

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0778

Affirmed
Ineligible Weeks 44-17 through 18-18
Overpayment and Penalties Assessed

PROCEDURAL HISTORY: On July 5, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not eligible for benefits for the weeks of October 29, 2017 through May 5, 2018 (weeks 44-17 through 18-18) because she was not available for work during those weeks (decision # 141045). On July 10, 2019, the Department served notice of an administrative decision based on decision # 141045 assessing a \$7,150 overpayment, a \$2,145 monetary penalty, and a 48 penalty weeks (decision # 194520). On July 16, 2019, claimant filed timely requests for hearing on both decisions. On August 8, 2019, ALJ Frank conducted a consolidated hearing at which the employer failed to appear, and on August 12, 2019 issued Order No. 19-UI-134888 affirming decision # 141045, and Order No. 19-UI-134885 affirming decision # 194520.

On August 16, 2019, claimant filed applications for review of Order Nos. 19-UI-134888 and 19-UI-134885 with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (May 13, 2019), EAB consolidated its review of Orders No. 19-UI-134888 and 19-UI-134885. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-0778 and 2019-EAB-0777).

Written Argument. Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090, EAB considered only information received into evidence at the hearing, and claimant's argument to the extent it was based thereon, when reaching this decision.

FINDINGS OF FACT: (1) IRS Environmental of Portland Inc. employed claimant as an abatement worker performing asbestos, lead, and mold removal and demolition work beginning in April 2017.

(2) In October 2017, claimant was pregnant and expecting a child in November 2017. On November 10 and 11, 2017, claimant was in the hospital, where her child was delivered.

(3) On October 25, 2017, claimant filed an initial claim for unemployment insurance benefits. When claimant filed her initial claim, she certified that she had been laid off by the employer due to a lack of work. The Department determined that claimant's claim was monetarily valid with a weekly benefit amount of \$275. The maximum weekly benefit amount in effect at the time claimant filed the claim was \$604.

(4) Claimant filed weekly claims for benefits for the weeks of October 29, 2017 through May 5, 2018 (weeks 44-17 through 18-18), the weeks at issue. The Department paid claimant benefits for each of those weeks with the exception of week 47-17. During those weeks, claimant sought demolition, asbestos abatement, meter reader and help desk work. Her labor market was the Portland metropolitan area, Troutdale, Gresham, Fairview, and Milwaukie, Oregon. In claimant's labor market, the customary days and hours for the work she sought were Monday through Saturday, 8:00 a.m. to 7:00 p.m.

(5) When filing each of her weekly claims for benefits online, the Department asked claimant, "Each day last week were you willing to work and capable of accepting and reporting for full-time, part-time and temporary work?" Audio Record at 17:15 to 18:15; Exhibit 1. Claimant responded "yes" each week. *Id.* Each week, claimant certified to the Department that her answers to its claim questions were true. Claimant understood that the claim questions asked by the Department were asked to determine her eligibility for benefits. Based on claimant's responses to the Department's claim questions, the Department paid claimant \$7,150 in benefits for the weeks at issue.

(6) The employer subsequently reported to the Department that claimant had stopped working on October 29, 2017, and did not return to work until sometime in June 2018. The employer reported that although it experienced a seasonal slowdown during the winter months, claimant "could have been working." Audio Record at 15:40 to 16:15. It reported that it had sent claimant email messages during the holidays in 2017 and in February 2018 offering her work opportunities but received no responses from her. Claimant did not respond to the employer's email inquiry in February 2018 offering work to begin in March 2018 because she "was a new mom and . . . was tired and . . . just needed a little extra time." Audio Record at 31:40 to 32:10.

CONCLUSIONS AND REASONS: Claimant is ineligible for benefits for weeks 44-17 through 18-18 because she was not available for work during those weeks. Claimant was overpaid benefits for those weeks in the amount of \$7,150, which she is liable to repay to the Department or have deducted from any future benefits otherwise payable to her. Claimant also is assessed a monetary penalty in the amount of \$2,145, and 48 penalty weeks.

Credibility. As a preliminary matter, claimant's testimony was internally inconsistent and differed from the Department's hearsay evidence of the employer's statements on the issues involved in this proceeding. For example, claimant initially testified that she was available for work during the week of her child's birth, although she was in the hospital for two days, but later admitted that she could not have worked during those two days in the hospital. *Cf.* Audio Record at 29:30 to 30:45 and 37:45 to 38:45. She also certified that she was available for work during each of the weeks at issue through May 5, 2018, but admitted later at hearing that she did not return to work in response to the employer's February 27, 2018 email offer of work to begin in March because she "was a new mom and . . . was tired and . . . just needed a little extra time." For those reasons, the Department's hearsay evidence from the employer was more persuasive than claimant's testimony,

and the findings in these orders have been based on the Department's evidence.

Available for Work. To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be:

(a) Willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and

(b) Capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities; and

(c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time; and

* * *

OAR 471-030-0036(3) (April 1, 2018). Where 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). By logical extension of that principal, where benefits have not been paid, a claimant has the burden to prove that the Department should have paid benefits. In this case, the Department paid claimant benefits for each of the weeks at issue with the exception of week 47-17. Therefore, the Department has the burden to show that claimant was not eligible for the benefits it paid her for weeks 44-17 through 18-18, with the exception of week 47-17, for which claimant has the burden to show that she was eligible for benefits for that week.

Claimant admitted that during the week of her child's birth, week 45-17, she was not willing or capable of working all of the usual hours and days of the week customary for the work she sought because she was hospitalized for two of those days. Audio Record at 37:45 to 38:45. She also admitted that she did not respond to the employer's email inquiry in February 2018 offering work to begin on March 23, 2018 because she "was a new mom and . . . was tired and . . . just needed a little extra time." From that admission, it reasonably may be inferred that she was not willing or capable of working all of the usual hours and days of the week customary for the work she sought from November 5, 2017 (the week of her child's birth) through May 5, 2018 (weeks 45-17 through 18-18), because she did not return to work until June 2018. With regard to week 44-17, which was the week prior to her child's birth, the Department established that although the employer may have been experiencing a seasonal slowdown during that week, the employer reported that claimant "could have been working" had she been willing to do so.

With regard to week 47-17, claimant failed to meet her burden to show that she was available for work during that week. It was approximately two weeks after her child's birth and given that as late as February 2018, claimant still "needed a little extra time" from work following the birth of

her child, it is more likely than not that claimant was not willing to report for any suitable work that week.

Accordingly, the preponderance of the credible evidence shows that during each of the weeks at issue, claimant was not available for work and, for that reason, was ineligible for benefits for those weeks under OAR 471-030-0036(3).

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 she received a total of \$7,150 in benefits for the weeks at issue, nor that when she filed each of her weekly claims for benefits for those weeks, she certified to the Department that she had been available for work during the week in question. Regardless of claimant's knowledge or intent, she received \$7,150 in benefits to which she was not entitled because her certifications that she had been available for work were false statements of material facts. Claimant therefore is liable to repay the \$7,150 she received to the Department or to have that amount deducted from any future benefits otherwise payable to her.

Misrepresentation. ORS 657.215 and ORS 657.310(2), read together, provide that if an individual has received any benefits to which the individual is not entitled because the individual has 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.

At hearing, claimant admitted that she understood that the weekly claim questions asked by the Department were asked to determine her eligibility for benefits. Audio Record at 36:00 to 36:40. She also admitted that she answered "yes" to the question regarding her availability for work, "Each day last week were you willing to work and capable of accepting and reporting for full-time, part-time and temporary work?" because she believed she had been given permission by her employer to claim benefits during the employer's "slowdown" period. Audio Record at 36:00 to 36:40. However, the record as a whole shows that claimant knew that her answers to that question were false and the question, on its face, was not limited to potential work for her employer, but applied to potential work for any employer. Because claimant did not have any reasonable justification for affirmatively reporting to the Department each week that she was available for work, when she knew that she was misrepresenting information the Department would use to determine her eligibility for benefits, it can be reasonably inferred that claimant thought that if she responded truthfully to that question, it would negatively affect her ability to receive benefits. More likely than not, claimant's misrepresentation that she was available for work during each of the weeks at issue was willful, and for the purpose of obtaining benefits. 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 depends on the number of occurrences of misrepresentation. An “occurrence” is counted as having occurred each time the individual willfully made a misrepresentation to obtain benefits. OAR 471-030-0052(7). Here, there are at least 27 weeks, each of weeks 44-17 through 18-18, for which claimant willfully failed to report that she was not willing to work or capable of accepting and reporting for full-time, part-time and temporary work. OAR 471-030-0052(7)(d) states that for the seventh or greater occurrences of misrepresentation within a five year period, the penalty to be assessed is 30 percent of the total amount of the benefits the individual received to which the individual was not entitled. Thirty percent of the \$7,150 in benefits that claimant received to which he was not entitled is \$2,145. Accordingly, claimant is assessed a monetary penalty of \$2,145.

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, also may be disqualified from receiving future benefits for a period not to exceed 52 weeks. The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052, which provides, in pertinent part:

(1) An authorized representative of the Employment Department shall determine the number of weeks of disqualification under ORS 657.215 according to the following criteria:

(a) When the disqualification is imposed because the individual failed to accurately report work and/or earnings, the number of weeks of disqualification shall be determined by dividing the total amount of benefits overpaid to the individual for the disqualifying act(s), by the maximum Oregon weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the individual's disqualifying act(s), rounding off to the nearest two decimal places, multiplying the result by four rounding it up to the nearest whole number.

(c) When the disqualification is imposed because the disqualifying act(s) relates to the provisions of ORS 657.155 (other than work and/or earnings), the number of weeks of disqualification shall be the number of weeks calculated in the same manner as under subsection (a) above, or the number of weeks in which a disqualifying act(s) occurred, whichever is greater.

Applying the formula set forth in OAR 471-030-0052(1)(c) to this case, the total amount of benefits overpaid to claimant based upon her failure to report the material fact that she was available for work during each of the weeks at issue (\$7,150) shall be divided 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 11.838, which rounded off to two decimal places equals 11.84, multiplying that

result by 4 which equals 47.36, and rounding that number up to the nearest whole number, which equals 48, results in 48 weeks. Claimant is assessed 48 penalty weeks of disqualification from future benefits.

Conclusion. Claimant is ineligible for benefits for the weeks including October 29, 2017 through May 5, 2018 (weeks 44-17 through 18-18) because she was not “available for work” during those weeks. Claimant is assessed a monetary penalty of \$2,145. Accordingly, claimant is required to repay the Department, by deduction from future benefits or otherwise, a total of \$9,295 (\$7,150 + \$2,145). Claimant is also assessed 48 weeks of penalty disqualification from future benefits to which she otherwise may be entitled.

DECISION: Orders No. 19-UI-134888 and 19-UI-134885 are affirmed.

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

DATE of Service: September 23, 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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