

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1193

Order No. 19-UI-141214 Affirmed ~ Ineligible Weeks 30-06 to 32-06
Order No. 19-UI-141210 Reversed ~ Overpayment Not Assessed

PROCEDURAL HISTORY: On September 22, 2006, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from July 23, 2006 through August 12, 2006 (decision # 84243). On October 12, 2006, decision # 84243 became final without claimant having filed a timely request for hearing. On November 7, 2019, the Department served notice of an administrative decision based on decision # 84243 assessing a \$1,228 overpayment (decision # 140414). On November 13, 2019, claimant filed a late request for hearing regarding decision # 84243 and a timely request for hearing regarding decision # 140414. On December 9, 2019, ALJ Wyatt conducted a consolidated hearing regarding decisions # 84243 and 140414, and on December 13, 2019, issued Order No. 19-UI-141214 allowing claimant's late request for hearing on decision # 84243 but affirming that decision, and Order No. 19-UI-141210 affirming decision # 140414. On December 23, 2019, claimant filed applications for review of Order Nos. 19-UI-141214 and 19-UI-141210 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (May 13, 2019), EAB consolidated its review of Order Nos. 19-UI-141214 and 19-UI-141210. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-1192 and 2019-EAB-1193, respectively). EAB considered the consolidated hearing records and claimant's written argument to the extent it was relevant and based on the hearing records.

Based on a *de novo* review of the entire records in this case, and pursuant to ORS 657.275(2), the portion of Order No. 19-UI-141214 allowing claimant's late request for hearing on decision # 84243 is **adopted**.

FINDINGS OF FACT: (1) On August 17, 2005, claimant filed an initial claim for unemployment insurance benefits (BYE 32-06). At that time, claimant received a PIN number for his claim that was set by him. It was necessary for the PIN number to be used when benefits for any week were claimed using the Department's interactive voice response system.

(2) On May 26, 2006, claimant was arrested and incarcerated at the Douglas County Jail. Claimant remained incarcerated at the Douglas County Jail until he was transferred directly from the jail to an Oregon state correctional facility, where he remained until November 2008.

(3) An individual other than claimant, using claimant's PIN number and the Department's interactive voice response system, claimed benefits as claimant for the weeks including July 23, 2006 through August 12, 2006 (weeks 30-06 through 32-06), the weeks at issue. That individual, using claimant's PIN number, certified that he was available for work and sought work during those weeks.

(4) On July 31, 2006, a person who identified himself as claimant contacted the Department by telephone and reported a change of address for claimant's claim to 1236 W Brown Avenue, Roseburg, OR 97470. That call was not made by claimant, and could not have been made by claimant based on the rules of the Douglas County Jail, where claimant was incarcerated at the time. Claimant never resided at that Roseburg address. Department records did not show that the call came from a correctional facility.

(5) Based on the certification of the individual posing as claimant and using claimant's PIN number that claimant was available for work during the weeks at issue, the Department issued three separate benefit checks in claimant's name totaling \$1,228 and sent them to 1236 W Brown Avenue, Roseburg, OR 97470. Those benefit checks were cashed on August 7, 11, and 12, 2006 at an unidentified bank, by an unidentified individual.

CONCLUSIONS AND REASONS: Claimant was not available for work during the weeks at issue. Claimant was not overpaid unemployment insurance benefits in the amount of \$1,228.

Available for Work. To be eligible to receive benefits, unemployed individuals must be available for 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...
- (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;

* * *

OAR 471-030-0036(3) (December 8, 2019). For purposes of ORS 657.155(1)(c), an individual is not available for work in any week claimed if during the week, the individual is incarcerated during any days or hours customary for the type of work sought. OAR 471-030-0036(3)(f)(B).

It was undisputed that during the entirety of the weeks at issue, claimant was incarcerated at either the Douglas County Jail or an Oregon state correctional facility. Regardless of who filed benefit claims for those weeks using claimant's name and PIN number, because claimant was incarcerated and not capable of reporting for work during any of the hours of the weeks at issue, under OAR 471-030-0036(3)(f)(B), claimant was not available for work during those weeks and was ineligible for benefits.

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). Where, as here, the Department has paid benefits and seeks to recoup them from an individual, it has the burden to prove benefits were received by the individual and should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Order No. 19-UI-141210 found that claimant "claimed and was paid" \$1,228 in benefits to which he was not entitled for the weeks at issue due to his incarceration, and therefore was required to repay that sum to the Department. Order No. 19-UI-141210 at 1, 4. The order reasoned, in a footnote:

... [C]laimant was incarcerated in Douglas County Jail during the entire period at issue. However, on July 31, 2006, the Department received by telephone a change of address for claimant. The caller, who identified himself as Kenneth Wilson, provided a mailing address that was subsequently used to mail the benefit checks to claimant. At hearing, claimant asserted that he had not claimed the weeks at issue, that he did not place the July 31, 2006 call to the Department, and that he did not cash the checks made out to him by the Department. The Department representative testified that if another individual claimed those weeks for claimant, that individual would have had to have been in possession of claimant's Department pin number, a number the individual could only have obtained from claimant. The Department representative further testified that it was claimant's responsibility to protect the security of his UI account.

Order No.19-UI-141210, FN 1, at 1-2. However, the record shows that the Department failed to meet its burden to establish that claimant "received" the \$1,228 in benefits to which he was not entitled.

The order correctly pointed out that claimant denied under oath that he claimed any of the weeks at issue, made the July 31, 2006 change of address call, or received or cashed the checks made out to him by the Department. Transcript at 15, 23. The Department also either agreed or failed to dispute that claimant did not call, and was unable to call, the Department from the jail to change his address, file claims for benefits, or leave the jail to cash the checks sent to an address where claimant never resided. Perhaps claimant lost control of his PIN number when he was arrested and presumably turned over his wallet. Perhaps someone at the Douglas County Jail where claimant was initially incarcerated came into possession of the PIN number and used it. Regardless of what actually occurred, claimant's testimony that he never filed the claims for or received the benefits in question outweighs the Department's speculation that claimant must have given his PIN number to someone else to claim and receive the benefits on claimant's behalf. Accordingly, the Department failed to meet its burden to establish that claimant "received" the \$1,228 in benefits to which he was not entitled.

Claimant was not overpaid unemployment insurance benefits in the amount of \$1,228, and for that reason is not required to repay those benefits to the Department.

DECISION: Order No. 19-UI-141214 is affirmed and Order No. 19-UI-141210 is set aside, as outlined above.

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

DATE of Service: January 27, 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. 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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