

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0584

Reversed & Remanded

PROCEDURAL HISTORY: On February 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$5,441 overpayment, \$1,632.30 monetary penalty, and 36 penalty weeks (decision # 193691). On March 1, 2018, decision # 193691 became final without claimant having filed a timely request for hearing. On April 17, 2018, claimant filed a late request for hearing. On April 19, 2018, ALJ Kangas issued Order No. 18-UI-107763, dismissing claimant's late request for hearing subject to her right to renew the request by responding to an appellant questionnaire by May 3, 2018. On May 2, 2018, claimant responded to the appellant questionnaire. On May 3, 2018, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 18-UI-107763 was canceled. On May 30, 2018, ALJ Janzen conducted a hearing, and on May 31, 2018 issued Order No. 18-UI-110453, allowing claimant's late request for hearing and concluding that claimant was overpaid \$4,419 and subject to a \$1,325.70 monetary penalty and 30 penalty weeks. On June 6, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the ALJ's findings and conclusions with respect to the late request for hearing issue as set forth in Order No. 18-UI-110453 are **adopted**. With respect to the overpayment and misrepresentation issues, this matter is set aside and remanded for further proceedings.

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).

The ALJ concluded that claimant was overpaid benefits in the amount of \$4,419.00. *See* Order No. 18-UI-110453 at 9. Although the record shows claimant was, in fact, overpaid some amount of benefits, in the absence of any reliable evidence about claimant’s tipped earnings in October 2017, which is material to a determination of the amount of benefits claimant was entitled to receive that month, the record fails to establish the actual amount of the overpayment. With respect to that issue, the ALJ admitted claimant’s tip logs into evidence as Exhibit 4, but did not specifically describe the documents contained within Exhibit 4 when admitting that exhibit. Although tip logs including logs reflecting claimant’s tips in October 2017 were attached to the appellant questionnaire claimant returned to the OAH on May 2, 2018, the version of the tip logs the ALJ stamped and admitted into evidence as Exhibit 4 did not, and the ALJ specifically stated in Order No. 18-UI-110453 that “[c]laimant did not present documentation about her tips from October 2017,” when, in fact, it appears that claimant had done so. *See* Order No. 18-UI-110453 at 7. It is unclear whether or not the ALJ admitted or omitted the October 2017 tip logs from evidence in this case. Because EAB’s review is *de novo* “on the record,” this matter is remanded to the ALJ to establish what, in fact, the ALJ intended to include in the record.¹ ORS 657.275(2). Additionally, regardless whether the ALJ admits or intended to admit the October 2017 tip log into the record, the ALJ must give claimant the chance to present testimony about her tipped earnings for the entire period in question, which, in the absence of a tip log reflecting claimant’s daily tips in October 2017, would require the ALJ to allow claimant to testify about her tipped earnings during that month.

The ALJ also concluded that claimant should be subject to penalty weeks and a monetary penalty for making a willful misrepresentation to obtain benefits. *See* Order No. 18-UI-110453 at 9. The ALJ reached that determination because claimant kept a tip log but did not report her tips, and “[t]he evidence is persuasive that claimant knew that she should have reported her tips in addition to her hourly wages, and failed to do so to receive benefits.” *Id.* Claimant testified, however, that she did not report her tips to the Department because of an error and because she had a medical condition that caused her to forget things, and the ALJ did not identify what “persuasive” evidence was relied upon to determine that claimant’s failure to report her tipped earnings was done willfully to obtain benefits.²

The Department’s witness testified that the Department assessed misrepresentation penalties in this case, in part, because of the size of the discrepancy between claimant’s gross earnings reports and those of the

¹ In so concluding, the ALJ apparently considered the “employer’s reported tips” as reliable evidence of claimant’s October 2017 tips, and we disagree with the ALJ’s decision to do so. The record shows that the employer likely misreported claimant’s earnings for weeks 37-17, 50-17 and 2-18, during which the reported hours multiplied by claimant’s hourly wage added to the employer’s reported tip amounts do not equal the gross earnings the employer reported to the Department. Additionally, the record shows that the employer reported claimant earning tips that, on average, were 100% more than the tipped earnings shown in claimant’s tip logs, which the ALJ accepted as credible evidence of claimant’s actual tipped earnings in all months except October 2017. Given the misreported wages and the discrepancy between claimant’s credible tip records and the employer’s reports, the record fails to show that the employer’s reports of claimant’s October 2017 tips were reliable evidence of claimant’s gross tipped earnings during that month.

² The ALJ also found as fact that claimant reported her tipped earnings to the Department when claiming week 4-18, but the record does not support that finding. Claimant reported that she worked 20 hours and earned \$255.00 during week 4-18. However, 20 hours times \$11.25/hour is \$225. Claimant’s tip logs reflected that she earned \$56 in tips during week 4-18. Had claimant reported her tipped earnings in addition to her wages during week 4-18, it is more likely than not that she would have reported \$281 to the Department (\$225 in wages plus \$56 in tips), and not \$255. It therefore does not appear that claimant reported tips to the Department when claiming benefits for week 4-18. The evidence more probably suggests that claimant made a simple mathematical or typographical error that resulted in her report of \$255 in earnings instead of her actual \$225 gross wage earnings (excluding tips).

employer. *See* Transcript at 22-23. However, with the exception of evidence regarding claimant's October 2017 reports, as noted above, the ALJ resolved the discrepancy between claimant's and the employer's reports in favor of claimant. The size of the discrepancy between claimant's and the employer's reports therefore fails to establish claimant's willful misrepresentation.

The Department's witness also testified that claimant's experience with a prior unemployment insurance claim and the fact that she had taken a "UI basics" quiz were the other reasons the Department assessed a misrepresentation penalty in this case. *Id.* The ALJ failed to question the witnesses about the significance of those things, however. With regard to claimant's prior unemployment insurance claim, the ALJ must ask the parties whether claimant was working while claiming benefits during any prior claim(s), and whether the claim(s) included reporting tipped earnings to the Department when filing weekly benefit claims. The ALJ should also ask whether or not claimant reported such tipped earnings to the Department, and whether she was ever instructed by a Department employee how to report earnings involving tips to the Department when claiming benefits. We note that the weekly claim certification questions in evidence (Exhibit 3) do not indicate whether an individual should include tips when reporting weekly gross earnings to the Department while claiming benefits; the ALJ should ask the witnesses whether and how claimants are informed of that requirement.

With respect to the "UI basics" quiz, the Department's witness suggested that claimant had taken the quiz one or more times, and that doing so should have adequately informed her of the requirement that she report her tips to the Department. Transcript at 22-23. That might be the case, but the ALJ did not ask the witnesses to read the tip-related "UI basics" question(s) into evidence, did not ask the Department's witness when claimant took the quiz(es), and did not ask whether or not claimant ever correctly answered that question. The ALJ also did not ask the witnesses to read into evidence what information claimant would have been given about reporting tipped earnings had she incorrectly answered that question. On remand, the ALJ should ask those questions of the parties, and also ask claimant to further describe her memory-related medical concerns and how they affected her understanding of whether or how to report tipped earnings to the Department, and any other circumstances that caused her not to report her tipped earnings to the Department when claiming benefits. Without such evidence, the record fails to show whether or not claimant's failure to report her tipped earnings was the result of an error or misunderstanding on claimant's part, or the result of her willful misrepresentation to obtain benefits.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant was overpaid and subject to misrepresentation penalties, Order No. 18-UI-110453 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-110453 is modified. The portion of Order No. 18-UI-110453 allowing claimant's late request for hearing is **adopted**. With respect to the overpayment and misrepresentation, Order No. 18-UI-110453 is set aside, and the matter remanded for further proceedings consistent with this order.

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

DATE of Service: July 9, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-110453 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

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