

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0340**

*Affirmed*  
*Request for Adjustment Of Claim Determination Denied*

**PROCEDURAL HISTORY:** On December 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant's request for an adjustment of claim determination was denied. Claimant filed a timely request for hearing. On March 30, 2016, ALJ Wyatt conducted a hearing at which the employer did not appear, and on March 18, 2016 issued Hearing Decision 16-UI-55315, affirming the Department's decision. On March 25, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Sometime before December 29, 2015, claimant filed an initial claim for unemployment insurance benefits. The base year for claimant's claim was July 1, 2014 through June 30, 2015.

(2) During the base year, SP Fiber Technologies, LLC employed claimant. For that year, the employer offered claimant the option of participating in a plan in which the employer would divert a portion of claimant's gross pay into a flex pay account for her use covering unreimbursed health-related expenses. The funds deducted for these purposes were pre-tax dollars, and were not subject to federal and state income taxes. Claimant elected to participate in the plan during the base year.

(3) Sometime after December 29, 2015, the employer submitted records to the Department showing claimant's wages for purposes of determining, among other things, her weekly and maximum unemployment insurance benefits amounts. The employer's records showed claimant received wages of \$40,970.21 during the base year. Exhibit 1. Pay records that claimant obtained from the employer showed she had total gross income of \$45,434.28 during the base year, with no indication of the amount of that income that was taxable or not taxable to her as income. Exhibit 2. A Department representative determined that the wages the employer reported for claimant during the base year accurately represented claimant's gross earnings, minus the pre-tax contributions to the employer's medical, dental and vision insurance and flex pay account plan.

**CONCLUSIONS AND REASONS:** Claimant’s request for adjustment of her claim determination to include as wages the amounts that were deducted from her gross pay for insurance and health-related expenses is denied.

ORS 657.266(1) states that the Department must promptly examine each new claim for benefits, determine the wages paid to claimant during the applicable base year, determine if those wages are sufficient to qualify claimant for benefits and, if so, determine the weekly benefit amount payable to claimant. ORS 650.150(1) states that an eligible individual shall be paid benefits in an amount that is determined by taking into account the individual’s work [in other words, wages] in subject employment during the base year. ORS 657.105(1) defines “wages” to mean all remuneration paid for employment subject to the exclusions of ORS 657.115 to 657.140. ORS 657.115(1)(c) states that “wages” do not include “the amount of any payment made to *or on behalf of an individual . . .* on account of medical or hospitalization expenses in connection with sickness or accident disability” (emphasis added). ORS 657.115(2) states “payment made” includes amounts paid by an employing unit for insurance or annuities or into a fund for those specified purposes. OAR 471-031-0205 (December 1, 2008) states that employee benefits paid through a cafeteria plan, as defined in the Internal Revenue Code (IRS) Section 125, are not included as wages if listed as excluded in ORS 657.115, even when paid through a payroll deduction.

The ALJ was somewhat hampered in fully developing the facts about the nature of the plan in which claimant was participating since the employer did not appear at the hearing and claimant’s testimony was unclear. However, from claimant’s description that her contributions were made in the form of pre-tax salary deductions, it can be reliably inferred that it was a cafeteria plan, and she elected of her own volition to participate in it. *See* 26 USC §125; <http://www.irs.gov/Government-Entities/Federal,-State-&-Local-Governments/FAQs-for-government-entities-regarding-Cafeteria-Plans>; Transcript at 22, 23, 24, 25. Claimant did not dispute the amount that was deducted from her gross pay to determine her “wages” for unemployment benefit purposes was an accurate representation of the pre-tax amounts she contributed to the employer’s cafeteria plan in the base year. Claimant’s objection was to the exclusion of any of those deducted amounts from her wages for purposes of determining the amount of her benefits. Where, as here, claimant did not receive benefits to which she contended she was entitled because of the deductions at issue, she has the burden to demonstrate by a preponderance of the evidence that the deductions were improper, by logical extension of the Oregon Court of Appeals’ holding in *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (Department carries burden to demonstrate claimant’s ineligibility to receive benefits when it seeks to recover benefits it has already paid to claimant; by extension, claimant carries the burden when benefits were not paid).

As narrowed, the issue in this case is whether it was proper for the Department to deduct those pre-tax contributions to the employer’s cafeteria plan in determining the amount of claimant’s base year “wages”. Those pre-tax contributions fall squarely within the exclusions of either ORS 657.115(1)(c) or ORS 657.115(2) or both. Even if those deducted amounts would have been available to claimant had she not elected to participate in the employer’s plan, those statutes provide they should still be excluded from the base year wages on which her benefits were calculated. The propriety of excluding the pre-tax amounts that claimant had deducted from her wages was affirmed in *Lee v. Employment Department*, 221 Or App 449, 190 P3d 453 (2008). There, the court held that pre-tax contributions that a claimant made to an employer’s cafeteria plan were not “paid to claimant” because he never controlled them, but chose to leave them with the employer to spend on his behalf for the purposes he had elected. *Lee*, 221

Or App at 453,454. As such, the court ruled that the pre-tax amounts that claimant paid into an employer's plan for health insurance and other health related expenses were properly considered, within the meaning of ORS 657.115(2), payments made "by an employing unit" and were properly excluded from claimant's total base year wages as calculated under ORS 657.105. *Lee*, 221 Or App 453-454. In this case, relying on ORS 657.105(1) and ORS 657.115(2), as interpreted in *Lee*, the amounts that were deducted from claimant's wages as contributions to the employer's plan to pay health insurance or health related expenses were properly excluded from the "wages" on which her unemployment insurance benefits were calculated.

Claimant's position at hearing that the amount of her pre-tax deductions should be included in her "wages" because they came out of her own pay in the first instance is not correct. While claimant elected to have the amounts she contributed to the plan deducted from her pre-tax wages that was not tantamount to her receipt of those funds. Those contributed funds were withheld from claimant's wages with her permission, never paid to her, and she never had control over them. The payments made to the employer's plan were actually made for claimant by the employer, and the fact that that the employer may have made those payments on claimant's behalf does not mean that claimant ever actually or constructively possessed them. *See Lee*, 221 Or App 453-454; <http://www.irs.gov/Government-Entities/Federal,-State,-&Local-Governments/FAQs-for-government-entities-regarding-Cafeteria-Plans> (pre-tax amounts deducted from an employee's pay to participate in a cafeteria plan are not considered received by the employee and are not subject to principles of constructive receipt).

Claimant also argued at hearing that it was not fair to exclude those deducted amounts from her earnings because she thought she ultimately paid income taxes on them. While claimant agreed the amounts that were deducted from her wages to contribute to the employer's plan were pre-tax dollars when they were deducted, she appeared to contend that she thought she was required to pay taxes on the deducted amounts at year's end, when she paid her annual income taxes. Transcript at 19-20, 21, 22, 23-24, 25-26, 29, 31. However, a pre-tax deduction of amounts from an individual's wages generally means that no taxes would ever be assessed against the amounts so deducted. The IRS materials on such employee deductions seem clear that they are not subject to federal income taxes at any time. *See* <http://www.irs.gov/Government-Entities/Federal,-State,-&Local-Governments/FAQs-for-government-entities-regarding-Cafeteria-Plans>. Notably, the IRS materials do not state that, while employee contributions are not subject to tax withholding at the time they are deducted for contribution to an employer's plan, they become subject to taxation later at the end of the tax year during which the deductions were made. Moreover, at hearing, claimant was asked if on her Form W-2s the wage deductions for the employer's plan were shown as taxable income to her in 2014 or 2015, and whether she reported the amounts of the deductions as income on her income tax returns, and she could not state with certainty whether she did or did not report them as taxable income. Transcript at 20, 21, 22, 23. Since claimant had the burden of proof in this matter, absent evidence that amounts deducted from her wages for contribution to the employer's plan were ultimately subject to income taxation, claimant has failed to demonstrate either that they were taxed, and by implication, that they were contributed to the employer's plan by her and not by the employer on her behalf.

In sum, claimant did not show that the pre-tax deductions from her wages during the base year were not properly excludable from her wages for purposes of calculating her eligibility for employment insurance benefits. Claimant's request for an adjustment of her claim determination to include as wages the

amounts she had deducted from her gross pay for insurance and unreimbursed health-related expenses is therefore denied.

**DECISION:** Hearing Decision 16-UI-55315 is affirmed.

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

**DATE of Service:** May 2, 2016

**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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