

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0594

Affirmed
Overpayment, No Penalties

PROCEDURAL HISTORY: On March 29, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$3,619 overpayment, \$1,085.70 monetary penalty, and 25 penalty weeks (decision # 193763). Claimant filed a timely request for hearing. On May 22, 2018, ALJ Janzen conducted a hearing, and on May 24, 2018 issued Order No. 18-UI-110079, assessing a \$3,586 overpayment and no misrepresentation penalties. On June 12, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion that claimant is not liable for misrepresentation penalties are **adopted**.

FINDINGS OF FACT: (1) On October 31, 2016, claimant filed an initial claim for unemployment insurance benefits. Her weekly benefit amount was \$333. Claimant claimed benefits from December 25, 2016 to December 31, 2016 (week 52-16) and January 15, 2017 to May 6, 2017 (weeks 3-17 to 18-17), the weeks at issue.

(2) During the weeks at issue, claimant worked for Vhaskera, LLC. During week 52-16, claimant's gross earnings and tips totaled \$89.00.¹ During week 3-17, claimant's gross earnings and tips totaled \$566.00. During week 4-17, claimant's gross earnings and tips totaled \$397.00. During week 5-17, claimant's gross earnings and tips totaled \$189.00. During week 6-17, claimant's gross earnings and tips totaled \$295.00. During week 7-17, claimant's gross earnings and tips totaled \$378.00. During week 8-17, claimant's gross earnings and tips totaled \$459.00. During week 9-17, claimant's gross

¹ The finding of fact in this paragraph are based upon the employer's July 19, 2017 report to the Department. *See* Exhibit 1. Although claimant disputed the employer's reports, she did not provide records of her weekly earnings capable of direct comparison to the employer's week-by-week reports, nor was she able to provide testimony specifically refuting the amounts on the employer's reports. The specific and detailed reports from the employer, ostensibly based upon payroll records and maintained as required by state law, and provided in response to an audit request from the Oregon Employment Department, are therefore the best available evidence as to claimant's weekly earnings during the weeks at issue.

earnings and tips totaled \$442.50. During week 10-17, claimant's gross earnings and tips totaled \$394.00. During week 11-17, claimant's gross earnings and tips totaled \$435.00. During week 12-17, claimant's gross earnings and tips totaled \$226.00. During week 13-17, claimant's gross earnings and tips totaled \$607.00. During week 14-17, claimant's gross earnings and tips totaled \$340.50. During week 15-17, claimant's gross earnings and tips totaled \$453.00. During week 16-17, claimant's gross earnings and tips totaled \$328.00. During week 17-17, claimant's gross earnings and tips totaled \$484.00. During week 18-17, claimant's gross earnings and tips totaled \$523.00.

(3) During each week at issue, claimant reported to the Department that she had earned significantly less than the employer's records reflected. The reason for the discrepancy was that some of claimant's clients paid her tips via credit card. Claimant did not know whether a client had tipped her, or in what amount, until she received her bi-weekly paycheck. Even then, claimant did not know to which week the credit card tips should be allocated. Claimant therefore did not report credit card tips to the Department when claiming weekly benefits.

(4) Based upon claimant's weekly reports to the Department about her gross earnings, the Department paid claimant benefits during 12 weeks during which claimant's earnings exceeded her weekly benefit amount and she was not eligible for benefits (weeks 3-17, 4-17, 7-17, 8-17, 9-17, 10-17, 11-17, 13-17, 14-17, 15-17, 17-17, and 18-17). In 4 additional weeks, because claimant underreported her earnings by omitting credit card tips from the reports, the Department did not sufficiently reduce claimant's weekly benefit amount and overpaid her benefits (weeks 5-17, 6-17, 12-17, and 16-17).

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant is liable to repay a \$3,586 overpayment and is not liable for 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.*

Only "unemployed" individuals are eligible to receive benefits. ORS 657.155(1). An individual is "unemployed" during "any week during which the individual performs no services and with respect to which no remuneration for services performed is paid or payable to the individual, or in any week of less than full-time work if the remuneration paid or payable to the individual for services performed during the week is less than the individual's weekly benefit amount." ORS 657.100(1).

During weeks 3-17, 4-17, 7-17, 8-17, 9-17, 10-17, 11-17, 13-17, 14-17, 15-17, 17-17, and 18-17, claimant's earnings from work exceeded her weekly benefit amount. She therefore was not "unemployed" and she was not eligible to receive any unemployment insurance benefits during those weeks. The Department paid claimant \$3,148 in benefits for those 12 weeks. She was not entitled to receive those benefits. Because the benefits were paid to her based upon her earnings reports to the Department that excluded her tipped earnings, and regardless of her knowledge or intent in excluding her tipped earnings from those reports, claimant is liable to repay the \$3,148 in overpaid benefits to the Department.

During weeks 5-17, 6-17, 12-17, and 16-17, claimant was “unemployed” because she was working less than full-time and the remuneration paid or payable to her for those weeks was less than her weekly benefit amount. ORS 657.150(6) provides that “[a]n eligible unemployed individual who has employment in any week shall have the individual’s weekly benefit amount reduced by the amount of earnings paid or payable that exceeds whichever is the greater of the following amounts: (a) Ten times the minimum hourly wage established by the laws of this state; or (b) One-third of the individual’s weekly benefit amount.”

In the first half of 2017, the minimum wage in Oregon was \$9.75 per hour.² Ten times \$9.75 is \$97.50. Claimant’s weekly benefit amount was \$333. One-third that amount is \$111. Because \$111 is greater than \$97.50, claimant’s weekly benefit amount was subject to a dollar-for-dollar reduction by the amount of her earnings that exceeded \$111.

During week 5-17, claimant earned \$189 in wages and tips. \$189 exceeds \$111 by \$78. Claimant’s weekly benefit amount is therefore subject to reduction by \$78. \$333 minus \$78 equals \$255. Claimant’s correct benefit amount was therefore \$255. Based upon claimant’s incorrect earnings report to the Department, the Department initially paid claimant \$324 in benefits, however. Because the Department paid claimant \$324 in benefits during a week she was only entitled to receive \$255, claimant was overpaid \$69 for week 5-17.

During week 6-17, claimant earned \$295 in wages and tips. \$295 exceeds \$111 by \$184. Claimant’s weekly benefit amount is therefore subject to reduction by \$184. \$333 minus \$184 equals \$149. Claimant’s correct benefit amount was therefore \$149. Based upon claimant’s incorrect earnings report, the Department initially paid claimant \$284. Because the Department paid claimant \$284 in benefits during a week she was only entitled to receive \$149, claimant was overpaid \$135 for week 6-17.

During week 12-17, claimant earned \$226 in wages and tips. \$226 exceeds \$111 by \$115. Claimant’s weekly benefit amount is therefore subject to reduction by \$115. \$333 minus \$115 equals \$218. Claimant’s correct benefit amount was therefore \$218. Based upon claimant’s incorrect earnings report, the Department initially paid claimant \$284. Because the Department paid claimant \$284 in benefits during a week she was only entitled to receive \$218, claimant was overpaid \$66 for week 12-17.

During week 16-17, claimant earned \$328 in wages and tips. \$328 exceeds \$111 by \$217. Claimant’s weekly benefit amount is therefore subject to reduction by \$217. \$333 minus \$217 equals \$116. Claimant’s correct benefit amount was therefore \$116. Based upon claimant’s incorrect earnings report, the Department initially paid claimant \$284. Because the Department paid claimant \$284 in benefits during a week she was only entitled to receive \$116, claimant was overpaid \$168 for week 16-17.

Claimant’s underreported earnings in weeks 5-17, 6-17, 12-17, and 16-17 resulted in claimant being overpaid \$438 during those weeks. Because claimant failed to accurately report her earnings the overpayments occurred, and regardless of her knowledge and intent in doing so, claimant is liable to repay the \$438 to the Department.

² <https://www.oregon.gov/boli/WHD/OMW/Pages/Minimum-Wage-Rate-Summary.aspx>

In sum, claimant was overpaid \$3,148 to the Department for the 12 weeks she was not unemployed and not eligible to receive any benefits, and was overpaid another \$438 to the Department for the 4 weeks during which she was unemployed but underreported her earnings to the Department. Claimant's total overpayment amount, which she is liable to repay to the Department, is therefore \$3,586.

DECISION: Order No. 18-UI-110079 is affirmed.

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

DATE of Service: July 12, 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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