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State of Oregon
**Employment Appeals Board**
875 Union St. N.E.
Salem, OR 97311

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# EMPLOYMENT APPEALS BOARD DECISION
# 2018-EAB-0065

*Modified*
*Adjustment of Claim Determination Allowed*

**PROCEDURAL HISTORY:** On October 18, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision allowing claimant's request to adjust the determination on her claim and adding $26,033.07 in base year wages and 1303 base year hours of work. Claimant filed a timely request for hearing on this decision. On November 7, 2017, the Department issued a second administrative decision denying claimant's request for further adjustment of the determination on her claim. Claimant filed a timely request for hearing on the second administrative decision. On January 5, 2018, ALJ M. Davis conducted a consolidated hearing on both administrative decisions, and on January 10, 2018 issued two hearing decisions, the first reversing the October 18, 2017 decision (Hearing Decision 18-UI-100548) and the second reversing the November 7, 2017 administrative decision (Hearing Decision 18-UI-100586). Both hearing decisions adjusted the determination on claimant's claim and concluded that claimant's base year wages in subject employment were $28,155.41 and claimant's base year hours worked were 1,408. On January 17, 2018, claimant filed timely applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 18-UI-100548 and 18-UI-100586. Although the ALJ stated at hearing that she had admitted Exhibits 1 and 2 into evidence, she did not mark any documents as hearing exhibits. Because both exhibits were described at the hearing and readily identifiable, EAB has corrected the ALJ's oversight and, as a clerical matter, has marked Exhibits 1 and 2. EAB considered the entire hearing record, including Exhibits 1 and 2, and claimant's written argument when reaching this decision, which for case-tracking purposes, is being issued in duplicate (EAB Decisions 2018-EAB-0065 and 2018-EAB-0066).

**FINDINGS OF FACT:** (1) Sherrie's Jewelry Box, Inc. employed claimant as a sales associate during the last three calendar quarters of 2016 and the first quarter of 2017, the quarters at issue. During the

quarters at issue, in addition to working for the employer, claimant also sold some jewelry and gemstones on consignment with the employer through a business she operated, known as Sol Radiance, LLC.

(2) The employment relationship between claimant and the employer was informal. During the quarters at issue, the employer typically paid claimant for her work as a sales associate based on the number of days she worked in particular weeks. If claimant worked five days in a week, the employer paid her around $800 for that week. If claimant worked four days in a week, the employer paid her around $600. If claimant worked fewer days in a week, the employer paid her less. The employer did not record the hours that claimant worked on any given day. A reasonable wage for the work claimant performed as a sales associate was $20 per hour. The employer also made payments to Sol Radiance during the weeks at issue based on jewelry and gemstones that claimant, through Sol Radiance, supplied to the employer. The employer usually paid claimant and Sol Radiance by check, although it occasionally paid claimant in cash. The employer made out checks both to claimant personally and to Sol Radiance for jewelry and gemstones that Sol Radiance supplied. The employer did not "decipher the difference" between claimant and Sol Radiance. Transcript at 22.

(3) During the second quarter of 2016, the employer made out checks to claimant personally totaling $5,452 as follows: $600 on April 8, 2016; $594 on April 23, 2016; $430 on April 28, 2016; $600 on April 30, 2016; $512 on May 6, 2016; $300 on May 13, 2016; $480 on May 20, 2016; $480 on May 27, 2016; $480 on June 3, 2016; $330 on June 10, 2016; and $646 on June 17, 2016. Exhibit1 at 2-12. Based on a reasonable wage of $20 per hour, claimant worked 273 hours in the second quarter of 2016. During the second quarter of 2016, on April 5, 2016, the employer made out one check to Sol Radiance for $310.50. Exhibit 1 at 49.

(4) During the third quarter of 2016, the employer made out checks to claimant personally totaling $6,688.37[1] as follows: $380 on July 1, 2016; $480 on July 9, 2016; $600 on July 15, 2016; $270 on July 22, 2016; $400 on July 29, 2016; $400 on August 4, 2016; $550 on August 12, 2016; $550 on August 19, 2016; $500 on August 26, 2016; $640 on September 2, 2016; $638.37 on September 10, 2016; $670 on September 17, 2017; and $610 on September 27, 2016. Exhibit 1 at 13-25. Based on a reasonable wage of $20 per hour, claimant worked 334 hours in the third quarter of 2016. During this third quarter, the employer made out a check to Sol Radiance on September 17, 2016 for $326.21. Exhibit 1 at 50.

(5) During the fourth quarter of 2016, the employer made out checks to claimant personally totaling $7,145 as follows: $800 on November 4, 2016; $800 on November 11, 2016; $830 on November 18, 2016; $640 on November 26, 2016; $585 on December 12, 2016; $915 on December 9, 2016; $800 on December 16, 2016; $975 on December 23, 2016; and $800 on December 30, 2016. Exhibit 1 at 26-35. Based on a reasonable wage of $20 per hour, claimant worked 357 hours during the fourth quarter of 2016. During this fourth quarter, on October 28, 2016, the employer made out a check to Sol Radiance for $600.

[1] While the ALJ found that claimant had earnings of $6,688.75 during the third quarter of 2016, the correct figure is $6,688.13 based on an accurate addition of the checks that claimant was paid during that quarter.

(6) During the first quarter of 2017, the employer made out checks to claimant personally totaling $8,869.66 as follows: $650 on January 13, 2017; $600 on January 20, 2017; $650 on January 27, 2017; $700 on February 3, 2017; $799.66 on February 9, 2016; $695 on February 10, 2017; $800 on February 25, 2017; $800 on March 3, 2016; $775 on March 10, 2017; $800 on March 18, 2017; and $800 on March 23, 2016. Exhibit 1 at 36-47. Based on a reasonable wage of $20 per hour, claimant worked 444 hours during the first quarter of 2017. Based on the checks the employer made payable to claimant personally during the quarters at issue, claimant had total earning of $28,155.03 and worked 1,408 hours in the base year.

(7) On September 24, 2017, claimant filed an initial claim for benefits. On September 29, 2017, the Department issued a wage and potential benefit report establishing claimant's base year as the last three quarters of 2016 and the first quarter of 2017, and indicating the claimant did not have any earnings or hours worked in subject employment during the base year and claimant's claim was not valid. Exhibit 2 at 1. On October 31, 2017, the Department issued a second wage and potential benefit report indicating that claimant had total wages of $21,668.07 from subject employment during the base year, 999 hours of work and her claim was valid with a weekly benefit amount of $270. Exhibit 2 at 2. On November 2, 2017, the Department issued a third wage and potential benefit report indicating that claimant had total wages of $24,551.82 from subject employment during the base year, 999 hours of work and her claim was valid with a weekly benefit amount of $306.

**CONCLUSIONS AND REASONS:** Claimant's claim determination should be adjusted to reflect that claimant had wages of $28,155.03 in subject employment and worked 1,408 hours in the base year, the second, third and fourth quarters of 2016 and the first quarter of 2017.

With exceptions that are not applicable here, ORS 657.150(2)(a) provides that to qualify for unemployment insurance benefits an individual must have worked in subject employment in the base year with total base year wages of $1,000 and have total base year wages equal to or in excess of one and one-half times the wages in the highest quarter of the base year and have earned wages in subject employment equal to six times the individual's weekly benefit amount in employment for service performed subsequent to the beginning of a benefit year if benefits were paid to the individual or any week in the preceding benefit year. "Wages" means all remuneration from employment, including the cash value of the remuneration. ORS 657.105(1). OAR 471-030-0010 (March 21, 1984) provides that for purposes of ORS 657.150(2), wages shall be assigned to the calendar quarter in which they are paid.

At hearing, the issues in this case were the amount of claimant's wages in the base year from subject employment and the hours that she worked in subject employment during the base year. With two exceptions, the facts were not disputed. The Department accepted, and claimant did not dispute, that checks the employer made payable to claimant during the quarters at issue, offered into evidence as Exhibit 1, should be considered to represent wages that claimant earned in subject employment. Transcript at 6, 7. Claimant did not contest the Department's position that a reasonable wage for her services was $20 per hour and, because neither claimant nor the employer kept records of claimant's hours worked, that the wage should be divided into claimant's earnings to determine the hours she worked during the base year. Because there was no dispute about them, claimant's wages and the hours worked during the second and the third quarter of 2016 and the first quarter of 2017 were as follows: second quarter 2016 -$5,452, 273 hours; third quarter 2016 - $6,688.37, 334 hours; first quarter 2017 - $8,869.66, 443 hours.

With respect to the amount of claimant's wages in the fourth quarter of 2016, claimant's attorney argued at hearing that claimant submitted checks that the employer made out to her personally during that quarter totaling $7,745, and $7,745 should be considered claimant's earnings for that quarter. Transcript at 10. However, claimant included a check made out to Sol Radiance for $600 on October 28, 2017 with the checks that were made out personally to her during that quarter. Exhibit 1 at 30. Since claimant did not dispute that checks the employer made out to Sol Radiance were not intended to compensate claimant for employment-related services, the $600 Sol Radiance check should not be included in claimant's wages for that quarter. Adding the checks made out to claimant personally during the fourth quarter of 2016, yields earnings from subject employment of $7,145.

Claimant also argued at hearing and in her written argument that during six of the weeks she worked for the employer during the relevant quarters of 2016 and 2017, she was paid in cash, had no canceled checks or documentary evidence to support what she earned during those weeks, but wanted earnings imputed to her for those weeks based on an average of the earnings checks she produced for all of the other weeks in the quarters at issue. Transcript at 11, 25; Claimant's Written Argument at 2-3. While claimant asserted in her written argument that it was "uncontroverted" that she worked during each of those six weeks, and claimant broadly asserted that she had, claimant's testimony detailing her work in those weeks and how much she actually worked and earned was tentative, diffident and vague, and she presented no other evidence, such as a tax return or a bank receipt, to corroborate, for example, that she might have worked during those weeks, that the checks the employer issued to her did not add up to all the taxable wages she reported to taxing authorities or what, if anything, she was paid in wages during those weeks. Claimant's Written Argument at 2; Transcript at 13-16. The employer's testimony on these same issues was equally indefinite and uncertain, and emphasized that claimant was only "very rarely" paid in cash. Transcript at 20, 22. The evidence in this record is speculative at best and is insufficient to show, more likely than not, that claimant actually worked during any of the six weeks during which she contended she was paid in cash and, if she did work, to impute an amount of wages that she earned for that work.

Claimant's argument that the ALJ had a "duty" to estimate claimant's wages during the six weeks for which she was unable to produce checks from the employer based on ORS 657.681(2) is not apposite. Claimant's Written Argument at 2. That statute is directed toward the Department computing and assessing employer contributions based on employer reports, says nothing about calculating the amount of a claimant's wages for purposes of determining whether claimant has a valid unemployment insurance claim under ORS 657.150(2)(a) and, in any event, it allows *but does not require* the Department to make an estimate if the employer fails to file a required report. Claimant's further contention that *Broadway Cab LLC v. Employment Department*, 265 Or App 254, 276-278, 336 P3d 12 (2014) affirmatively obligated the ALJ to compute an amount of wages for claimant for those six weeks, regardless of the reliability of the evidence that was proffered to establish that wages were paid or their amount, also is not well taken. Claimant's Written Argument at 3. At issue in *Broadway Cab* was an ALJ's order that both stated that the record did not contain substantial evidence on which an assessment of an employer's contributions could be made for purposes of ORS 657.681 while simultaneously stating that the ALJ found the Department's assessment to have been incorrect. 265 Or App at 278. The court held that the ALJ erred in issuing such a contradictory order, and that if the ALJ found Department's assessment to have been incorrect, he was required to modify it, either by increasing the assessed amount or by decreasing it. *Id.* *Broadway Cab* is not reasonably construed as obliging an ALJ,

in determining whether a claimant has sufficient base year wages for a valid claim, to find wages for claimant during weeks of a base year based on speculation and uncorroborated assertions, particularly when the preponderance of the reliable evidence does not show that claimant worked in those weeks or how much claimant's earnings were.

Claimant's claim determination should be adjusted to reflect that claimant had $28,155.03 in wages, rather than the $28,155.41 found by the ALJ, and worked 1,408 hours in the base year, which was the second, third and fourth quarters of 2016 and the first quarter of 2017. Hearing Decisions 18-UI-100548 and 18-UI-100586 at 3.

**DECISION:** Hearing Decisions 18-UI-100584 and 18-UI-100586 are modified, as outlined above.

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

**DATE of Service: <u>February 16, 2018</u>**

**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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