b) provides that for the third or fourth occurrence, the monetary penalty is equal to 20 percent of the total amount of benefits the individual received due to his misrepresentation.<sup>2</sup> 20 percent of \$2,360 is \$472. Claimant's is therefore liable for a \$472 monetary penalty to the Department.

In sum, we agree with the Department and the ALJ that claimant was overpaid \$2,950 that he is liable to repay to the Department. We also agree that he is subject to penalties for misrepresenting material facts; however, we conclude that the penalties must be reduced, and he is therefore subject to a reduced 16-week penalty disqualification period and to pay a reduced monetary penalty totaling \$472.

**DECISION:** Hearing Decision 18-UI-103209 is modified, as outlined above.<sup>3</sup>

J. S. Cromwell and D. P. Hettle;  
S. Alba, not participating.

**DATE of Service:** March 26, 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, and 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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<sup>2</sup> The Department witness suggested that claimant might not be liable for a monetary penalty during week 36-17 because his earnings during that week were so low that his misrepresentation did not result in an overpayment. The outcome of this case remains the same regardless because claimant would still be liable for a 20% penalty for three misrepresentation occurrences.

<sup>3</sup> If decision # 174203 is reversed and claimant is not disqualified from benefits for quitting work at J B, the Department will recalculate the overpayment amount, penalty weeks and monetary penalty.