

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0758

Modified
Late Request for Hearing Allowed
No Overpayment, No Penalties

PROCEDURAL HISTORY: On March 15, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was overpaid \$4,611 and liable for a \$691.65 monetary penalty and 52 penalty weeks (decision # 194362). On April 4, 2013, decision # 194362 became final without claimant having filed a timely request for hearing. On May 30, 2018, claimant filed a late request for hearing by telephone. On June 4, 2018, ALJ Kangas reviewed claimant's request and issued Order No. 18-UI-110632, dismissing claimant's late request for hearing subject to her right to renew the request by responding to an appellant questionnaire by June 18, 2018. On June 11, 2018, claimant responded to the appellant questionnaire. On June 15, 2018, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 18-UI-110632 was cancelled. On July 3, 2018 and July 18, 2018, ALJ Seideman conducted a hearing, and on July 27, 2018 issued Order No. 18-UI-113973, allowing claimant's late request for hearing, affirming decision # 194362's assessment of a \$4,611 overpayment, and concluding that claimant was not liable for a monetary penalty or penalty weeks. On August 1, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusions that claimant's late request for hearing should be allowed, and that claimant is not liable for a monetary penalty or penalty weeks are hereby **adopted**. The only remaining issue is whether or not claimant should be liable for the \$4,611 overpayment.

FINDINGS OF FACT: (1) Claimant filed an initial claim for unemployment insurance benefits effective the week ending October 29, 2011 (BYE 42-12). She was issued a reliacard and a confidential PIN to use when filing weekly unemployment insurance claims.

(2) At some point thereafter, claimant experienced a fire at her residence. She thought that the fire had destroyed her reliacard and the notes she had made about her PIN. Claimant then moved into a room at her friend's mother's home with all of her personal belongings.

- (3) On January 24, 2012, claimant was incarcerated at the Northern Oregon Regional Correctional Facilities. At the time of claimant's arrest and incarceration, and for months thereafter, she did not have access to any of her personal belongings, and thought her unemployment insurance benefits reliacard and her PIN had been destroyed by fire and no one else had access to them, either.
- (4) While incarcerated, claimant was not available for work or eligible to receive unemployment benefits.¹
- (5) On January 29, 2012, someone other than claimant filed a weekly claim for unemployment insurance benefits for the week ending January 28, 2012 (week 4-12). As a result of that claim, the Department paid \$159 in benefits to claimant's reliacard account. Claimant did not know that the claim had been filed, she did not ask that it be filed, and she did not have access to the reliacard account funds that were deposited when the Department paid benefits on her claim.
- (6) Each week from March 11, 2012 through September 22, 2012 (weeks 11-12 through 38-12), someone other than claimant continued to file weekly claims for benefits each week. As a result of each of those claims, the Department paid \$159 in benefits every week to claimant's reliacard. Between January 22, 2012 and September 22, 2012, the Department paid a total of \$4,611 in benefits to claimant's reliacard. Claimant did not know that the claims had been filed and did not have access to the account in which the Department deposited the benefits payments.
- (7) During claimant's incarceration, her friend's mother paid for one hot meal voucher that entitled claimant to a hamburger, chips and soda from the jail commissary. During some months, her friend's mother also put \$20-\$25 on claimant's account so that claimant could make phone calls from jail.
- (8) On September 6, 2012, claimant was released from jail. Prior to being released from jail, claimant was not aware that anyone was claiming unemployment insurance benefits in her name or receiving benefits paid to her reliacard account. Claimant did not ask or authorize anyone to make the claims or receive the money on her behalf. Claimant was not aware of receiving any of the proceeds of the fraudulent claims.
- (9) Sometime after being released from jail, claimant discovered that someone had been claiming benefits on her behalf. Claimant assumed that her friend's mother was the person fraudulently claiming benefits, because her friend's mother had custody of all of claimant's personal possessions while claimant was incarcerated. When claimant tried to collect her personal items from her friend's mother after being released from jail the majority of her belongings were gone.
- (10) Claimant accused her friend's mother of using her PIN and reliacard and claiming benefits while she was in jail, and her friend's mother admitted that she had. On November 6, 2017, claimant filed a report of theft to The Dalles Police Department and asked to pursue charges. Police informed claimant that the statute of limitations had expired and criminal charges were no longer possible.

¹ See Exhibit 2, decision # 110104 concluding claimant was not available for work due to her incarceration; decision # 110104 became final on April 1, 2013.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant was not liable to repay overpaid benefits to the Department.

The Department argued at the hearing that claimant was responsible for repaying the \$4,611 in benefits to the Department that the Department had paid to claimant's reliacard account while she was incarcerated. Although the Department conceded that claimant had not personally filed the claims from jail, nor had she asked or authorized anyone to make the claims on her behalf, she was nevertheless responsible to repay the funds for two reasons. *See* July 18, 2018 hearing, Audio recording at ~29:10. The first theory was that the thief who filed claims on claimant's account had claimant's unemployment insurance benefits PIN, so claimant must not have been careful enough to safeguard her PIN and must therefore be responsible for what happened based upon her negligence. *See Id.* at ~ 41:00-42:00. The second theory was that claimant benefited from the fraudulent claims because the person who is alleged to have made the claim bought claimant a meal and put money on her account some months, and it was "quite possible" that the money the person used to do those things "came from" the fraudulently claimed benefits. *See Id.* at 29:30.

The ALJ agreed, and wrote:

When claimant started claiming benefits, she chose to use a reliacard, and benefits were credited to it through her bank. She was given a PIN number [*sic*] and other secure information. Then when her house burned, she moved in with Valerie, the mother of the man claimant was dating. During all of the turmoil she had not searched everything, but then she was arrested and placed in confinement. She assumed that her purse and reliacard had burned with her house.

However, in face [*sic*] Valerie found the reliacard and apparently the PIN number [*sic*] and claimed benefits for all of the weeks in question. Both claimant and the Department representative talked to Valerie subsequently, and she admitted that she had obtained the benefits. Claimant did not obtain any of them.

However, claimant's reliacard was used, with the PIN number [*sic*], in obtaining the benefits and claimant is therefore liable to repay those benefits. * * *²

Notably, neither the ALJ nor the Department's witness cited legal authority (*e.g.* a statute or administrative rule) that stands for the proposition that the victim of identity theft is responsible for the debts incurred by the thief. Nor did the ALJ address the Department's argument that claimant benefited from the fraudulently claimed benefits. We disagree that the record establishes claimant should be liable for the overpayment in this case for either reason.

ORS 657.310(1) provides that an individual is liable to repay overpayments or have overpaid benefits deducted from any future benefits otherwise payable, but only if the "individual received any benefits under this chapter 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 . . ." (Emphasis added.) ORS 657.310(3)(a) states that

² Order No. 18-UI-113973 at 4.

the Department may recover “the amount of any benefits paid to an individual” only if the decision assessing the overpayment specifies [t]hat *the individual, by reason of the false statement, misrepresentation or nondisclosure*, is liable to repay the amount to the Unemployment Compensation Trust Fund.” (Emphasis added.)

Under the terms of ORS 657.310, individuals are only liable to repay benefits if they receive benefits because *they* make or cause to be made a false statement or misrepresentation. Even assuming for the sake of argument that claimant “received” the \$4,611 in benefits because they were deposited to her reliacard, because claimant did not actually make any false statements or misrepresentations with respect to the claims, cause any to be made, or, indeed, even know that anyone was making them, she cannot be held liable to repay the overpaid benefits or have them deducted from future benefits otherwise payable under ORS 657.310.

ORS 657.315(1) provides that “[i]f the Director of the Employment Department decides *that 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 or the equivalent law of another state for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final.”

Under the terms of ORS 657.315, a claimant might be held personally liable to have overpaid benefits deducted from future benefits otherwise payable even if the overpayment did not occur because of actions attributable to the claimant or the claimant’s conduct. However, the prerequisite to such a requirement is that claimant have “been paid benefits.” There is no dispute in this case that the Department paid the fraudulently claimed benefits to claimant’s reliacard account; however, at no relevant time did claimant have possession of or access to her reliacard account, and therefore she did not directly receive and was not personally paid any of the fraudulently claimed benefits.

With respect to the Department’s argument that claimant is liable to repay the benefits because she benefited from the fraudulent payment of benefits, the record does not substantiate that she did, or in what amount. Although claimant and the Department suspect a particular individual of having made the fraudulent claims and stolen the benefits payments the Department made to claimant’s reliacard account, that individual has not been arrested or convicted of the crime of theft, or found liable for the theft in a civil court, nor is there documentation of the individual’s admission of guilt in the record. The record fails to establish by a preponderance of the evidence that the individual claimant suspected of the fraudulent claims and theft was, in fact, responsible for having committed those acts. In the absence of evidence establishing that that individual committed the acts, the record fails to show that the money that individual deposited into claimant’s jail account amounted to claimant benefiting from the individual’s fraudulent benefit claims.

Even if we assumed for the sake of argument that the individual suspected of making the fraudulent claims did in fact make them, and that person also gave claimant a small amount of money while she was incarcerated, the record only shows that it was “possible” that the money given to claimant came from the fraudulently claimed benefits. The “possibility” that money came from the benefits is not a

preponderance of the evidence that the money did, in fact, come from the fraudulently claimed benefits. And, even assuming for the sake of argument that claimant, as the unwitting third party recipient of benefits another individual fraudulently claimed, would nevertheless be liable for repaying any amount of the benefits, the text of ORS 657.315 would only authorize the Department to deduct the amount she was actually “paid” from future benefits otherwise payable, and this record fails to establish what that amount should be.³

There is no dispute in this case that the Department erroneously paid \$4,611 in unemployment insurance benefits to an ineligible individual, nor is there any reasonable dispute that the Department is entitled to seek repayment or collection of that money. In this case, however, claimant was reasonably certain that her reliacard and PIN had been destroyed in a fire, and therefore did not have reason to know or suspect that an untrustworthy individual would have access to them. She did not make or cause to be made any fraudulent claims for unemployment insurance benefits, nor was she even aware that the fraudulent claims had been made or that benefit money was deposited to her reliacard account until well after the fact. She did not collect the benefits that were paid to her account, and while a very small portion of the funds could “possibly” have been unwittingly given to claimant, the record fails to show that such funds were, in fact, paid to claimant or received by claimant, much less how much. Although someone should certainly be responsible for repaying fraudulently claimed benefits to the Department, this record fails to show that claimant is the appropriate individual under ORS 657.310 or ORS 657.315 to repay \$4,611 to the Department or have that amount deducted from future benefits otherwise payable. Claimant is therefore not liable for the overpayment under Employment Department law.

DECISION: Order No. 18-UI-113973 is modified, as outlined above.

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

DATE of Service: September 6, 2018

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

³ The Department alleged that claimant received money for phone calls every month in addition to some commissary money; claimant indicated that she received money for calls only some months, not every month, and only received a credit to her commissary account one time for a single meal. There is no objective evidence in this record to substantiate the actual amount of money the person alleged to have fraudulently claimed benefits actually gave to claimant during her incarceration.