

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0650

Affirmed
Overpayment and Penalties Assessed

PROCEDURAL HISTORY: On May 28, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$947 overpayment, a \$236.75 monetary penalty, and 11 penalty weeks (decision # 194132). Claimant filed a timely request for hearing. On June 26, 2019, ALJ Frank conducted a hearing, and on July 5, 2019, issued Order No. 19-UI-132811, modifying the Department's decision in part by concluding claimant was subject to 7 penalty weeks instead of 11. On July 12, 2019, 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 portion of the order under review concluding that claimant did not misrepresent that he had experienced a work separation from the employer in September of 2017 is **adopted**.

FINDINGS OF FACT: (1) On July 6, 2017, claimant filed an initial claim for unemployment insurance benefits. Claimant's claim was established as valid with a weekly benefit amount of \$373. The maximum weekly benefit amount at the time claimant filed his claim was \$604. The Oregon minimum wage in effect and applicable to claimant when claimant filed his initial claim was \$11.25.¹

(2) Tanuki, a Portland area restaurant, employed claimant as a waiter from August 4, 2017 to September 16, 2017.

(3) Claimant claimed and was paid benefits for the weeks including July 30 through September 2, 2017 (weeks 31-17 through 35-17), the weeks at issue.

¹ EAB has taken notice of this fact, which is a generally cognizable fact. OAR 471-041-0090(1) (May 13, 2019). A copy of the information is available to the parties at <https://www.oregon.gov/boli/WHD/OMW/Pages/Minimum-Wage-Rate-Summary.aspx>. Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

(4) When claimant filed his benefit claim for week 31-17, claimant reported to the Department that his earnings for that week were \$146.25, although claimant worked 14.5 hours and earned gross wages and tips totaling \$385.13. When claimant filed his benefit claim for week 32-17, he reported to the Department that his earnings for that week were \$135.00, although claimant worked 12 hours and earned gross wages and tips totaling \$298.60. When claimant filed his benefit claim for week 33-17, he reported to the Department that his earnings for that week were \$205.50, although claimant worked 18.5 hours and earned gross wages and tips totaling \$453.53. When claimant filed his benefit claim for week 34-17, he reported to the Department that his earnings for that week were \$135.00, although claimant worked 12 hours and earned gross wages and tips totaling \$249.80. When claimant filed his benefit claim for week 35-17, he reported to the Department that his earnings for that week were \$292.50, although claimant worked 13 hours and earned gross wages and tips totaling \$318.45.

(5) When filing his claims for weeks 31-17 through 35-17, claimant certified to the Department that his reported earnings were true and accurate although he knew that he had not reported any tip income he had received or expected to receive, and had not contacted the employer to clarify what earnings to report when filing his claims. When filing his claim for week 35-17, claimant certified to the Department that his reported earnings for that week were true and accurate although he knew he had not contacted the employer to clarify what earnings to report when filing his claim. When filing his claims for each of the weeks at issue, claimant understood and believed that the more earnings he reported the less his benefits would be. Transcript at 23.

(6) Based on claimant's false certifications to the Department about his earnings, the Department paid claimant \$947 in benefits he was not entitled to receive.

CONCLUSIONS AND REASONS: Claimant is assessed a \$947 overpayment and a \$236.75 monetary penalty which he is liable to repay to the Department or have deducted from any future benefits otherwise payable to him. Claimant is also assessed a penalty disqualification from future benefits of 7 weeks.

As a preliminary matter, only "unemployed" individuals are eligible for benefits. ORS 657.150(6). An individual is not "unemployed," and, therefore, ineligible for benefits, in any week in which his earnings exceed his weekly benefit amount. *See* ORS 657.100(1). A claimant is responsible for furnishing the Department with the information required for correctly processing the claim, including "current work activity and earnings." OAR 471-030-0025 (January 11, 2018). The information required may include the amount of time devoted to the work activity and the gross amount of remuneration or wages, including tips, received or expected to be received. *Id.*; OAR 471-030-0017 (1)(c) (January 11, 2018). Remuneration for services provided to an employer generally shall be allocated to the week in which the services were performed. OAR 471-030-0017(3). An eligible individual who has employment in any week claimed shall have his (or her) weekly benefit amount reduced by the amount of earnings paid or payable that exceeds the greater of ten times the Oregon minimum hourly wage or one-third of his weekly benefit amount. ORS 657.150(1).

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.*

Claimant did not dispute that he earned the weekly earnings reported by the employer set out in Exhibit 1, or that when he made his weekly claim reports, he reported less than his actual earnings as set forth in that exhibit. Transcript at 21. Because claimant's reported earnings were less than his actual earnings during the weeks at issue, he was not eligible to receive the benefits which he did for those weeks and the Department overpaid him in the amount of \$947. Regardless of claimant's knowledge or intent, he received \$947 in benefits to which he was not entitled because the earnings information he provided to the Department consisted of false statements of material facts. Claimant therefore is liable to repay the \$947 he received to the Department or to have that amount deducted from any future benefits otherwise payable to him.

Misrepresentation. ORS 657.215 and ORS 657.310(2), read together, provide that if an individual has received any benefits to which the individual was not entitled because the individual willfully made a false statement or misrepresentation or willfully failed to report a material fact to obtain benefits, the individual is liable to pay a monetary penalty and to have a penalty period of benefit disqualification imposed.

After asserting that he did not report his tip income because he did not know what the tip amounts were at the time he filed his claims, claimant admitted that he would have reported his tip income if he had known the employer was reporting such income. Transcript at 21, 23. He also admitted that he knew the Department needed accurate earnings information to assess his benefits and that the higher his earnings, the less benefits he would receive. Transcript at 23. Viewing the record as a whole, more likely than not, claimant willfully made false statements and failed to report material facts to obtain benefits when he falsely reported his earnings for each of the weeks at issue. Accordingly, claimant is liable for misrepresentation penalties.

Penalties. ORS 657.310(2) provides that a monetary penalty for willful misrepresentations to obtain benefits shall be between 15 and 30 percent of the benefits the individual received to which the individual was not entitled. OAR 471-030-0052(7) (January 11, 2018) specifies that the monetary penalty assessed for a willful misrepresentation that is made to obtain benefits is a function of the number of occurrences of misrepresentation. An "occurrence" is counted as having occurred each time the individual willfully made a misrepresentation of obtain benefits. OAR 471-030-0052(7).

Here, there are five weeks constituting the weeks at issue, and for each week, claimant willfully failed to report his actual earnings for the week, instead reporting reduced earnings. OAR 471-030-0052(7)(c) states that for five occurrences of misrepresentation, the penalty to be assessed is 25 percent of the total amount of the benefits the individual received to which the individual was not entitled. Twenty-five percent of the \$947 in benefits that claimant received to which he was not entitled is \$236.75. Accordingly, claimant is assessed a monetary penalty of \$236.75.

ORS 657.215 provides that an individual who willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. OAR 471-030-0052(1)(a) sets out the formula for calculating the weeks of penalty disqualification if the individual willfully failed to report work or earnings to receive benefits.

Applying that formula to this case, claimant's penalty weeks are determined by dividing the total amount of benefits overpaid to him based on the disqualifying acts (\$947) by the maximum weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the disqualifying act (\$604), which equals 1.568, then rounding that number off to two the nearest two decimal places (1.57), multiplying that result by 4 (6.28), and rounding that number up to the nearest whole number, which equals 7 weeks. Claimant is assessed 7 penalty weeks of disqualification from future benefits.

In sum, claimant is required to repay the Department, by deduction from future benefits or otherwise, a total of \$1,183.75. Claimant is also assessed 7 weeks of penalty disqualification.

DECISION: Order No. 19-UI-132811 is affirmed.

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

DATE of Service: August 16, 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 desisyong ito.

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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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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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