

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-1127**

*Modified*  
*\$1,027 Overpayment Assessed*

**PROCEDURAL HISTORY:** On September 25, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was overpaid \$1,027 in benefits she was required to repay the Department (decision # 193816). Claimant filed a timely request for hearing. On November 8, 2019, ALJ Janzen conducted a hearing, and on November 13, 2019, issued Order No. 19-UI-139664, modifying decision #193816 by concluding claimant was overpaid \$1,104 in benefits she was required to repay. On December 3, 2019, the Department filed an application for review of Order No. 19-UI-139664 with the Employment Appeals Board (EAB).

EAB considered the Department's written argument to the extent it was based on the hearing record.

**FINDINGS OF FACT:** (1) On October 3, 2018, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant had a monetarily valid claim with a weekly benefit amount of \$189.

(2) Claimant claimed and received benefits for the weeks from December 16, 2018 through February 9, 2019, February 17 through February 23, 2019, and March 24 through April 20, 2019 (weeks 51-18 through 06-19, 08-19, and 13-19 through 16-19), the weeks at issue.

(3) McGrath's Publick Fish House employed claimant as a member of its wait staff and in other capacities during the weeks at issue. Claimant earned \$10.75 per hour plus a percentage of tips as calculated by the employer. Claimant was unaware of the method used by the employer to calculate her tips and was sometimes unaware of whether she received any tips. During a routine audit of claimant's claim, the Department obtained information regarding claimant's actual earnings during the weeks at issue and compared that information with claimant's reported earnings during that same period. Exhibit 1.

- (4) When claimant claimed benefits for the week December 16 through December 22, 2018 (week 51-18), she reported \$139.75 in earnings although she earned \$125.02 during that week.
- (5) When claimant claimed benefits for the week December 23 through December 29, 2018 (week 52-18), she reported \$150.50 in earnings although she earned \$382.81 during that week.
- (6) When claimant claimed benefits for the week December 30, 2018 through January 5, 2019 (week 01-19), she reported \$172.00 in earnings although she earned \$530.94 during that week.
- (7) When claimant claimed benefits for the week January 6 through January 12, 2019 (week 02-19), she reported \$182.75 in earnings although she earned \$458.89 during that week.
- (8) When claimant claimed benefits for the week January 13 through January 19, 2019 (week 03-19), she reported \$172.00 in earnings although she earned \$199.11 during that week.
- (9) When claimant claimed benefits for the week January 20 through January 26, 2019 (week 04-19), she reported \$107.50 in earnings although she earned \$206.51 during that week.
- (10) When claimant claimed benefits for the week January 27 through February 2, 2019 (week 05-19), she reported \$107.50 in earnings although she earned \$182.82 during that week.
- (11) When claimant claimed benefits for the week February 3 through February 9, 2019 (week 06-19), she reported \$107.50 in earnings although she earned \$176.96 during that week.
- (12) When claimant claimed benefits for the week February 17 through February 23, 2019 (week 08-19), she reported \$53.75 in earnings although she earned \$163.98 during that week.
- (13) When claimant claimed benefits for the week March 24 through March 30, 2019 (week 13-19), she reported \$118.25 in earnings although she earned \$298.68 during that week.
- (14) When claimant claimed benefits for the week March 31 through April 6, 2019 (week 14-19), she reported \$172.00 in earnings although she earned \$156.65 during that week.
- (15) When claimant claimed benefits for the week April 7 through April 13, 2019 (week 15-19), she reported \$139.75 in earnings although she earned \$183.66 during that week.
- (16) When claimant claimed benefits for the week April 14 through April 20, 2019 (week 16-19), she reported \$150.50 in earnings although she earned \$0 during that week.
- (17) Based on claimant's false reports to the Department about her earnings during the weeks at issue, the Department paid her a total of \$1,027 in benefits she was not entitled to receive. Exhibit 1.

**CONCLUSION AND REASONS:** Claimant was overpaid \$1,027 in benefits during the weeks at issue, which she is liable to repay to the Department or have deducted from any future benefits otherwise payable to her.

As a preliminary matter, only “unemployed” individuals are eligible for benefits. ORS 657.150(1). An individual is not “unemployed,” and, therefore, ineligible for benefits, in any week in which the individual’s earnings exceed the individual’s 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. OAR 471-030-0017 (1)(c). Remuneration for services provided to an employer shall be allocated to the week in which the services were performed. OAR 471-030-0017 (3)(a). An eligible individual who has employment in any week claimed shall have the individual’s weekly benefit amount reduced by the amount of earnings paid or payable that exceeds the greater of ten times the minimum hourly wage established by the laws of Oregon or one-third of the individual’s weekly benefit amount. ORS 657.150(6). For purposes of ORS 657.150(6)(a), the term “minimum hourly wage” means the minimum wage rate set forth under 653.025(2). OAR 471-030-0017 (1)(i). Under ORS 653.025(2), the minimum hourly wage during the period from July 1, 2018, to June 30, 2019, the period at issue here, was \$12. ORS 653.025(2)(c).

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 asserted at the hearing on November 8, 2019 that she did not believe she received all of the earnings the employer reported she had been paid during the weeks at issue. Transcript at 17. After admitting that she probably had most of her actual paystubs for those weeks at another location, the ALJ agreed to keep the record open until November 12, 2019 to allow claimant submit those paystubs to OAH by “fax” for entry into the record and consideration prior to the entry of an order. Transcript at 13, 19-22. Subsequently, claimant did not submit any additional evidence to OAH.

The evidence submitted by the Department shows that claimant’s reported earnings for the weeks at issue differed from the employer’s reported earnings for claimant during those same weeks as specified in the Department’s Schedule of Adjustments. Exhibit 1. Because the employer’s reported earnings for claimant were based on its business records, it reasonably may be inferred that those amounts are credible and constitute claimant’s actual earnings for each of the weeks at issue. Based on the difference between claimant’s reported earnings and her actual earnings for those weeks, the Department applied the provisions of ORS 657.100, ORS 657.150(6), ORS 653.025(2) and OAR 471-030-0017(1)(i), and determined that based on claimant’s false statements regarding her earnings, the Department overpaid claimant a total of \$1,027. Exhibit 1.

However, Order No. 19-UI-139664 concluded that the Department was mistaken in its calculations and that claimant was overpaid \$1,104 benefits, rather than \$1,027 in benefits as determined by the Department. Order No. 19-UI-139664 at 4, 5. The Order reasoned that the Department mistakenly used the minimum wage applicable to the Portland, Oregon area, \$12 per hour, rather than the minimum wage applicable to the Jackson County, Oregon area, where claimant worked, which was \$10.75 per

hour. Order No. 19-UI-139664 at 4, 5. However, OAR 471-030-0017 (1)(i) specifically provides that when calculating overpayments in any case under ORS 657.150(6), the “minimum hourly wage” to be applied is the minimum wage rate set forth in 653.025(2), which is the minimum wage rate applicable to the Portland area. Here, during the weeks at issue, that wage rate was \$12 per hour, the minimum wage rate used by the Department in calculating the \$1,027 overpayment claimant was assessed. Accordingly, the Department was correct in assessing an overpayment against claimant in the amount of \$1,027.

**DECISION:** Order No. 19-UI-139664 is modified, as outlined above.

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

**DATE of Service:** January 3, 2020

**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

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## 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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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