

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0884

Reversed & Remanded

PROCEDURAL HISTORY: On July 19, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision assessing claimant a \$1,248 overpayment, \$187.20 monetary penalty, and eight penalty weeks (decision # 194638). Claimant filed a timely request for hearing. On August 19, 2019, ALJ Snyder conducted a hearing at which the employer did not appear, and on August 27, 2019, issued Order No. 19-UI-135699, affirming the Department's decision. On September 12, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant wrote phrases on his application for review that he may have intended to serve as written argument. EAB did not consider claimant's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). In addition, portions of the phrases were not legible.

FINDINGS OF FACT: (1) During week 51-18, claimant filed an initial claim for unemployment compensation benefits, establishing a weekly benefit amount of \$624.

(2) Claimant claimed benefits for the week of December 16 through December 22, 2018 (week 51-18). Claimant reported earnings of \$440 for that week based on his hourly rate of \$55 for eight hours of work on December 17. Claimant did not report additional earnings for that week. The Department gave claimant waiting week credit for week 51-18.

(3) Claimant claimed benefits online for the period from December 31, 2018 through January 12, 2019 (weeks 01-19 and 02-19). When he claimed each week, claimant certified that he had not worked and had no earnings. The Department paid claimant \$624 in benefits for each of weeks 01-19 and 02-19. The online system advised claimant that failing to provide true and accurate information could lead to overpayments and fraud penalties.

(4) In June 2019, the Department received information from the employer that claimant worked 40 hours during week 51-18, and had earnings of \$2,178.80. The employer also reported that claimant worked 16

hours and received eight hours of holiday pay during week 01-19, and had total earnings of \$1,307.28 for that week.

CONCLUSION AND REASONS: Order No. 19-UI-135699 is reversed, and this matter remanded for another hearing and order on whether claimant should be assessed an overpayment or penalties.

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.*

In addition, 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). 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. The length of the penalty disqualification period and monetary penalty are determined by applying the provisions of OAR 471-030-0052 (January 11, 2018), 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.

* * *

(d) When the disqualification is imposed because the disqualifying act(s) under ORS 657.215 relates to the provisions of 657.176 and a failure to accurately report work and/or earnings, the number of weeks of disqualification shall be the number of weeks calculated in the manner set forth in subsection (a) plus four weeks.

* * *

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

Order No. 19-UI-135699 concluded that claimant was liable to repay an overpayment based upon his failure to accurately report his hours and earnings when claiming benefits during weeks 51-18 (December 16 through December 22, 2018) and 01-19 (December 30, 2018 through January 5, 2019), which also caused an overpayment for week 02-19 (January 6 through January 12, 2019) because week 02-19, rather than week 51-18, became claimant's waiting week.¹ The order concluded that, as a result, claimant was overpaid \$624 in benefits for each of weeks 01-19 and 02-19.² However, the record is insufficient to determine if claimant was overpaid during the weeks at issue.

Claimant testified that his "last day" working for the employer was December 17, 2018 (during week 51-18). Transcript at 12. However, the Department witness testified that the employer reported to it, in June 2019, that claimant worked 16 hours and received holiday pay during week 01-19. However, the Department witness also testified that when claimant responded to the Department's inquiry about that information, he reported to the Department that he disagreed with that information because "he last worked" on December 17, 2018, and "was just merely paid through [week 01-19]." Transcript at 5. The employer, which did not appear at the hearing, gave the Department copies of timecards for claimant for weeks 51-18 and 01-19 reporting earnings of \$2,178.80 and \$1,307.28, respectively. However, the employer's documents are internally inconsistent. For example, the employer's documents showed that claimant worked 80 hours during week 01-19. Exhibit 1, Benefit Earnings Audit, but the timesheet for week 01-19 was signed by the employer on December 19, 2018, before week 01-19, and states that claimant worked 16 hours and earned holiday pay during that week. In addition, the timecard for week 51-18 does not contain claimant's signature, and the employer's signature is from December 10, 2018, which was before week 51-18. Exhibit 1, Employee Timesheet [for Week 51-18].

On remand, it is necessary to determine if an employer-employee relationship existed between claimant and the employer during weeks 51-18 and 01-19. It is also necessary to determine if claimant performed services for the employer during each of those weeks, when he performed the services, and what, if any, remuneration was paid or payable to (earned by) claimant for such services. Put another way, the record does not show if the amounts claimant allegedly received from the employer during the weeks at issue were for services performed. If the amounts were for services performed, the record does not show the weeks in which those services were performed, or if claimant can reasonably estimate when the services were performed. *See* OAR 471-030-0017. If the employer appears for the hearing, it would be necessary to ask questions to determine why the employer's benefit earnings audit differed from its timecards for claimant, and why the timecards were signed before the weeks occurred.

The record also does not show if any of the payments claimant allegedly received during weeks 51-18 and 01-19 were for severance pay. If claimant received severance pay, the record does not show if claimant was required to perform services to receive the pay, and if so, when he performed the services. The record also does not show if claimant was still employed when he allegedly received "holiday" pay during week 01-19. If claimant received holiday pay, the record does not show to which holidays the holiday pay was allocated.

Order No. 19-UI-135699 also concluded that claimant willfully failed to report the hours he worked and his earnings to obtain benefits.³ Claimant offered potentially plausible explanations for having reported

¹ Order No. 19-UI-135699 at 6-7.

² Order No. 19-UI-135699 at 6-7.

³ Order No. 19-UI-135699 at 4-5.

different hours and earnings than the employer, but the record must be developed on those matters. Claimant testified that his “last day” of work was December 17, 2018, but that he may have received payments from the employer due to “salary continuation.” Transcript at 12. However, the record does not show what claimant meant by “salary continuation.” Claimant also testified that when he claimed the weeks at issue, he “had no agreement with [the employer],” and offered that as a reason why he did not report earnings reported by the employer. Transcript at 15. However, the record does not show what claimant meant by an “agreement” with the employer. Claimant also testified that, when he received a payment, he did not know “what days were holiday, what days were potentially continuation.” Transcript at 15. However, the record does not show what claimant understood regarding the reason he received each payment he allegedly received from the employer. Nor does the record show why claimant did not claim benefits for week 52-18 (December 23 through December 29, 2018).

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant was paid benefits to which he was not entitled and is liable to repay those benefits or have them deducted from future benefits, and whether claimant willfully made a misrepresentation to obtain benefits, Order No. 19-UI-135699 is reversed, and this matter is remanded.

DECISION: Order No. 19-UI-135699 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: October 18, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-135699 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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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