

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0738

Modified
Overpayment, No Penalties

PROCEDURAL HISTORY: On June 21, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$1,654 overpayment, \$496.20 monetary penalty, and 52 penalty weeks (decision # 193907). Claimant filed a timely request for hearing. On July 23, 2018, ALJ Janzen conducted a hearing, and on July 24, 2018 issued Order No. 18-UI-113673, affirming the Department's decision. On July 26, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On November 30, 2017, claimant filed an initial claim for unemployment benefits. His claim was valid, and his weekly benefit amount was \$176. Thereafter, claimant filed weekly claims for benefits for weeks 48-17 to 49-17, 1-18 to 2-18, 4-18 to 8-18, and 10-18 to 12-18.

(2) During week 48-17, claimant earned \$249.90 from employment. He reported to the Department that he did not have any earnings for that week. The Department assigned him waiting week credit for that week. During week 49-17, claimant earned \$499.80 from employment. The Department did not pay claimant benefits for that week because the week was used in service of an earlier misrepresentation disqualification.

(3) During week 1-18, claimant earned \$224.91 from employment. He reported to the Department that he earned \$25.00 that week. As a result, the Department paid claimant \$176 in benefits for the week. During week 2-18, claimant earned \$374.85 from employment. As a result of claimant's report, the Department paid him \$176 in benefits for the week.

(4) During week 4-18, claimant earned \$374.85 from employment. He initially reported to the Department that he earned \$375 that week, but subsequently called the Department and reported that he earned \$50.00 that week. As a result of claimant's amended earnings report, the Department paid claimant \$176 in benefits for the week. During week 5-18, claimant earned \$374.85 from employment. He reported to the Department that he earned \$75.00 that week. As a result, the Department paid claimant \$176 in benefits for the week. During week 6-18, claimant earned \$331.12 from employment. He reported to the Department that he earned \$100.00 that week. As a result, the Department paid

claimant \$176 in benefits for the week. During week 7-18, claimant earned \$324.88 from employment. He reported to the Department that he earned \$160.00 that week. As a result, the Department paid claimant \$128 in benefits for the week. During week 8-18, claimant earned \$268.65 from employment. He reported to the Department that he earned \$170.00 that week. As a result, the Department paid claimant \$118 in benefits for the week.

(5) During week 10-18, claimant earned \$518.55 from employment. He reported to the Department that he earned \$100.00 that week. As a result, the Department paid claimant \$176 in benefits for the week. During week 11-18, claimant earned \$24.99 from employment. He reported to the Department that he earned \$25.00 that week. As a result, the Department paid claimant \$176 in benefits for the week. During week 12-18, claimant earned \$733.46 from employment. He reported to the Department that he did not have any earnings for that week. As a result, the Department paid claimant \$176 in benefits for the week.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was overpaid in the amount of \$1,654 that he is liable to repay to the Department; we disagree, however, that claimant is liable for monetary penalties or penalty weeks.

Overpayment. Only unemployed individuals are eligible to receive unemployment insurance benefits. ORS 657.155(1). An individual is deemed “unemployed” in any week during which the individual performs no services and is not remunerated, or in any week of less than full-time work if the remuneration paid or payable to the individual is less than the individual’s weekly benefit amount. ORS 657.100(1).

At the hearing, claimant disagreed with the employer’s earnings reports to the Department, asserting that the reports were “too high”, and that “Bob” from the employer’s affiliate said that if claimant would “try and get unemployment benefits they [the employer] will report a number [of earnings] that’s much higher than” what he actually worked “to avoid trying to pay you.” Transcript at 33, 39, 40. Claimant did not, however, specify which weeks he thought the employer’s earnings reports were “too high” versus which weeks he thought the reports were accurate. He did not offer any testimony or evidence about his hours of work during any particular week or what he thought he earned during any weeks he thought were “too high.” He also did not otherwise provide the Department or ALJ with records disputing the amounts the employer reported to the Department. In the absence of any specific information, documentation, or objective proof substantiating claimant’s claims about the employer’s earnings reports or suggesting that the employer’s reports to the Department were inaccurate, the Department’s evidence of claimant’s earnings during the weeks at issue is the most reliable source of information, and we relied upon the Department’s information when reaching this decision.

During weeks 48-17 to 49-17, 1-18 to 2-18, 4-18 to 8-18, 10-18, and 12-18, claimant’s remuneration from employment each week exceeded his weekly benefit amount of \$176. He was, therefore, not “unemployed” and was not eligible to receive benefits during each of those weeks.

During week 11-18, claimant was “unemployed” because he worked less than full-time and earned less than his weekly benefit amount. However, he was not eligible for payment of benefits during that week under ORS 657.155(1)(d), which requires that an individual be “unemployed for a waiting period of one

week” before the individual is eligible for payment of benefits. Claimant therefore was not eligible to receive an unemployment insurance benefit payment during week 11-18.

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.*

Claimant received \$1,654 in unemployment insurance benefits during weeks 48-17 to 49-17, 1-18 to 2-18, 4-18 to 8-18, and 10-18 to 12-18. Because claimant was either not “unemployed” during those weeks or was eligible only for waiting week credit, he was not eligible to receive any of those benefits. Claimant received the benefits because he underreported his weekly earnings when he filed his weekly claims for benefits. Regardless of claimant’s knowledge or intent in underreporting his weekly earnings, because he caused the overpayment, he is liable to repay the overpayment to the Department. He is, therefore, liable to repay the Department \$1,654 in overpaid benefits.

Misrepresentation. ORS 657.215 provides that an individual is disqualified for benefits if the individual willfully made a false statement or misrepresentation, or willfully failed to report a material fact, to obtain any benefits under this chapter. The Department has the burden to prove by a preponderance of the evidence that a misrepresentation occurred. *See e.g. Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

The ALJ concluded that claimant’s underreported earnings amounted to nine willful misrepresentations that he made for the purpose of obtaining benefits he was not entitled to receive, and he was therefore liable for penalties in addition to repaying the overpayment.¹ The ALJ wrote, “Claimant testified that he consistently misreported his earnings because it was difficult to know what his wages were and he estimated them to the best of his ability,” but his testimony “not credible” because it “was evasive and inconsistent,” he “tried to avoid answering questions and stated that he did not know what he was paid by the employer despite having his earnings from the employer directly deposited into his account,” and his “actions show that he knew what he needed to report as earnings to receive benefits and adjusted his reports to receive benefits.”² We disagree.

Although claimant did not always directly answer the ALJ’s questions the first time they were asked, the record does not show it is more likely than not that occurred because he was being “evasive and inconsistent” and “trying” to “avoid” answering questions. It is equally likely that claimant did not understand the question(s) the first time they were asked, or that he had a story to tell and was eager to tell it regardless whether what he was saying was responsive to the ALJ’s questions, neither of which mean that claimant was not otherwise a credible witness.

Likewise, claimant’s failure to “know what he was paid . . . despite having his earnings from the employer directly deposited into his account” did not mean his testimony was not credible. Many

¹ Order No. 18-UI-113673 at 6-7.

² *Id.*

individuals do not know the exact amount of their direct deposits, particularly where, as here, the individual did not receive a physical paystub with each deposit, and only received them every six to eight weeks. Transcript at 28. Claimant's job involved two positions with two employers that were "sort of lumped into one" which he found "kind of confusing." Transcript at 26. Claimant testified, unrefuted, that although he reported his hours to the employer on a daily basis, the employer did not necessarily pay him for all of the hours he reported working, so he did not know what his wages would be in any given week and therefore did not know what to report when he made his claims. Transcript at 28, 31. Finally, although he was expected to report his weekly earnings to the Department, it is also unrefuted that he was paid by the employer every other week and his paycheck lagged one week behind, making it difficult for him to know when to report what earnings to the Department. Transcript at 37.

For all those reasons, we find it credible and plausible that claimant did not accurately report his earnings during the weeks at issue because he did not know what his actual hours and earnings were. Although he was certainly careless, and perhaps grossly negligent in reporting his hours and earnings, in order to apply penalties there must be evidence that claimant "willfully" misrepresented his earnings "to obtain any benefits." "Willfully" is generally defined to mean "obstinately and often perversely self-willed," or "done deliberately."³ Here, given the factors listed herein, the record fails to establish that claimant more likely than not acted "obstinately" or "deliberately" when he underreported his hours and earnings. To any extent claimant nevertheless should have contacted the Department after each direct deposit to correct his prior earnings reports, it is notable that individuals are instructed to report their gross earnings to the Department when filing weekly claims for benefits, and knowing the amount of his net pay direct deposits would not have supplied claimant with the accurate information about his gross earnings he needed to correct those reports.

The Department established that claimant was overpaid \$1,654 in unemployment insurance that he is liable to repay. Claimant is not, however, liable for any monetary penalties or penalty weeks.

DECISION: Order No. 18-UI-113673 is modified, as outlined above.

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

DATE of Service: August 24, 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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³ <https://www.merriam-webster.com/dictionary/willfully>