

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0808**

*Hearing Decision 16-UI-62209 Reversed – No Disqualification*  
*Hearing Decision 16-UI-62210 Modified – No Overpayment, No Penalties*

*Decisión de la Audiencia 16-UI-62209 Revocada – No Suspensión de Beneficios*  
*Decisión de la Audiencia 16-UI-62210 Modificada – No Sobrepena, No Sanciones*

**PROCEDURAL HISTORY:** On April 25, 2016, the Oregon Employment Department (the Department) served notice of two administrative decisions, one concluding claimant voluntarily left work without good cause (decision # 151113), and one assessing a \$10,773 overpayment, 52 penalty weeks, and a \$1,615.95 monetary penalty (decision # 202952). Claimant filed timely requests for hearing for both decisions. On June 16, 2016, ALJ Menegat conducted hearings, and on June 21, 2016 issued Hearing Decision 16-UI-62209, affirming decision # 151113, and Hearing Decision 16-UI-62210, assessing an overpayment of \$10,773, and no penalty weeks or monetary penalty. On July 6, 2016, claimant filed applications for review of Hearing Decisions 16-UI-62209 and 16-UI-62210 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-62209 and 16-UI-62210. No party applied for review of that portion of Hearing Decision 16-UI-62210 concluding that claimant was not subject to penalty weeks or a monetary penalty. EAB therefore limited its review of Hearing Decision 16-UI-62210 to whether claimant was overpaid benefits. For case-tracking purposes, this decision is being issued in duplicate as EAB Decisions 2016-EAB-0807 and 2016-EAB-0808.

**FINDINGS OF FACT:** (1) Bliss Roofing employed claimant as a roofer beginning June 8, 2015.

(2) On November 6, 2015, a work crew that claimant customarily worked with at Bliss Roofing took a leave of absence from work to travel to Mexico. Claimant understood from the leader of the work crew that the crew planned to return to work for the employer in December 2015 or January 2016. Claimant knew that the work crew leader asked that the manager not assign claimant to a different work crew and believed that the employer's other work crews were complete, and did not need additional employees in their crews. Claimant asked the employer's manager if he could take time off work until his regular crew returned to work and if he could collect unemployment insurance benefits during that time. The

manager told claimant that he could take the time off work and apply for unemployment insurance benefits. Claimant told the manager he would “stay in contact” with her. Transcript at 5. The manager told claimant to contact his regular crew leader when the crew leader returned from Mexico. Claimant never told the employer that he quit work or intended to quit work.

(3) Based on his conversation with the manager, claimant believed he qualified for unemployment insurance benefits. Claimant therefore restarted his claim for benefits on November 13, 2015, reporting to the Department that he had been laid off for lack of work with the employer. Claimant claimed benefits for the weeks from November 8, 2015 through April 2, 2016 (weeks 45-15 through 13-16). The Department paid claimant \$10,773 in benefits.

(4) In January 2016, the employer held a master shingle class and test. The employer paid for claimant to take the class and test.

(5) In February 2016, the leader of claimant’s work crew returned to Oregon. When claimant learned that he had returned to Oregon, he called the employer’s manager to inform her of the crew leader’s return.

(6) The employer’s manager told claimant that the crew leader from his prior work crew no longer wanted claimant in his work crew. Claimant asked the manager if the employer had repair work he could perform. The manager did not have repair work for him.

(7) Claimant continued to report regularly to the employer’s workplace to see if the employer had work for him. The employer had no work available.

(8) In March 2016, claimant received an offer of other work. Claimant stopped reporting the employer’s workplace to see if the employer had work for him.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that no work separation occurred in November 2015. Claimant therefore was not overpaid benefits.

**Work Separation.** Under ORS 657.176(1), a representative of the Department shall promptly examine each claim to determine, among other things, if an individual is subject to disqualification as a result of a work separation. A work separation occurs when the employer-employee relationship is severed and there is no continuing relationship. OAR 471-030-0038(1) (August 3, 2011). If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving of work. OAR 471-030-0038(2)(a). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

In Hearing Decision 16-UI-62209, the ALJ concluded that a work separation occurred when claimant went on a leave of absence with his work crew on November 6, 2015 because claimant chose to end the “actual working relationship” at that time.<sup>1</sup> The ALJ reasoned that, because claimant applied for unemployment insurance benefits rather than advising the employer that he was not going to Mexico

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<sup>1</sup> Hearing Decision 16-UI-62209 at 3.

like his coworkers and was willing to continue working, claimant voluntarily left work.<sup>2</sup> We disagree with the ALJ's conclusion that a work separation occurred. The record shows that claimant was willing to continue working for the employer after November 6, 2015, and the employer was willing to let him do so. That claimant agreed to contact the manager and return to work when his crew returned from Mexico, and that claimant participated in training provided by the employer during the layoff period, shows there was a continuing relationship between claimant and the employer, at least until the crew leader returned to work in February 2016 and the manager notified claimant that claimant would no longer be working with that crew, if not until claimant stopped contacting the employer in March 2016. In November 2015, the claimant did not quit work and the employer did not discharge him. OAR 471-030-0038(2)(a) and (b). Because neither party severed the employment relationship in November 2015, no work separation occurred at that time. Claimant is not disqualified from receiving unemployment insurance benefits based on that purported work separation.

**Overpayment.** 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.*

In Hearing Decision 16-UI-62210, the ALJ concluded that claimant received \$10,773 in benefits to which he was not entitled because Hearing Decision 16-UI-62209 concluded that claimant quit working for the employer without good cause, disqualifying claimant from the receipt of benefits for weeks 45-15 through 13-16.<sup>3</sup>

However, because we reverse Hearing Decision 16-UI-62209, claimant is not disqualified from the receipt of benefits based on a work separation from the employer. The record, therefore, does not establish that claimant is not entitled to the \$10,773 he received.

In sum, the employment relationship was not severed between claimant and the employer in November 2015, thus there was no work separation. Claimant therefore is not disqualified from receiving benefits for weeks 45-15 through 13-16 based on his work separation from the employer. The record therefore fails to show that claimant is not entitled to the \$10,773 he received.

**DECISION:** Hearing Decision 16-UI-62209 is set aside, and Hearing Decision 16-UI-62210 is modified, as outlined above.

*La Decisión de la Audiencia 16-UI-62209 se deja a un lado, y la Decisión de la Audiencia 16-UI-62210 se ha modificado, de acuerdo a lo indicado arriba.*

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

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<sup>2</sup> Hearing Decision 16-UI-62209 at 3.

<sup>3</sup> Hearing Decision 16-UI-62210 at 4.

**DATE of Service: August 5, 2016**

**NOTE:** This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

*NOTA: Esta decisión revoca una decisión de audiencia que negaba los beneficios. Por favor tenga en cuenta que puede tomar el Departamento de varios días a dos semanas para pagar los beneficios atrasados.*

**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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*NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en [courts.oregon.gov](http://courts.oregon.gov). En este sitio web, hay información disponible en español.*

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