

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0293

Hearing Decision 18-UI-104392 Affirmed – Disqualification
Hearing Decision 18-UI-104393 Affirmed – Overpayment, Penalties

PROCEDURAL HISTORY: On November 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 92056). On November 20, 2017, the Department served notice of another administrative decision assessing an overpayment of \$6,874, a monetary penalty of \$1,031.10, and 48 penalty weeks (decision # 194257). Claimant filed a timely request for hearing regarding both decisions. On February 23, 2018, ALJ S. Lee conducted two hearings, and on March 2, 2018 issued Hearing Decision 18-UI-104392, affirming decision # 92056, and 18-UI-104393, stating that it affirmed decision # 194257. However, Hearing Decision 18-UI-104393 modified decision # 194257 by assessing a \$6,974 penalty and 50 penalty weeks, and failed to address the monetary penalty in the order. On March 21, 2018, claimant filed a timely application for review of Hearing Decisions 18-UI-104392 and 18-UI-104393 with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 18-UI-104392 and 18-UI-104393. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0292 and 2018-EAB-0293).

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the portions of the hearing decisions under review regarding claimant's work separation in which the ALJ concluded that claimant voluntarily left work without good cause are **adopted**. The remainder of this decision therefore focuses only on the overpayment and penalties issues.

FINDINGS OF FACT: (1) On July 13, 2017, claimant filed an initial claim for unemployment insurance benefits. The Department determined claimant had a valid claim with a weekly benefit

amount of \$574. The maximum weekly benefit amount in effect when claimant filed his initial claim was \$604.

(2) During the week of July 23 through July 30, 2017, claimant worked for Primal Cuts Meat Market and had earnings of \$604.50. Claimant knew he earned at least minimum wage for his work, and received his paycheck before August 21, 2017. On July 30, 2017, claimant quit work with Primal Cuts Meat Market.

(3) On August 21, 2017, claimant restarted his unemployment benefits claim. When claimant restarted his claim, he certified to the Department that he had not worked for any employer since he filed his initial claim.

(4) Claimant claimed benefits for the period of July 23 through July 29, 2017 (week 30-17), and the weeks from August 13 through October 28, 2017 (weeks 33-17 through 43-17). These are the weeks at issue.

(5) When claimant claimed week 30-17, the Department asked claimant, "Did you quit a job last week?" Claimant answered, "No." When asked to fill in his hours and gross earnings for week 30-17, claimant provided no hours or gross earnings for week 30-17. Claimant never told the Department that he quit a job or had earnings during week 30-17.

(6) Based on claimant's certifications that he did not quit a job in week 30-17 and had no earnings that week, the Department erroneously paid claimant \$574 each week for weeks 30-17 and weeks 33-17 through 42-17, and paid claimant \$560 for week 43-17.

CONCLUSIONS AND REASONS: Claimant is assessed a \$6,874 overpayment, which he is liable to repay to the Department or have deducted from any future benefits otherwise payable to him, and is assessed a \$1,031.10 monetary penalty. Claimant is also assessed 50 weeks as a penalty disqualification from future benefits otherwise payable to him.

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 not "unemployed" in any week during which the individual earns more than the individual's weekly benefit amount. ORS 657.100(1).

The Department paid claimant \$6,874 in benefits which he was not eligible to receive because he quit work with Primal Cuts Meat Market without good cause during week 30-17 and had earnings of more than his benefit amount for week 30-17. He was, therefore, overpaid \$6,874, the total amount paid to him during the weeks at issue. The Department paid benefits to claimant because, when he restarted his claim for benefits on August 21, 2017, he withheld information about his earnings with Primal Cuts Meat Market during week 30-17 and failed to report that he voluntarily quit that job on July 30, 2017. Had claimant reported the earnings and the work separation when he reopened his claim, the Department would have stopped paying benefits and completed an investigation regarding the work separation before it paid benefits for the weeks at issue. Claimant's failure to report his earnings and work

separation amounted to false statements or failures to disclose material facts. Regardless of claimant's knowledge or intent when withholding that information from the Department, claimant caused the overpayment and is therefore liable to repay it or have the overpayment amount deducted from future benefits otherwise payable.

Misrepresentation and 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.

Claimant contended that he did not report his work separation because he made less than \$600 for Primal Cuts Meat Market and, because claimant thought the employer would not need to claim claimant as an employee under tax laws, it was not necessary for claimant to disclose his employment with Primal Cuts Meat Market to the Department. Audio Record at 20:59 to 21:53. It is not plausible that claimant failed to report his quit from Primal Cuts Meat Market because of some tax law where the Department asked claimant the question, "Did you quit a job last week (week 30-17)?" Under the circumstances, there was no logical answer to that question other than "yes." The preponderance of the evidence is that claimant willfully failed to report the work separation to obtain benefits.

Regarding his earnings from Primal Cuts Meat Market during week 30-17, claimant asserted that he did not report his earnings because he was uncertain of the amount. Audio Record at 22:40 to 22:58. However, claimant knew that he earned at least minimum wage, and he did not report his earnings even when he received them in August. Thus, his contention that he did not report his earnings because he did not know the amount is not persuasive. The preponderance of the evidence is that claimant willfully failed to report the earnings to obtain benefits.

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 the individual was not entitled. 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 one time and once failed to report his work separation to avoid a disqualification from benefits. Therefore, claimant had a total of two occurrences of willful misrepresentation. For the first and second occurrences of misrepresentation within five years of the occurrence for which a penalty is being assessed, the appropriate penalty to be assessed is 15 percent of the total amount of benefits the individual received to which the individual was not entitled. OAR 471-030-0052(7)(a). Fifteen percent of \$6,874, the total amount of the benefits that claimant received to which he was not entitled for the weeks at issue, is \$1,031.10. The amount of the monetary penalty which is assessed against claimant therefore is \$1,031.10.

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. 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 willful misrepresentations involve both a work separation under OAR 657.176 and a failure 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 (\$6,874) 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 (\$604), rounded up to the nearest two decimal places (which yields a result of 11.38), multiplying that result by four (45.52), rounding that result up to the nearest whole number (46), plus four weeks (50). Accordingly, based on his willful misrepresentations to receive benefits, claimant is also subject to a penalty disqualification from future benefits for a period of 50 weeks.

DECISION: Hearing Decisions 18-UI-104392 and 18-UI-104393 are affirmed.

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

DATE of Service: April 16, 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. 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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