

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-0946**

*Reversed and Remanded*

**PROCEDURAL HISTORY:** On June 25, 2013, the Oregon Employment Department (the Department) served notice of two administrative decisions concluding claimant was suspended for misconduct from February 14, 2013 through February 16, 2013 (decision # 122629), and another concluding claimant was discharged for misconduct on May 23, 2013 (decision # 124447). Decision #122629 became final without a request for hearing having been filed. On October 21, 2013, claimant filed a request for hearing on decision #124447. A hearing was scheduled for December 10, 2013 for decision # 124447. On December 16, 2013, ALJ Clink issued Hearing Decisions 13-UI-06528, dismissing claimant's request for hearing for failure to appear at the December 10, 2013 hearing.

On March 28, 2014, the Department served notice of an administrative decision concluding claimant was overpaid \$1,980 and must repay this amount to the Department (decision # 120639). Claimant filed a timely request for hearing. On May 12, 2014, ALJ M. Davis conducted a hearing, and on May 13, 2014 issued Hearing Decision 14-UI-17483, affirming the Department's decision. On June 2, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

**CONCLUSIONS AND REASONS:** Hearing Decision 14-UI-17483 is reversed, and this matter remanded.

On June 25, 2013, the Department issued decision # 122629 concluding claimant was suspended for misconduct, and disqualified from receiving benefits beginning February 10, 2013 and until claimant qualified again for benefits under Employment Department law. Claimant did not request a hearing on that decision. As a result, it became final as a matter of law on July 15, 2013. Given that decision # 122629 is final, claimant was suspended from work due to misconduct as a matter of law, and was subject to disqualification from benefits beginning week 7-13, until he requalified for benefits.

On June 25, 2013, the Department also issued decision # 124447, concluding claimant was discharged for misconduct on May 23, 2013. Claimant requested a hearing but failed to appear for the hearing, thus his request for hearing was dismissed, decision # 124447 became final and, as a matter of law, claimant was discharged for misconduct. This began a new period of disqualification starting with week 21-13.

**Overpayment Amount.** Based on the Schedule of Adjustments for decision # 120639, the overpayment decision, claimant was disqualified from receiving benefits because of the suspension for misconduct for week 7-13 and weeks 9-13 through 21-13. However, Oregon law provides that an individual who is suspended from work for misconduct is disqualified from receiving benefits “until the individual has performed service in employment subject to this chapter . . . for which remuneration is received that equals or exceeds four times the individual’s weekly benefit amount subsequent to the week in which the act causing the disqualification occurred.” ORS 657.176(2). Because claimant’s weekly benefit amount was \$290, once he earned \$1,160, he ended his disqualification based on decision # 122629. According to the Schedule of Adjustments, claimant’s earnings for weeks 9-13<sup>1</sup> through 13-13 totaled \$1,260.45. Given that claimant appears to have sufficient earnings to end the disqualification based on decision # 122629 by the end of week 13-13, the record fails to show a basis for concluding claimant was overpaid during subsequent weeks.

**Method of Repayment.** ORS 657.315(1) provides that if an individual has been paid benefits to which the individual is not entitled because of an error not due to the individual providing a false statement or misrepresentation of a material fact or not disclosing a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding the individual is not eligible for the benefits, the individual is liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter for any week or weeks within 52 weeks following the week in which the decision establishing the erroneous payment became final. ORS 657.310(1) provides that if an individual received 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 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.

There is no dispute that claimant has an overpayment for some amount as a result of decisions # 122629 and # 124447. However, the record contains no evidence as to why claimant was paid benefits he was not entitled to receive. The record does not contain sufficient information to determine whether claimant’s overpayment occurred because of an error that is not attributable to claimant, in which case ORS 657.315 would apply and the overpayment would be deductible from future benefits due, or whether it occurred because claimant, without the intent to defraud, provided the Department with a false statement or failed to disclose a material fact, in which case ORS 657.310 would apply and claimant could be required to repay the benefits. Without such evidence, we are unable to determine whether claimant is liable to repay the overpayment or have it deducted from future benefits.

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<sup>1</sup> Because ORS 657.176(2) includes remuneration received “subsequent to the week in which the act that caused the disqualification occurred,” the calculation does not include remuneration from week 7-13, the week when the disqualification occurred.

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 the amount of claimant's overpayment, and whether claimant is liable to have the amount deducted from any future benefits otherwise payable to the individual pursuant to ORS 657.315(1), or to either repay the benefits or have the amount of the benefits deducted from any future benefits pursuant to ORS 657.310(1), Hearing Decision 14-UIB-17483 is reversed, and this matter remanded to OAH for further proceedings.

**DECISION:** Hearing Decision 14-UI-17483 is set aside, and this matter remanded for further proceedings consistent with this order.

Tony Corcoran and J. S. Cromwell;  
Susan Rossiter, not participating.

**DATE of Service:** July 11, 2014

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 14-UI-17483 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

**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 website at [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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