

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0332

Order No. 18-UI-105321 Affirmed ~ Disqualification
Order No. 18-UI-105320 Affirmed ~ Overpayment and Penalties

PROCEDURAL HISTORY: On January 10, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant failed without good cause to accept suitable work from the employer on November 27, 2017 (decision # 112438). Claimant filed a timely request for hearing. On January 11, 2018, the Oregon Employment Department (the Department) served notice of a second administrative decision based on decision # 112438 concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing a \$645 overpayment, \$96.75 in monetary penalties and five (5) penalty weeks (decision # 195055). Claimant filed a timely request for hearing on each decision. On March 12, 2018, ALJ S. Lee conducted a consolidated hearing, and on March 15, 2018, issued Order No. 18-UI-105321, affirming decision # 112438, and Order No. 18-UI-105320 affirming decision # 195055. On April 3, 2018, claimant filed applications for review of Order Nos. 18-UI-105321 and 18-UI-105320 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 18-UI-105321 and 18-UI-105320. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0331 and 2018-EAB-0332, respectively).

FINDINGS OF FACT: (1) On July 5, 2017, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant's claim was valid and established his weekly benefit amount at \$215. The maximum benefit amount in effect at the time of claimant's initial claim filing was \$604.

(2) During November 2017, claimant worked for the employer, Cody Staffing, a temporary agency, as a driver and warehouse worker. From late 2015 through November 2017, claimant had worked off and on for the employer at one of its clients, Auto Warehousing Company (AWC), during the swing shift at its Portland, Oregon location, located within claimant's Portland metropolitan area labor market.

(3) On November 27, 2017, a job recruiter from the employer contacted claimant by phone. During the call, the recruiter offered claimant work at AWC, but during the day shift from 7:00 a.m. to 3:30 p.m.

rather than the swing shift, beginning the next day, November 28, 2017. The work offered by the employer paid \$11.25 per hour, the same wage claimant had been earning from the employer for previous swing shifts worked at AWC, last on November 22, 2017. Claimant refused the offered day shift work after explaining that he needed two or three days' notice because he picked up his 10-year-old grandchild at school during the day and watched him until the child's parent picked him up later, and "prefer[red]" to work swing shift. Exhibit 1. When claimant could not pick up the child, he would arrange for someone else or the child's father to pick him up.

(4) Claimant filed a weekly claim for unemployment insurance benefits for the week November 26 through December 2, 2017 (week 48-17). When filing his claim, claimant was asked the question, "Did you fail to accept an offer of work last week?" to which claimant responded, "no." Claimant then certified that his report to the Department about his claim for that week was true and accurate, even though he knew he had refused the day shift job offer on November 27, 2018. Based on claimant's certification, the Department paid claimant benefits for that week in the amount of \$215. Claimant subsequently filed weekly claims for benefits for the weeks December 3 through December 16, 2017 (weeks 49-17 through 50-17). The Department also paid claimant benefits for each of those weeks in the amount of \$215.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant refused an offer of suitable work without good cause. In addition, claimant was overpaid \$645 in regular benefits, must repay the Department that amount or have it deducted from any future benefits otherwise payable, is liable for a \$96.75 monetary penalty, and as an additional penalty, is disqualified from receiving future benefits for a period of 5 weeks.

Job Refusal. ORS 657.176(2)(e) requires a disqualification from unemployment insurance benefits if an individual failed without good cause to accept suitable work when offered. OAR 471-030-0038(6)(a) (August 3, 2011) defines "good cause" as "such that a reasonable and prudent person, exercising ordinary common sense, would refuse to * * * accept suitable work when offered by the employer." Factors to consider when determining whether work is "suitable" include, in pertinent part, "the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual." ORS 657.190.

In a job refusal case, the burden of proof is on claimant to establish that a valid offer of work was not suitable, or that he (or she) had good cause to refuse the offer.¹ The Department, however, has the burden to prove that claimant is not entitled to benefits.² In other words, the Department must first establish that the employer made claimant a valid offer of work and that he refused it, thus making a *prima facie* showing that claimant was not entitled to benefits; if, and only if, the Department meets that

¹ See accord *Marella v. Employment Dept.*, 223 Or. App. 121, 194 P.3d 849 (2008) (so stating).

² *Alaska Tanker Co. v. Employment Dept.*, 185 Or. App. 687, 61 P.3d 276 (2003) (the Court held, in a vacation pay case, that because the "employer is the party arguing that claimant's benefits should be reduced, employer bears the burden of proof on that issue"); citing *Johnson v. Employment Dept.*, 177 Or. App. 464, 34 P.3d 716 (2001) (the employer has the burden to show misconduct in a discharge case under ORS 657.176(2)).

burden does it then shift to claimant to show the offer of work was not valid, or show he had good cause for refusing it.

Here, the Department established that the employer made claimant a valid offer of suitable work. According to the Department's witness, the employer made the offer prior to the date the work was to occur and provided sufficient detail about the time, place, location, hours and wages. The work offered was the same work for the same client and for the same wages that claimant had accepted previously from the employer with the exception that it was during the day shift rather than the swing shift. The Department's witness also asserted, and claimant did not dispute, that claimant refused the offer of work that was scheduled to begin the following morning. The Department made a *prima facie* showing that claimant was not entitled to benefits

At hearing, claimant asserted that the job offer in question was "not satisfactory" because it was for work during a shift different from what he had accepted from that employer for two and one-half years and because previously he had agreed to babysit his grandson during that shift and needed at least two days prior notice to arrange alternate childcare. Audio Record ~ 58:30 to 1:02:00. However, although the shift offered may have been different from what he was used to, we infer from claimant's experience with that employer that the hours and day of work offered was customary for the warehouse work he had been seeking. And, although claimant may have agreed to babysit his grandson during the day shift, claimant did not assert or show that he had legal custody of, or responsibility for, the child. Moreover, he explained that on days he could not pick up the child from school and thereafter watch the child, he had made other arrangements, which specifically included having the child's father, claimant's son, pick up and watch his own child. Audio Record ~ 26:15 to 27:15. On this record, claimant had from 3:00 p.m. on November 27 to at least later that evening to make alternate child care arrangements that would have allowed him to accept the employer's offer of "suitable" work during the day shift on November 28, 2017. Claimant did not attempt to explain why it would have taken him two days to make such arrangements. Accordingly, for the reasons stated, claimant failed to meet his burden to show that he had good cause for refusing the job offer in question and is disqualified from receiving unemployment insurance benefits for that reason until he has earned at least four times his weekly benefit amount from work in subject employment.

Overpayment and Penalties. 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.* In addition, 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).

Claimant was ineligible to receive unemployment insurance benefits between November 26 and December 16, 2017 because his job refusal on November 27, 2017 disqualified him under ORS 657.176(2)(e). He was overpaid \$645 in regular benefits based on his weekly claims to the Department during that time because when he filed his weekly claim for week 48-17, he made a false report to the Department related to his qualification for benefits; specifically, when asked whether or not he "fail[ed] to accept an offer of work last week", claimant replied, "no", even though he had. Because claimant

was overpaid benefits because of his false statement about a job refusal, claimant is liable to repay the Department the amount of his overpayment, \$645, or have that amount deducted from any future benefits otherwise payable to him.

Claimant testified that he did not report his job refusal when answering the question regarding whether he had failed to accept an offer of work the previous week because he did not believe the offer was “satisfactory.” Audio Record ~1:01:45 to 1:02:50. However, he went on to explain that he knew that he had refused an offer and, by answering as he did, there would probably be a hearing on the issue. Audio Record ~1:02:45 to 1:03:50. Accordingly, from that explanation we infer that claimant likely chose not to report the job refusal to the Department to avoid the potential effect reporting it could have on his benefit payments. On this record, claimant’s false statements and misrepresentations were willful.

Based on claimant’s willful false statement and decision to withhold a material fact from the Department to obtain benefits, claimant is subject to penalty weeks and a monetary penalty. The maximum number of penalty weeks allowed under ORS 657.215 is 52, and the number of penalty weeks is determined under OAR 471-030-0052(1)(a) and (b), which provides, when the disqualification is imposed because the disqualifying acts relate to the provisions of ORS 657.176, the number of penalty weeks is calculated by dividing the total overpayment by the maximum Oregon weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the disqualifying act(s), rounding off to the nearest two decimal places, multiplying the result by four and rounding that number up to the nearest whole number ($\$645 \div 604 = 1.067 \times 4 = 4.27$, rounded up = 5 weeks). Claimant is also liable for a penalty equal to 15 percent of the overpaid benefits because there was a single occurrence of misrepresentation. Fifteen percent of \$645 is \$96.75, making claimant’s total repayment liability \$741.75.

In sum, claimant was overpaid \$645 in regular benefits, must repay the Department that amount or have it deducted from any future benefits otherwise payable, is liable for a \$96.75 monetary penalty, and as an additional penalty, is disqualified from receiving future benefits for an additional period of 5 weeks.

DECISION: Order Nos. 18-UI-105321 and 18-UI-105320 are affirmed.

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

DATE of Service: May 2, 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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