

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0556**

*Modified*  
*Overpayment Assessed*

**PROCEDURAL HISTORY:** On November 2, 2012, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$1,665 overpayment, a \$249.75 monetary penalty and 14 penalty weeks (decision # 200626). Claimant filed an untimely request for hearing. On January 3, 2013, ALJ Lohr conducted a hearing, and on January 15, 2013 issued Order No. 13-UIB-00840, allowing claimant's request for hearing and otherwise affirming decision # 200626. On January 29, 2013, claimant filed an application for review of Order No. 13-UIB-00840 with the Employment Appeals Board (EAB). On March 1, 2013, EAB issued Appeals Board Decision 13-AB-0186, affirming Order No. 13-UIB-00840. On April 1, 2013, Appeals Board Decision 13-AB-0186 became final without a petition for judicial review having been filed.

On May 30, 2017, the Department served notice of an administrative decision assessing a \$6,454 overpayment, a \$1,936.20 monetary penalty and 52 penalty weeks (decision # 193329). Claimant filed a timely request for hearing. On July 20, 2017, ALJ M. Davis conducted a hearing, and on July 21, 2017 issued Order No. 17-UI-88609 assessing a \$6,454 overpayment but no penalties. On August 10, 2017, Order No. 17-UI-88609 became final without a request for review having been filed with the Employment Appeals Board (EAB).

On March 22, 2018, the Department served notice of an administrative decision assessing a \$1,717 overpayment, a monetary penalty of \$525.10 and 24 penalty weeks (decision # 194447). On March 28, 2018, the Department served notice of an administrative decision cancelling decision # 194447 and assessing a \$2,102 overpayment, a \$630.60 monetary penalty and 30 penalty weeks (decision # 193842). Claimant filed a timely request for hearing on decision # 193842. On May 10, 2018, ALJ Wyatt conducted a hearing, and on May 18, 2018 issued Order No. 18-UI-109690, affirming decision # 193842. On May 29, 2018, claimant filed an application for review with EAB.

EAB considered claimant's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Prior to September 27, 2017, claimant had filed four valid claims for unemployment insurance. When claimant filed claims for weekly benefits under these claims, he had on occasion reported earnings from employment in those weeks.

(2) On December 25, 2015, as part of the claim process when receiving benefits, claimant completed the UI Basic Review and responded that, when reporting earnings from employment on his weekly claim report, he should report his net pay and not his gross pay. Exhibit 1 at 28. On March 13, 2016, claimant again completed the UI Basic Review and again responded that when reporting earnings, he was required to report his net pay and not his gross pay. Exhibit 1 at 28. On April 3, 2016, claimant once again completed the UI Basic Review, but this time responded that, if he had earnings to report in a week in which he claimed benefits, he should report his gross pay and not his net pay. Exhibit 1 at 27. On November 13, 2016, claimant completed yet another UI Basic Review and responded that if he had earnings during any claim week, he needed to report his net pay and not his gross pay. Exhibit 1 at 26. On December 25, 2016, claimant completed a final UI Basic Review and responded that if he had earnings to report in any claim week he should report his net pay and not his gross pay. Exhibit 1 at 26.

(3) On September 27, 2016, claimant filed an initial claim for unemployment insurance benefits. The claim was determined valid with a weekly benefit amount of \$590. The maximum benefit amount in effect when claimant filed this claim was \$590. Claimant claimed benefits under this claim through claim week 38-17. On January 28, 2018, claimant filed another initial claim for unemployment benefits. This claim was determined valid with a weekly benefit amount of \$529. Claimant claimed benefits under this claim through claim week 05-18.

(4) Claimant claimed benefits for claim weeks 25-17 through 27-17, 29-17 through 31-17, 36-17, 38-17, 01-18 and 03-18 through 05-18, the weeks at issue. During the weeks at issue, claimant worked for Columbia Memorial Hospital and earned \$40.27 per hour. When claimant reported his earnings from employment during the weeks at issue, claimant multiplied the hours that he estimated he had worked by his hourly wage and reduced that resulting figure by 30 percent to account for taxes and deductions. Claimant thought he was required to report his net earnings from employment and not his gross earnings.

(5) During the weeks at issue, benefits that would otherwise have been paid to claimant were applied to offset the \$6,454 in overpaid benefits assessed against him in Order No. 17-UI-88609. The earnings that claimant and the employer reported and the benefits that the Department applied to the prior overpayment to claimant were as follows:

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<u>Week</u>	<u>Hours Claimant Reported</u>	<u>Claimant Reported Earnings</u>	<u>Employer Reported Earnings</u>	<u>Benefits Applied To Prior Overpayment</u>
25-17	09	266	388	520
26-17	09	234	388	552
27-17	09	252	356	534
29-17	08	224	384	562
30-17	17	470	700	316
31-17	08	224	384	562
36-17	09	252	376	534
38-17	09	252	376	534
01-18	16	416	716	0
03-18	17	455	1,016	0
04-18	08	208	320	497
05-18	14	364	652	341

**CONCLUSIONS AND REASONS:** Claimant was overpaid \$2,102 in benefits that he is liable to repay to the Department or to have deducted from any future benefits otherwise payable to him. Claimant is not assessed a monetary penalty or penalty weeks.

**Overpayment.** An individual is deemed “unemployed” and eligible to receive benefits in any week only if the individual worked less than full-time and earned less than the individual’s weekly benefit amount. ORS 657.100(1). If an eligible unemployed individual has employment in any week, the individual’s weekly benefit amount is reduced by the amount of earnings paid or payable that exceeds ten times the applicable state minimum wage or one-third of the individual’s weekly benefit amount, whichever is greater. ORS 657.150(6)(a). 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 misrepresentation of a material fact, or failed to disclose a material fact, the individual is liable to repay the overpaid amount or to have it deducted from any future benefits otherwise payable to the individual. ORS 657.310(1).

Claimant and the employer’s witness agreed at hearing that the Department’s Schedule of Adjustments accurately set out the earnings that the employer actually paid to claimant for the weeks at issue. Transcript at 25, 31. Claimant did not dispute that the earnings he reported to the Department for those weeks were inaccurate. Nor was it disputed that the amount of benefits applied to claimant’s prior overpayment during the weeks at issue was based on claimant’s representations as to his earnings during those weeks. Accordingly, regardless of claimant’s knowledge or intent, even if he did not know he was incorrectly stating his earnings, he is liable to repay to the amounts were over-applied to his prior overpayment based on representations he made to the Department as to his earnings during the weeks at issue.

The amounts that were over-applied to claimant’s prior overpayment based on incorrect representations he made as to his earnings are set out below.

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<u>Week</u>	<u>Correct Earnings</u>	<u>Benefits Applied To Prior Overpayment</u>	<u>Correct Benefit Amount</u>	<u>Benefits Overpaid/ Overapplied</u>
25-17	388	520	398	122 <sup>1</sup>
26-17	388	552	398	154
27-17	356	534	430	104
29-17	384	562	402	160
30-17	700	316	0	316 <sup>2</sup>
31-17	384	562	402	160
36-17	376	534	410	124
38-17	376	534	410	124
01-18	716	0	n/a <sup>3</sup>	0
03-18	1,016	0	n/a	0
04-18	320	497	WW	497 <sup>4</sup>
05-18	652	341	0	<u>341</u>

**TOTAL OVERPAYMENT/OVERAPPLICATION** **\$2,102.00**

\$2,102 in benefits were applied to claimant’s overpayment that he was not otherwise entitled to receive as a result of his inaccurate representations about his earnings from employment during the weeks at issue. As a consequence, claimant is liable to repay that amount to the Department or to have it deducted from any future benefits otherwise payable to him.

**Penalties.** ORS 657.215 and ORS 657.310(2), read together, provide that an individual who has willfully made false statements or misrepresentations or willfully failed to report a material fact to obtain benefits may be assessed a monetary penalty as well as penalty weeks of future disqualification from benefits. The Department has the burden to show claimant’s willfulness by a preponderance of the evidence. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In Order No. 18-UI-109690, the ALJ assessed penalties against claimant for willfully making false reports of his earnings to obtain benefits, including a monetary penalty of \$525.10 and 24 penalty

<sup>1</sup> Under ORS 657.150(6), the correct benefit amount was calculated for week 25-17 as follows. The state minimum wage during week 25-17 was \$9.75 and multiplied ten times is \$97.50 which is less than \$196, which was one-third of claimant’s weekly benefit amount of \$590. [www.oregon.gov/boli/WHD/OMW/Pages/Minumum-Wage-Rate-Summary.aspx](http://www.oregon.gov/boli/WHD/OMW/Pages/Minumum-Wage-Rate-Summary.aspx). Claimant’s earnings of \$388 less \$196 yields \$192. Claimant’s weekly benefit amount of \$590 less \$192 yields a correct benefit amount of \$398. A similar calculation would be used in weeks 26-17, 27-27, 29-17, 31-17, 36-17 and 38-17, taking into account that as of week 27-17 the applicable state minimum was raised to \$10.25 per hour. *Id.*

<sup>2</sup> Claimant’s correct benefit amount in week 30-17, as well as in weeks 01-18, 03-18 and 04-18 was \$0 because his correct earnings were greater than his weekly benefit amount of \$590 (from week 25-17 through week 38-17) or \$529 (from week 01-18 through 05-18). ORS 657.100(1).

<sup>3</sup> Because no benefits were applied to claimant’s overpayment in this week or week 03-18, and he earned in excess of his weekly benefit amount in both weeks, the correct benefit amount is irrelevant for purposes of determining if benefits were over-applied to his prior overpayment and the amount of that overpayment.

<sup>4</sup> Claimant was not eligible to receive benefits, or to have them applied to his overpayment, in week 04-18 because the Department determined that week was claimant’s waiting week for benefits. ORS 657.155(1)(d).

weeks. The ALJ implicitly did not accept claimant’s contention that he innocently reduced his pay from the employer by 30 percent because he thought he should report his net earnings to the Department rather than his gross pay. The ALJ based his inference that claimant willful under-reported earnings during the weeks at issue on claimant’s having reported earnings far less than 70 percent of the earnings the employer reported for him for certain weeks, on claimant having had four claims prior to the claims at issue here and on a misrepresentation decision issued against claimant in 2012, decision # 200626. Order No. 18-UI-109690 at 5. We disagree and conclude that because the Department did not rule out that claimant’s under-reporting his earnings was not willful, penalties may not be assessed against claimant.

At the outset, there was no direct evidence that claimant willfully under-reported his earnings during the weeks at issue and claimant did not concede that he had done so to Department representatives or during his testimony at hearing. *See* Transcript at 12-19, 20-24. While the ALJ relied on the discrepancy between the earnings that claimant reported during the weeks at issue and 70 percent of the earnings that the employer reported to infer willfulness, he did not appear to consider the extent of the discrepancy between 70 percent of the earnings based on hours that claimant reported to the Department and what claimant actually reported he earned to the Department. In general, claimant reported earnings that were fairly close in amount to 70 percent of the hours that he worked multiplied by his hourly wage, as set forth below:

<u>Week</u>	<u>Hours Reported</u>	<u>Hours Multiplied By Wage</u>	<u>70 Percent Of Hours Multiplied By Wage</u>	<u>Earnings Claimant Reported</u>	<u>Discrepancy</u>
25-17	9	362	253	266	+13
26-17	9	362	253	234	-19
27-17	9	362	253	252	-1
29-17	8	322	225	224	+1
30-17	17	684	479	470	-9
31-17	8	322	225	224	+1
36-17	9	362	253	252	-1
38-17	9	362	253	252	-1
01-18	16	644	450	416	-44
03-18	17	685	480	455	-25
04-18	8	322	225	208	-17
05-18	14	564	395	364	-31

Based on the above table, it appears plausible that claimant intended to report as earnings 70 percent of his wages as calculated from hours of work that he reported to the Department. That the hours he reported were less than the employer reported for him may or may not support a finding of willful under-reporting depending on the other evidence presented by the Department.

While the Department contended that the misrepresentation decision from 2012, decision # 200626, was evidence that claimant knew he was required to report his gross earnings rather than net earnings to the Department during the weeks at issue, decision # 200626 was based on claimant’s failure to report any earnings from employment to the Department. Neither does Order No. 13-UIB-00840 nor EAB Decision 13-EAB-0186, which reviewed decision # 200626, address the issue of reporting net earnings

as opposed to gross earnings to the Department at all, let alone as the basis for a finding of willfulness. Decision # 200626 and the subsequent decisions upholding it do not constitute a sound basis for inferring that claimant knew that he was required to report his gross earnings to the Department during the weeks at issue and that by reporting his net earnings he was engaging in a willful under-reporting of his earnings. Moreover, the Department's witness did not rebut claimant's contention that he always reported net earnings to the Department when receiving benefits under prior claims and that during the hearing involving the 2017 overpayment which was issued prior to the hearing on decision # 193842, the hearing on decision # 193329, the issue of whether he was required to report gross earning rather than net earnings was not addressed. Transcript at 22. Decision # 193329 and the order issued after the hearing on it, Order No. 17-UI-88609, give credence to claimant's contention insofar as neither stated that claimant's reporting of net earnings was an issue.

In addressing the Department advisements that accompanied claimant's filing of the initial claims that are at issue here, the Department's witness did not assert that any of them expressly informed claimant that he was required to report gross earnings to the Department rather than his net earnings after taxes and other deductions. Transcript at 12 *et seq.* While the Department's witness referred to claimant's response to the UI Basic Review on April 3, 2016, in which claimant stated in response to question 2 that he was required to report gross earnings to the Department, as evidence of his willful under-reporting of earnings, claimant answered that same question on four other occasions, earlier on December 21, 2015 and March 13, 2016 and later on November 13, 2016 and December 25, 2016, that he was required to report net earnings. Transcript at 28; *see also* Exhibit 1 at 26-18. The most reliable conclusion that can be drawn from claimant's array of different responses to question 2 is that, at best, he was confused about whether he was required to report gross or net earnings to the Department. They do not suggest that claimant knew that he was required to report gross earnings or that, when he reported net earnings, he did so for the purpose of under-reporting his earnings.

While claimant reported less in earnings to the Department during the weeks at issue that the employer reported, the Department did not demonstrate by a preponderance of the evidence that claimant knew he was under-reporting them and that he was doing so willfully for the purpose of obtaining benefits to which he was not entitled. The Department did not meet its burden to show that penalties should be assessed against claimant under ORS 657.215 and ORS 657.310(2).

**DECISION:** Order No. 18-UI-109690 is modified, as outlined above.

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

**DATE of Service: July 5, 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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