

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0982**

*Modified*  
*Reduced Overpayment and Penalties*

**PROCEDURAL HISTORY:** On July 12, 2019, the Oregon Employment Department (Department) served notice of an administrative decision concluding Hoffman Structures Inc. discharged claimant for committing a disqualifying act and was disqualified from benefits effective January 13, 2019 (decision # 160047). On August 1, 2019, decision # 160047 became final without claimant having filed a timely request for hearing. On August 8, 2019, the Department served notice of another administrative decision assessing a \$10,302 overpayment, \$1,545.30 monetary penalty, and 52 penalty weeks (decision # 193665). Claimant filed a timely request for hearing on decision # 193665. On September 23, 2019, ALJ Wyatt conducted a hearing at which the employer failed to appear, and on September 25, 2019, issued Order No. 19-UI-137083, affirming decision # 193665. On October 15, 2019, the Department filed an application for review of decision # 193665 with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** The Department submitted a written argument in which it sought to introduce evidence not offered during the hearing. OAR 471-041-0090 (May 13, 2019) allows EAB to consider such additional evidence if the party offering it shows that it is relevant and material, and that factors or circumstances beyond the party's reasonable control prevented the party from presenting it during the hearing. The additional evidence consisted of claimant's earnings during weeks 13/19 through 15/19 from JT Wimsatt Contracting Co., and is relevant and material to whether claimant was overpaid for some of the weeks at issue. The Department did not offer the evidence at hearing because it received the information after the hearing. Having shown that the additional evidence is relevant and material, and that the Department was unable to submit the evidence at hearing due to a reason beyond its reasonable control, EAB has considered the additional evidence when reaching this decision. The Department's written argument and supporting documents have been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 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 exhibit will remain in the record.

**FINDINGS OF FACT:** (1) Before 2018, claimant had two prior unemployment insurance claims. Claimant completed the Department's basic benefits review class in 2017 and again on March 10, 2019.

(2) On December 4, 2018, claimant filed an initial claim for unemployment insurance benefits. Claimant's weekly benefit amount was \$624, the maximum weekly benefit amount in effect at the time.

(3) Hoffman Structures Inc. (Hoffman) employed claimant from January 14, 2019 until it discharged him on January 16, 2019 (during week 3/19). Claimant had earnings of \$677.82 from Hoffman during week 3/19.

(4) Claimant filed weekly claims for benefits for the weeks from January 13, 2019 through March 23, 2019 (weeks 3/19 through 12/19), and from April 7, 2019 through May 25, 2019 (weeks 15/19 through 21/19). When claimant claimed each week, he certified that his answers were true and accurate.

(5) On January 22, 2019, claimant filed a weekly claim for the week of January 13, 2019 through January 19, 2019 (week 3/19). When filing, claimant was asked, "Were you fired or suspended from a job last week?" Exhibit 1. Claimant responded, "No." Exhibit 1. Claimant was also asked, "If you worked last week, or received or will receive vacation or holiday pay for the week, fill in the number of hours and your gross earnings (before deductions)." Exhibit 1. Claimant responded, "No," and entered "0" for both hours and earnings. Exhibit 1. Because of the way claimant answered those questions, the Department paid claimant \$6,240 in unemployment insurance benefits for the weeks of January 13, 2019 through March 23, 2019 (weeks 3/19 through 12/19), and \$318 for the week of April 7 through April 13, 2019 (week 15/19).

(6) Claimant earned \$1,232.40 from the employer JT Wimsatt Contracting Co. (JT Wimsatt) during week 13/19, and \$1,889.18 during week 14/19. EAB Exhibit 1. Claimant earned \$514 from JT Wimsatt during week 15/19. EAB Exhibit 1. Claimant's employment with JT Wimsatt ended on April 14, 2019.

(7) During week 14/19, a Department claims representative called claimant and left him a message asking him to call the Department and provide information about his work separation and earnings from Hoffman. Claimant did not respond to the message. Claimant never reported to the Department that he worked for Hoffman, was discharged by Hoffman, or his earnings from Hoffman for week 3/19.

(8) On September 23, 2019, claimant participated in a hearing on the overpayment and penalties decision at issue in this case (decision # 193665). The ALJ asked claimant to explain why claimant did not report his work separation or earnings from Hoffman. Claimant stated that he was "not contesting" that he failed to report the work separation and earnings from Hoffman, and was only contesting whether he was overpaid after his employment ended with JT Wimsatt. Audio Record at 22:59 to 23:56. When the ALJ asked claimant if he was discharged during the week of January 13 through 19, 2019, claimant agreed that he was discharged that week. Audio Record at 25:57 to 27:03. Claimant responded "No," when the ALJ asked claimant if he had further explanation for why he answered, "No," when he had to respond to the questions of whether he was discharged or had earnings during the week of January 13 through 19, 2019. Audio Record at 27:04 to 27:13.

**CONCLUSIONS AND REASONS:** Claimant is assessed a \$6,558 overpayment and a \$983.70 monetary penalty, both of which he is liable to repay to the Department, or to have deducted from future benefits otherwise payable to him. Claimant is also assessed 47 weeks as a penalty disqualification from future benefits otherwise payable to him.

**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. ORS 657.310(1).

The Department's administrative decision # 160047, which concluded that Hoffman discharged claimant for committing a disqualifying act and was disqualified from benefits effective January 13, 2019, is final as a matter of law. Pursuant to decision # 160047, claimant was disqualified from receiving benefits beginning on January 13, 2019 and until he received payment from an employer in the amount of four times his weekly benefit amount, which was a total of \$2,496. Order No. 19-UI-137083 concluded that claimant was overpaid for the weeks including January 13, 2019 through March 23, 2019 (3/19 through 12/19), and April 7, 2019 through May 25, 2019 (15/19 through 21/19).<sup>1</sup> Based on the additional information provided by the Department showing claimant earned \$2,496 as of the week ending April 6, 2019 (week 14/19), the record shows the disqualification from decision # 160047 ended that week. EAB Exhibit 1. Claimant therefore was disqualified from receiving benefits for weeks 3/19 through 14/19, but not for weeks 15/19 through 21/19.

The Department paid claimant \$624 in benefits each week from January 13, 2019 through March 23, 2019 (weeks 3/19 through 12/19), for a total of \$6,240. Because claimant was not eligible for those benefits during those weeks, he was overpaid. Claimant was eligible for waiting week credit for week 15/19. The Department paid claimant the reduced benefit amount of \$318 based on his reported earnings from JT Wimsatt for that week. Because week 15/19 should have been claimant's waiting week, claimant was also overpaid for week 15/19. The total overpaid for weeks 3/19 through 12/19 and week 15/19 was \$6,558.

The overpayment occurred because when claimant claimed benefits for the week of January 13, 2019 through January 19, 2019, claimant did not report to the Department that he had been discharged from a job that week, or that he had earnings that week. That statement was false as a matter of law because decision # 160047 is final. Because claimant's overpayment was caused by his false statements and failure to disclose material facts about his employment with Hoffman, claimant is liable to repay the overpayment of \$6,558 or have it deducted from any future benefits otherwise payable to him.

**Misrepresentation.** 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. 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).

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<sup>1</sup> Order No. 19-UI-137083 at 2, 4.

Although the ALJ asked claimant during the hearing why he did not report that he had a work separation and earnings from Hoffman during the week of January 13, 2019 through January 19, 2019 (week 3/19), claimant offered no explanation. The questions claimant answered when he claimed week 3/19 were clear, concise and not susceptible to being misunderstood. The discharge and unreported earnings occurred less than one week before January 22, 2019, when claimant failed to report the information to the Department. Claimant admitted that he knew he had been discharged during week 3/19. He did not assert that a misunderstanding or mistake led to his failure to disclose that he was discharged and had earnings during week 3/19. Based on the lack of any explanation from claimant as to why he failed to disclose his discharge and earnings from Hoffman, and claimant having had prior claims and attended the Department's benefits review classes, it is more probable than not that claimant knew reporting truthfully would have adverse consequences on his ability to obtain benefits, and that he willfully failed to disclose those material facts to obtain benefits. Claimant is therefore liable for penalty weeks and a monetary penalty.

The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052 (January 11, 2018), which provides, in pertinent part, that when the disqualifying acts under ORS 657.215 relate to the provisions of 657.176 and a failure 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 acts 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 acts, rounding off to the nearest two decimal places, multiplying the result by four, rounding it up to the nearest whole number, and adding four weeks. OAR 471-030-0052(1)(d). Because this decision modifies the overpayment amount from Order No. 19-UI-137083 and the overpayment amount is used to calculate the penalty disqualification period, this decision must likewise modify the penalty disqualification period. Claimant's overpayment is modified to \$6,558, which, divided by \$624 and rounded off to the nearest two decimal places, is 10.51. Multiplying 10.51 by four and rounding up to the nearest whole number is 43. Adding four additional weeks to 43 is 47 penalty weeks. Claimant's penalty disqualification period therefore totals 47 weeks.

The amount of the monetary penalty is determined by applying the provisions of OAR 471-030-0052, which provide, in pertinent part:

The department will review the number of occurrences of misrepresentation when applying the penalty as described in ORS 657.310(2). An occurrence shall be counted each time an individual willfully makes a false statement or representation, or willfully fails to report a material fact to obtain benefits. The department shall use the date the individual failed to report a material fact or willfully made a false statement as the date of the occurrence. For an individual subject to disqualification by administrative action under 657.215, the penalty will be . . . for the first or second occurrence within 5 years of the occurrence for which a penalty is being assessed, 15 percent of the total amount of benefits the individual received but to which the individual was not entitled.

OAR 471-030-0052(7), OAR 471-030-0052(7)(a). Claimant made two misrepresentations, first when failing to report that he was not discharged from a job during week 3/19 even though he knew Hoffman discharged him that week, and second when failing to report his earnings from Hoffman for week 3/19. Claimant is therefore liable for a penalty equal to 15% of his \$6,558 overpayment. Because this decision

modifies the overpayment amount from Order No. 19-UI-137083, and the overpayment amount is used to calculate the monetary penalty amount, this order must likewise modify the monetary penalty amount. Fifteen percent of the modified overpayment of \$6,558 is \$983.70.

**Conclusion.** Claimant was overpaid \$6,558 and, as a result of willfully failing to report two material facts to obtain benefits, he is liable for a \$983.70 monetary penalty, and 47 penalty weeks.

**DECISION:** Order No. 19-UI-137083 is modified, as outlined above.

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

**DATE of Service:** November 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](http://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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