

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0454

Reversed & Remanded

PROCEDURAL HISTORY: On February 9, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 200637) concluding that claimant was overpaid unemployment benefits in the amount of \$752 that she was required to repay, and assessing a \$225.60 monetary penalty and 10 penalty weeks. Claimant filed a timely request for hearing. On March 22, 2016, the Department issued an amended decision (# 200954), concluding that claimant was overpaid unemployment benefits in the amount of \$542 that she was required to repay, and assessing no monetary penalty or penalty weeks. On March 23, 2016, ALJ Frank conducted a hearing, and on April 1, 2016, issued Hearing Decision 16-UI-56341, affirming the amended decision (decision # 200954). On April 18, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) On July 7, 2015, claimant filed an initial claim for unemployment benefits. Her weekly benefit amount was \$210 per week, and the maximum benefit in effect at the time she filed her initial claim was \$567.

(2) Claimant filed claims for benefits for the following weeks, referred to as the weeks at issue: 28-15 (July 12 through 18, 2015), weeks 30-15 through 32-15 (July 26 through August 15, 2015), week 34-15 through 38-15 (August 23 through September 26, 2015), week 40-15 (October 4 through 10, 2015), 42-15 through 44-15 (October 18 through November 7, 2015) and 47-15 (November 22 through 28, 2015).

(3) During all of the weeks at issue, claimant worked for and earned wages from Sephora. When claimant filed her weekly claims for benefits, she reported her gross earnings by multiplying the hours she had worked during the week by her hourly wage. Claimant accurately reported her earnings on this basis for the following weeks at issue: 28-15, 30-15 through 32-15, 34-15, 35-15, 40-15, 42-15, 44-15. Based on claimant's reported earnings, the Department paid claimant a total of \$1982 in unemployment benefits for these weeks.

(4) From September 7 through 20, 2015, claimant worked 8.90 hours for Sephora at a wage of \$12.15 per hour. During this period, she also earned \$91.73 in “holiday premium” pay, \$109.35 in “suspension/pay,” and \$54.68 in “sick pay/balance.” Exhibit 2.

CONCLUSION AND REASONS: Hearing Decision 16-UI-56341 is set aside, and this matter remanded for further development of the record.

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.* Where, as here, the Department seeks to recover benefits it has already paid to claimant, the Department carries the burden to demonstrate claimant’s ineligibility to receive this benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

At hearing, the Department witness, who was not the author of decision # 200954, presented a spread sheet prepared by the employer to demonstrate claimant’s purported earnings during the weeks at issue. The spread sheet listed the amounts claimant earned for each of the weeks at issue, but provided no information as to how these amounts were calculated. Claimant testified that she reported her earnings during the weeks at issue by multiplying the hours she had worked by her hourly wage. At best, the evidence regarding claimant’s work and earnings for the weeks at issue, with the exception of weeks 36-15 through 38-15, was evenly balanced. Under these circumstances, any uncertainty must be resolved against the Department as the party with the burden of persuasion. We therefore conclude that claimant did not receive benefits she was not entitled to receive for the following weeks 28-15, 30-15 through 32-15, 34-15, 35-15, 40-15, 42-15 through 44-15 and 47-15.

Further information is necessary to determine if claimant was overpaid benefits for weeks 36-15 through 38-15, the period from September 6 through 26, 2015, however. Claimant’s check stubs for the period from September 7 through 20, 2015, show that she received \$91.73 in “holiday premium” pay, \$109.35 in “suspension/pay,” and \$54.68 in “sick pay/balance.” On remand, the ALJ must ask claimant to explain what these payments represent, and conduct an inquiry sufficient to determine whether these payments constitute wages within the meaning of ORS 657.105 through 657.117. If the ALJ determines that these payments were wages, the ALJ must then ask when claimant earned these wages, whether claimant reported these earnings in her weekly claims for benefits, and if she did report these earnings, during what weeks she reported them.

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). Further development of the record is needed to determine whether claimant received benefits she was not entitled to receive during weeks 36-15 through 38-15, and this matter is therefore remanded to obtain additional evidence.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision

16-UI-54426 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.

DECISION: Hearing Decision 16-UI-56341 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: May 19, 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. 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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