

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0141

Affirmed
No Redetermination

PROCEDURAL HISTORY: On October 9, 2018, the Oregon Employment Department (the Department) served notice of a wage and potential benefit report concluding that claimant had \$50,400 in total wages from subject employment during his base year. On December 20, 2018, the Department served notice of an amended wage and potential benefit report concluding that claimant did not have any wages from subject employment during his base year, and therefore did not qualify for unemployment insurance benefits. Claimant filed a timely request for redetermination on the amended wage and potential benefit report. On January 23, 2019, ALJ Seideman conducted a hearing, and on January 25, 2019 issued Order No. 19-UI-123452, affirming the December 19, 2018 wage and potential benefit report. On February 5, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's handwritten notation on the application for review as a written argument when reaching this decision.

FINDINGS OF FACT: (1) Claimant was the sole member of a limited liability company, Baxter Office Products LLC, and worked for Baxter. Beginning sometime around 2008, Baxter paid claimant for the services he provided as an employee, and issued a federal W-2 tax form to claimant each calendar year that reported his earnings from employment. Baxter paid unemployment insurance taxes on the wages that it paid to claimant.

(2) Sometime around 2012, the Department performed an audit on Baxter. In the course of the audit, claimant understood the Department's auditor to tell him that Baxter did not need to pay unemployment insurance taxes on him and that, if he wished, the Department would refund up to two years of the taxes that Baxter had paid to cover him. Claimant understood the auditor to mean that if Baxter did not seek a refund of the unemployment taxes it had paid on him and continued to pay those taxes, he would be covered by unemployment insurance if Baxter ever laid him off. Baxter did not ever file with the Department a written election with the Department to have it consider claimant's services as an LLC member as employment subject to unemployment insurance laws and benefits, including unemployment insurance coverage.

(3) Sometime shortly before October 7, 2018, Baxter went out of business. On October 7, 2018, claimant filed a claim for unemployment insurance benefits. The claim was determined valid with a weekly benefit amount of \$525. The base year for claimant's claim was July 1, 2017 through June 30, 2018. During the base year, Baxter paid claimant \$50,400 in compensation for services he provided.

(4) Claimant claimed benefits for the weeks of October 7, 2018 through December 15, 2018 (weeks 41-18 through 50-18) and was paid benefits for weeks 42-18 through 50-18.¹ The Department stopped paying benefits to claimant after it determined that claimant did not have any wages from subject employment during the base year.

CONCLUSIONS AND REASONS: Claimant's request for redetermination is denied. Claimant did not have any wages from subject employment during the base year of July 1, 2017 through June 30, 2018, and he therefore does not qualify for benefits based on wages earned during the base year.

ORS 657.150(2)(a) and (b) provide that to qualify for benefits an individual must have worked in subject employment in the base year and earned certain specified minimum wages or worked certain minimum hours. ORS 657.044(1)(c) provides that subject employment does not include the services that an LLC member provides for the LLC. ORS 657.425(1) provides that an employer for which an individual performs services that are not subject employment may file a written election with the Department to consider such services as subject employment.

At issue in this case is whether claimant had sufficient wages or hours of services in the base year from subject employment to qualify for unemployment insurance benefits. Claimant did not dispute that all the wages he had during the base year, \$50,400, were from services that he provided to an LLC of which he was the sole member. Claimant also did not dispute that he never filed a written election with the Department to have those services considered subject employment for purposes of employment laws or unemployment insurance coverage under ORS 657.425(1). Because all of the services claimant provided during the base year were for an LLC that he owned and of which he was a member, and he never filed a written election for that service to be treated as if it were subject employment, claimant does not qualify for unemployment insurance benefits based on the language of the applicable statutes.

Based on his having paid unemployment insurance taxes on himself and the auditor failing to expressly inform him in 2012 that making such tax payments would not secure unemployment insurance coverage unless he filed a written election under ORS 657.425(1), claimant argued that he should be entitled to unemployment insurance benefits. Claimant is in essence seeking to invoke the doctrine of equitable estoppel against the Department's application of ORS 657.044(c) and ORS 657.425(1) to the services he provided to Baxter during the base year.

The doctrine of equitable estoppel "requires proof of a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it." *Keppinger v. Hanson Crushing, Inc.*, 161 Or App 424, 428, 983 P2d 1084 (1999) (citation omitted). In addition, to establish estoppel against a state agency, a party "must have relied on the agency's representations and the party's

¹ We take notice of these facts, which are contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record at EAB.

reliance must have been reasonable.” *State ex rel SOSOC v. Dennis*, 173 Or App 604, 611, 25 P3d 341, rev den, 332 Or 448 (2001) (citing *Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995)).

Here, it appears that in 2008 claimant began paying unemployment insurance taxes on himself and assumed doing so would result in unemployment insurance coverage. There is no evidence in the record that claimant consulted the relevant statutes or regulations or made direct inquiry of the Department to determine the accuracy of his assumption. It was not reasonable for claimant to have drawn the conclusion he did without investigation. In addition, the auditor’s failure to inform claimant four years later that he needed to file a written election if he desired unemployment insurance coverage was not a false representation by the auditor (as opposed to a failure to provide comprehensive, complete information on a matter that the auditor likely did not know was material to claimant’s actions). As well, the auditor’s failure to fully inform was likely not done with the intention of inducing any particular action by claimant, let alone deterring claimant from filing the required written election under ORS 657.425(1). The doctrine of equitable estoppel is not appropriately applied to preclude the Department from applying ORS 657.044(1)(c) and ORS 657.425(1) to the services claimant provided to Baxter, or to find that claimant qualifies for unemployment insurance benefits despite not having wages from subject employment during the base year of July 1, 2017 through June 30, 2018.

At hearing, the Department’s representative indicated that she would request that the Department refund to Baxter the unemployment insurance taxes that Baxter paid under the misapprehension that claimant had unemployment insurance coverage. Audio at ~19:06, ~29:20. EAB encourages claimant, on behalf of Baxter, to follow up on this possible refund with the representative.

DECISION: Order No. 19-UI-123452 is affirmed.

DATE of Service: March 11, 2019

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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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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