

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0655

Modified
Overpayment, No Penalties

PROCEDURAL HISTORY: On April 26, 2019, the Oregon Employment Department (the Department) served two notices of administrative decision, the first concluding that claimant voluntarily left work without good cause (decision # 100449) and the second concluding that claimant was not available for work during the weeks of November 11, 2018 through January 19, 2019 (decision # 101406). On May 1, 2019, the Department served notice of another administrative decision assessing an overpayment of \$3,838, a monetary penalty of \$1,151.40 and 35 penalty weeks based on decision # 100449 and decision # 101406 (decision # 195839). Claimant filed timely requests for hearing on the three administrative decisions.

On June 17, 2019, ALJ Snyder conducted three hearings, at which AM Deliveries of Oregon Inc. was the only employer to appear. On June 24, 2019, the ALJ issued three orders, the first order affirming decision # 100449 and concluding that claimant voluntarily left work without good cause (Order No. 19-UI-132171); the second order reversing decision # 101406 and concluding that claimant was available for work during the weeks of November 11, 2018 through January 19, 2019 (Order No. 19-UI-132170); and the third order modifying decision # 195839 and assessing an overpayment of \$3,838, a monetary

penalty of \$575.70, and 25 penalty weeks (Order No. 19-UI-132203). On July 15, 2019, the Department filed an application for review of Order No. 19-UI-132203 with the Employment Appeals Board (EAB). On July 15, 2019, Order Nos. 19-UI-132170 and 19-UI-132171 became final without applications for review having been filed

EAB considered the Department's written argument when reaching this decision.

FINDINGS OF FACT: (1) On September 16, 2019, claimant filed an initial claim for benefits. Claimant's claim was determined valid with a weekly benefit amount of \$386. Claimant had filed three previous unemployment insurance claims.

(2) Sometime before November 3, 2018, claimant decided to leave work with Subcom Excavation & Utilities and gave notice that he was quitting. On November 3, 2018, while still working for Subcom, claimant worked a shift training for AM Deliveries of Oregon Inc. Claimant's next scheduled shift for AM was on November 10, 2018. Claimant did not show up or report to work for AM on November 10, 2018 because he had decided to continue working full time for Subcom and not to work for AM. On November 13, 2018, claimant told AM that he was not going to work for AM.

(3) On November 14, 2018, claimant restarted his unemployment insurance claim. At that time, claimant did not report to the Department that he had quit a job with AM. Claimant did not think he needed to report a work separation from AM because he never stopped working full time for Subcom, and had only worked one training shift for AM. Claimant claimed benefits for the week of November 11 through November 17, 2018 (week 46-18). For week 46-18, claimant reported that he earned \$100 from Subcom after estimating the hours that he worked for Subcom in that week. The Department paid claimant \$386 in benefits for week 46-18. Subcom later reported to the Department that Subcom had paid \$750 to claimant for week 46-18. Claimant believed that the discrepancy between the \$100 that he reported and the \$750 that Subcom reported was due to Subcom compensating him in week 46-18 for a previous week in which his paycheck was short. Had claimant reported that he earned \$750 for week 46-18, he would not have received any benefit payment.

(4) Claimant claimed benefits for the weeks of November 18, 2018 through January 19, 2019 (weeks 47-18 through 02-19). For weeks 47-18 through 01-19, the Department paid claimant \$386 in benefits for each week, for total benefit payments of \$2,702. During week 02-19, claimant performed two days of work for Octagon Constructors LLC. When claimant claimed benefits for week 02-19, claimant did not know how Octagon was going to calculate his compensation or how much Octagon owed him for his work. As best he could, claimant estimated that he was going to earn \$150 from Octagon for week 02-19 and reported that amount to the Department. For week 02-19, the Department paid claimant \$364 in benefits. Sometime after week 02-19, Octagon decided to pay claimant a flat rate for those two days of work and paid claimant \$805 for his work during week 02-19. Had claimant reported that he earned \$805 for week 02-19, the Department would not have paid claimant any benefits for that week.

(5) Claimant claimed benefits for the week of January 13, 2019 through January 19, 2019 (week 03-19) and the Department paid claimant \$386 in benefits for that week. Weeks 46-18 through 03-19 are collectively referred to as the weeks at issue. During the weeks at issue, the Department paid claimant a total of \$3,838 in benefits.

CONCLUSIONS AND REASONS: The Department paid claimant \$3,838 in benefits that he is liable to repay or to have deducted from any future benefits otherwise payable to him. Claimant is not liable to pay a monetary penalty or to have penalty weeks assessed.

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.* Where, as here, the Department has paid benefits it has the burden to prove benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976)

Order No. 19-UI-132202 concluded that claimant was overpaid \$3,838 in benefits and must repay those benefits or have them deducted from future benefits. The order was correct.

Administrative Decision # 100449, which found that claimant voluntarily left work with AM Deliveries without good cause, was affirmed by Order No. 19-UI-132171, with an effective disqualification date of November 4, 2018 (week 45-18). Order No. 19-UI-132171 became final on July 15, 2019 without an application for review having been filed. That order establishes that claimant was disqualified from benefits during the weeks at issue, weeks 46-18 through 03-19. Had claimant reported the separation from AM Deliveries when he restarted his claim for benefits, he would not have received benefits for those weeks. Because claimant failed to disclose the material fact of this work separation, even if his failure to do so was an innocent error, claimant was overpaid the \$3,838 in benefits he received for the weeks at issue. Accordingly, claimant is liable to repay the \$3,838 in benefits he received or to have them deducted from any future benefits otherwise payable to him.

Penalties. 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. ORS 657.215. An individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2).

At the outset, Order No. 19-UI-132203 is correct that since Order No. 19-UI-132170 reversed administrative decision # 101406 and found claimant was available for work during the weeks at issue, claimant did not as matter of law make misrepresentations when he certified that he was available for work during the weeks at issue. Order No. 19-UI-132203 at 5. The remaining issue was whether claimant willfully misrepresented his earnings for weeks 46-18 and 02-19, rather than merely being wrong when he reported incorrect earnings to the Department for those weeks.

Order No. 19-UI-132203 concluded that claimant willfully made false statements or misrepresentations to obtain benefits, both as to his earnings from Subcom in week 46-18 and from Octagon Constructors in week 02-19. In determining that claimant acted willfully in misreporting his earnings, the order reasoned that "claimant had no reasonable explanation for the discrepancy" between the earnings that he reported and those which the employers reported and "he did not contest that the employer's figures were

accurate.” Order No. 19-UI-132203 at 3. As a result, the order assessed a \$575.70 monetary penalty and 25 penalty weeks. Order No. 19-UI-132202 at 5. The order is incorrect in this respect.

It is not sufficient to establish willfulness that claimant did not dispute the accuracy of either employer’s earnings figures. Rather, the evidence must show claimant knew he was supplying inaccurate information with the intention of receiving benefits to which he was not entitled. *See* ORS 657.215. However, claimant’s explanation for why he failed to report accurate earning for weeks 46-18 and 02-19 was plausible and did not suggest that he was providing false earnings information for the purpose of obtaining benefits. The evidence did not rule out that the discrepancy in earnings for week 46-18 that he and Subcom reported was due to Subcom having included on that paycheck an amount to compensate claimant for a previous paycheck on which Subcom had shorted him. The evidence also did not rule out that the discrepancy for week 02-19 between what claimant and Octagon reported was due to claimant being required to report his earnings before Octagon had determined how much to compensate him or that it would do so based on a flat rate. Neither of these explanations suggest willful misrepresentation on claimant’s part when he reported what he thought he had earned from those employers in weeks 46-18 and 02-19.

The weight of the evidence does not show that claimant willfully made false statements or misrepresentations to obtain benefits. As a result, claimant is not assessed a monetary penalty or penalty weeks of disqualification.

DECISION: Order No. 19-UI-132203 is modified, as outlined above.

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

DATE of Service: August 21, 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 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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