

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0217

Reversed
Overpayment & Penalties Not Assessed

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). On July 30, 2019, claimant filed a timely request for hearing. On August 5, 2019, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled on August 19, 2019. On August 19, 2019, ALJ Snyder conducted a hearing at which the employer did not appear. Claimant and the Department appeared for the hearing and provided evidence. On August 27, 2019, ALJ Snyder issued Order No. 19-UI-135699, affirming decision # 194638. On September 12, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

On October 18, 2019, EAB issued EAB Decision 2019-EAB-0884, reversing Order No. 19-UI-135699 and remanding this case to OAH for further development of the record. On October 21, 2019, OAH mailed notice of a remand hearing scheduled for November 4, 2019. On November 4, 2019, OAH re-mailed notice of a remand hearing scheduled for November 18, 2019. On November 18, 2019, ALJ Snyder conducted a hearing at which claimant and the employer failed to appear, and issued Order No. 19-UI-139923, dismissing claimant's request for hearing because claimant failed to appear for the November 18 remand hearing and concluding that Order No. 19-UI-135699, affirming the Department's decision # 194638, remained undisturbed.

On December 10, 2019, claimant filed a late application for review with EAB that was treated as a late request to reopen the November 18, 2019 remand hearing. ALJ Kangas reviewed claimant's request, and on December 19, 2019, issued Order No. 19-UI-141509, denying the request and leaving Order No. 19-UI-135699 undisturbed. On December 23, 2019, claimant filed a timely application for review of Order No. 19-UI-141509 with EAB.

On January 30, 2020, EAB issued EAB Decision 2019-EAB-1188, vacating Orders No. 19-UI-139923 and 19-UI-141509, and reversing Order No. 19-UI-135699 and remanding this matter to OAH for further proceedings. On February 4, 2020, OAH mailed notice of a remand hearing regarding the merits of decision # 194638 scheduled for February 18, 2020. On February 18, 2020, ALJ Snyder conducted a

hearing at which the Department appeared, but the employer and claimant failed to appear. On February 26, 2020, ALJ Snyder issued Order No. 20-UI-145170, affirming decision # 194638 by assessing claimant a \$1,248 overpayment, \$187.20 monetary penalty, and eight penalty weeks. On March 7, 2020, claimant filed an application for review with EAB.

EAB did not consider claimant's written argument on his application for review 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).

FINDINGS OF FACT: (1) Claimant's last day of work with MWH Constructors Inc. (employer) was December 17, 2018. Claimant earned \$440 from the employer on December 17, 2018 (\$55 per hour x 8 hours worked). Claimant never completed timecards for the employer.

(2) On December 17, 2018, claimant filed an initial claim for unemployment insurance benefits, establishing a weekly benefit amount of \$624.

(3) Claimant claimed benefits for the week of December 16, 2018 through December 22, 2018 (week 51-18). Claimant reported earnings of \$440 for week 51-18. Based on that report, the Department gave claimant waiting week credit for week 51-18. The employer reported that claimant worked 40 hours during week 51-18. Exhibit 1 at 11. Based on the employer's new information, the Department determined that the employer paid claimant \$2,178.80 during week 51-18.

(4) Claimant claimed benefits for December 30, 2018 through January 12, 2019 (weeks 01-19 and 02-19). Claimant reported that he did not work and had no earnings during week 01-19. Based on that report, the Department paid claimant \$624 for week 01-19. The employer first reported to the Department that claimant worked 80 hours during week 01-19. Exhibit 1 at 4. The employer later reported that claimant had 24 hours of paid time for week 01-19. Based on the employer's new information, the Department determined that the employer paid claimant \$1,307.28 during week 01-19, that claimant's waiting week should be week 02-19, and that the Department therefore had overpaid claimant \$624 for week 01-19 and week 02-19.

(5) On June 21, 2019, claimant replied to Department inquiries for more information about his earnings from the employer during December 2018 and January 2019. Claimant responded and told the Department that he disagreed with the information the employer provided the Department. Claimant told the Department that he did not work for the employer after December 17, 2018. Audio Record at 13:14 to 13:37 (August 19, 2019 Hearing).

CONCLUSIONS AND REASONS: We conclude that claimant is not liable for an overpayment, penalty weeks or a monetary penalty.

The Department assigned waiting week credit or paid benefits to claimant for weeks 51-18, 01-19 and 02-19, the weeks at issue. Therefore, the Department has the burden to prove by a preponderance of the evidence 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).

Order No. 20-UI-145170 concluded that although claimant reported working 8 hours and earning \$440 during week 51-18, “claimant had actually worked 40 hours . . . and earned \$2,178.80” during that week, and that although claimant reported no work or earnings for week 01-19, claimant had worked 16 hours and was paid for those hours and 8 vacation hours during that week.¹ The order further reasoned that “claimant did not dispute the earnings reported by the employer,” and “could not explain” why his reports differed from those of the employer, and therefore concluded that claimant willfully misrepresented his hours and earnings to obtain benefits.² However, the preponderance of the evidence in the record does not support those conclusions.

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’s evidence of claimant’s hours and earnings for weeks 51-18 and 01-19 consisted of an earnings audit report and timecards the employer provided to the Department in May and June 2019. Exhibit 1 at 4-5, 11-12. The employer did not participate in the hearings, and the Department did not provide evidence of conversations with the employer explaining the documents it provided to the Department. Absent such explanation or other evidence to clarify the inconsistencies between the audit report and timecards, those documents are unreliable. The earnings audit report states that claimant had 80 compensable hours and was paid \$4,357.70 during week 01-19. Exhibit 1 at 4. However, the employer’s timecard for the same period is inconsistent with the earnings audit report because, instead of 80 hours, it appears to show 32 compensable hours, with a “total for the week” of 16 hours. Exhibit 1 at 12. The employer’s timecard for week 51-18 shows claimant worked 40 hours, but it appears that the employer initially attributed those hours to week 01-19. Exhibit 1 at 11 and 4. Moreover, claimant reported to the Department and testified that he did not work after December 17, 2018. Exhibit 1 at 11; Audio Record at 24:44 to 24:48 (August 19, 2019 Hearing). The timecards are also unreliable because claimant never completed timecards for the employer, and it is not possible to discern from the record what information the employer used to prepare the timecards.

Although claimant “could not explain” the discrepancies between his reports and the documents provided by the employer, it was not his burden to do so. Claimant provided the only firsthand, sworn testimony of his last day of work, the hours he worked, and his earnings during each week at issue. Claimant testified that he did not dispute the “numbers” reported by the employer, but he did dispute the “timing” of the information alleged by the employer in its documents. Audio Record at 36:09 to 36:32 (August 19, 2019 Hearing). The Department’s evidence does not outweigh claimant’s evidence regarding what hours and earnings he had for each week at issue. Absent more precise, consistent information of what hours and earnings claimant had for each of those weeks, the most persuasive evidence in the record of claimant’s hours and earnings for each week at issue was from claimant’s reports when he claimed benefits and his testimony at hearing. Accordingly, we conclude that the

¹ Order No. 20-UI-145170 at 5.

² Order No. 20-UI-145170 at 5.

Department failed to prove by a preponderance of the evidence that claimant was not eligible for waiting week credit for week 51-18, and his full weekly benefit amount of \$624 for weeks 01-19 and 02-19.

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). 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.

There was a discrepancy between the information provided by the employer and by claimant. Because claimant was not able to explain at hearing why his reports to the Department differed from the employer's information, the order under review concluded that claimant willfully misrepresented his hours and earnings to obtain benefits.³ However, as previously noted, claimant did not have the burden of proof in this matter, the Department did. It was the Department's burden to prove by a preponderance of the evidence that the employer's information was correct, and not claimant's burden to prove that the information was incorrect. Therefore, claimant's inability to explain the discrepancies was not persuasive evidence that he willfully misrepresented his hours and earnings to obtain benefits.

At hearing, the Department also asserted that it determined claimant willfully misrepresented information to obtain earnings because he did not respond to its request for additional information. Audio Record at 16:27 to 17:02 (August 19, 2019 Hearing). However, claimant provided a statement to the Department on June 21, 2019 in response to the Department's inquiries about the weeks at issue, and claimant's apparent failure to provide additional information to the Department after that time does not show that he willfully misrepresented information to obtain benefits. The record does not show that claimant willfully provided inaccurate information to the Department to obtain benefits. We therefore conclude that claimant did not make a willful misrepresentation, and is not liable for a monetary penalty or any penalty disqualification weeks.

In sum, on the evidence in this record, the Department failed to prove by a preponderance of the evidence that claimant was overpaid or liable for penalties.

DECISION: Order No. 20-UI-145170 is set aside, as outlined above.

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

DATE of Service: April 14, 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.

³ Order No. 20-UI-145170 at 5.

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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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