

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0098

Affirmed
Overpayment and Penalties

PROCEDURAL HISTORY: On November 15, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$3,011 overpayment, \$903.30 monetary penalty, and 20 penalty weeks (decision # 193536). Claimant filed a timely request for hearing. On January 9, 2020, 2019, ALJ Shoemake conducted a hearing at which the employer failed to appear, and on January 17, 2020, issued Order No. 20-UI-142948, affirming the Department's decision. On February 3, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: Order No. 20-UI-142948 states that Exhibit 2, copies of an I-9 and driver's license, would be admitted into the record unless a party submitted a written objection to the admission of Exhibit 2 by January 22, 2020, and the objection was sustained. Claimant submitted a written objection to the admission of Exhibit 2 on January 26, 2020. Because claimant's objection was not received within the time period allowed by Order No. 20-UI-142948, it was not considered and Exhibit 2 remains in the record. However, claimant stated that he did not receive a copy of Exhibit 2 with the order, and a copy is therefore attached to his copy of this decision.

FINDINGS OF FACT: (1) On September 20, 2013, claimant reported to the police in Portland, Oregon, that he gave a ride to a woman he did not know on September 5, 2013, and that after he dropped her off, he noticed his wallet was missing from his vehicle. Exhibit 1 at 18-19. Claimant reported to the police that his stolen wallet contained credit cards and that he had canceled the credit cards immediately after noticing the wallet was missing on September 5. Exhibit 1 at 18-19. The police report did not state that claimant reported his driver's license, social security number or passport were in his stolen wallet. Exhibit 1 at 18-19. Claimant told the police that, later in September 2013, someone tried to obtain money from his credit cards, and successfully obtained \$90. Exhibit 1 at 18-19.

(2) On November 11, 2018, claimant filed an initial claim online for unemployment insurance benefits, establishing a valid claim with a weekly benefit amount of \$624. The maximum weekly amount available at that time was \$624.

(3) Shortly after November 11, 2018, the Department mailed claimant a notice of what his weekly benefit amount would be based on his base year wages. The notice showed claimant had earnings from Peopleready Inc. during the third quarter of 2017 (July through September 2017). Claimant did not notify the Department that earnings from Peopleready Inc. were allegedly incorrectly reported on the notice. Exhibit 1 at 23.

(4) Claimant claimed benefits online for each week from January 20, 2019 through April 20, 2019 (weeks 04-19 through 16-19), the weeks at issue. When claimant claimed benefits for each week at issue, he certified to the Department that he did not work or have earnings during that week. Based on these certifications, for each week at issue, the Department paid claimant benefits of \$624. Claimant received those benefits.

(5) Peopleready Inc. employed claimant during the weeks at issue. For each week from January 20, 2019 through March 30, 2019, claimant had prorated earnings of \$425.94 from the employer. Exhibit 1 at 33. From March 31, 2019 through April 6, 2019, claimant had earnings of \$350 from the employer. From April 7, 2019 through April 13, 2019, claimant had earnings of \$1,013.82 from the employer. From April 14, 2019 through April 20, 2019, claimant had earnings of \$273 from the employer.

(6) Based on the earnings reported to the Department by the employer, on September 16, 2019, the Department sent claimant a notice of overpayment letter that included the weeks from March 31, 2019 through April 20, 2019. Claimant responded to the Department that he had not worked for the employer during those weeks. Claimant told the Department about his police report from 2013 and stated that his stolen wallet had contained his driver's license, social security number, and credit cards.

(7) On September 25, 2019, claimant told a Department representative that he did not work during any of the weeks from January 20, 2019 through April 20, 2019, and that it must have been another person working using his identification, name, and social security number. Claimant told the representative that he had not worked for the employer since December 2016. Claimant told the representative that he received worker's compensation benefits from the employer until June 2017.

(8) On October 4, 2019, claimant told a Department representative that he did not work for the employer since he was injured in December 2016, and that someone had stolen his passport. Exhibit 1 at 22-23.

(9) Also on September 25 and October 4, 2019, claimant told the Department that he had never worked for a second employer, General Labor & Industrial Staffing. However, when the Department contacted General Labor & Industrial Staffing, that employer provided information showing claimant worked for them in 2019, and sent the Department a copy of claimant's driver's license, issued on June 10, 2019, showing claimant's correct name, address and date of birth. Exhibit 2. Claimant confirmed with the Department that he had renewed his driver's license on June 10, 2019.

CONCLUSIONS AND REASONS: Claimant is liable to repay the \$3,011 overpayment, \$903.30 monetary penalty, and is subject to 20 penalty weeks.

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.* The Department has the burden to prove that benefits should not have been paid. *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; by logical extension of that principal, where benefits have not been paid claimant has the burden to prove that the Department should have paid benefits).

Only unemployed individuals are eligible to receive benefits in any week. *See* ORS 657.155(1). An individual is "unemployed" "in any week of less than full-time work if the remuneration paid or payable to the individual for services performed during the week is less than the individual's weekly benefit amount." ORS 657.100(1). During week 15-19, claimant earned more than his weekly benefit amount. He therefore was not "unemployed" and was not eligible to receive any amount of unemployment insurance benefits during that week. The Department paid claimant \$624 in benefits for that week that he was not entitled to receive because he was not unemployed.

During all the remaining weeks at issue, claimant earned less than his weekly benefit amount from employment. He therefore was "unemployed" during those weeks and eligible for reduced benefits. ORS 657.150(6) provides that "[a]n eligible unemployed individual who has employment in any week 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 state minimum wage or one-third the individual's weekly benefit amount. The Department paid claimant \$2,387 in benefits for the weeks he was unemployed and eligible for reduced benefits. Record, Schedule of Adjustments.

Claimant did not dispute that he reported no earnings for the weeks at issue, but asserted that he did not report earnings because he had no earnings from the employer during those weeks, and had not worked for that employer since December 2016. However, the preponderance of the evidence shows that claimant had unreported earnings from the employer during all the weeks at issue. His assertion that another person used his name and social security number to work for the employer, without persuasive corroboration, is outweighed by the Department's evidence that claimant worked for the employer and had earnings as shown on the Schedule of Adjustments attached to decision # 193536. Claimant's claim of identity theft is unpersuasive for several reasons. First, although claimant reported the theft of his wallet in 2013, the police report does not show that claimant's driver's license, passport, or social security number were in the stolen wallet. Second, in November 2018, claimant received notice that his weekly benefit amount would be based in part on earnings from the employer during July through September 2017, and claimant did not contact the Department until after he received notice of an overpayment to inform it that he had not worked for Peopleready Inc. during that time in 2017. Third, claimant told the Department that he had not worked for another employer, General Labor & Industrial Staffing, during 2019. Claimant alleged regarding that employer as well that another person used his identity to work, yet General Labor & Industrial Staffing provided the Department with a copy of a driver's license for claimant issued in June 2019. This license could not have been the license allegedly stolen in 2013.

Pursuant to ORS 657.310(1), regardless of claimant's knowledge or intent, he received \$3,011 in benefits to which he was not entitled because the earnings information he provided to the Department consisted of false statements of material facts. Claimant therefore is liable to repay the \$3,011 he

received to the Department or to have that amount deducted from any future benefits otherwise payable to him.

Misrepresentation. 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). Because claimant's only explanation for why he failed to report his earnings during all the weeks at issue was implausible as explained above, the preponderance of the evidence is that claimant failed to report any earnings so that he would qualify for benefits during the weeks at issue. More likely than not, claimant willfully made false statements and failed to report material facts to obtain benefits when he falsely reported no earnings for each of the weeks at issue. Accordingly, claimant is liable for misrepresentation penalties.

Monetary Penalty. 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 is a function of the number of occurrences of misrepresentation. An "occurrence" is counted as having occurred each time the individual willfully made a misrepresentation of obtain benefits. OAR 471-030-0052(7). Here, there are 13 weeks constituting the weeks at issue, and for each week, claimant willfully failed to report his earnings for the week, instead reporting no earnings. Therefore, there were 13 occurrences. OAR 471-030-0052(7)(d) states that for the seventh or greater occurrence within 5 years of the occurrence for which a penalty is being assessed, 30 percent of the total amount of benefits the individual received but to which the individual was not entitled. Thirty percent of the \$3,011 in benefits that claimant received to which he was not entitled is \$903.30. Accordingly, claimant is assessed a monetary penalty of \$903.30.

Penalty Weeks. 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(1)(a) (January 11, 2018), which provides, in pertinent part, that the Department shall determine the number of weeks of disqualification under ORS 657.215 according to the following criteria:

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.

Applying that formula to this case, claimant's penalty weeks are determined by dividing the total amount of benefits overpaid to him based on the disqualifying acts (\$3,011) 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 (\$624), which equals 4.82532051, then rounding that number off to the nearest two decimal places (4.83), multiplying that result by 4 (19.32), and rounding that number up to the nearest

whole number, which equals 20 weeks. Claimant is assessed 20 penalty weeks of disqualification from future benefits. In sum, claimant is required to repay the Department, by deduction from future benefits or otherwise, a total of \$3,914.30. Claimant is also assessed 20 weeks of penalty disqualification.

DECISION: Order No. 20-UI-142948 is affirmed.

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

DATE of Service: March 12, 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 desisyon.

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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