

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0730

Modified
Overpayment Assessed
Repayment or Deduction from Future Benefits Required for Weeks 16-20 and 17-20
Deduction from Future Benefits Required for Weeks 18-20 through 21-20

PROCEDURAL HISTORY: On September 21, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$6,912 overpayment that claimant was required to repay to the Department (decision # 90243). Claimant filed a timely request for hearing. On November 9, 2020, ALJ Snyder conducted a hearing, and on November 10, 2020 issued Order No. 20-UI-156298, affirming decision # 90243. On November 18, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On March 31, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department established claimant's weekly benefit amount (WBA) at \$552.00.

(2) Claimant filed claims for regular benefits for each of the weeks from April 12, 2020 through May 23, 2020 (weeks 16-20 through 21-20). These are the weeks at issue. The Department paid claimant \$552.00 for each of the weeks at issue. The Department also paid claimant \$600.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits for each of the weeks at issue. In sum, for the six weeks at issue, claimant received total regular benefits of \$3,312.00 and total FPUC benefits of \$3,600.00.

(3) Claimant last worked for her employer on March 26, 2020. On April 26, 2020, the employer sent claimant an e-mail informing her that they had received a Paycheck Protection Program (PPP) loan which would allow them to pay their employees for the period of April 12, 2020 through April 25, 2020 (weeks 16-20 and 17-20). In early May 2020, claimant received a check from the employer for \$1,045.00 for the period of April 12, 2020 through April 25, 2020.

(4) When claimant claimed benefits for week 18-20 (April 26, 2020 through May 2, 2020), she reported earnings of \$1,045.00 to the Department.

(5) In early June 2020, claimant received a check from the employer for \$2,134.67 for the period of April 26, 2020 through May 23, 2020 (weeks 18-20 through 21-20). On June 9, 2020, claimant

contacted the Department and reported that she had received \$2,134.67 from the employer. At that time, payment of benefits for weeks 18-20 through 21-20 were still in “suspense” and had not yet been paid. Audio Record at 30:05. After claimant’s call to the Department, the Department paid claimant for weeks 18-20 through 21-20.

CONCLUSIONS AND REASONS: Claimant received \$3,312.00 in regular benefits and \$3,600.00 in FPUC benefits to which she was not entitled, and is liable to either repay the benefits or have the amount deducted from any future benefits otherwise payable to claimant under ORS Chapter 657 and applicable federal law.

Remuneration and overpayment. Only unemployed individuals are eligible to receive benefits in any week. *See* ORS 657.155(1). An individual is deemed “unemployed” in any week during which the individual performs no services and with respect to which no remuneration for services performed is paid or payable to the individual, or 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).

The order under review correctly concluded that “[b]ecause Claimant had earnings which exceeded her weekly benefit amount during the period at issue, her weekly benefit amount was reduced to \$0 each week.” Order No. 20-UI-156298 at 3. Although the order’s conclusion is correct, the order does not explain how it arrived at this conclusion.

It is first necessary to determine the remuneration claimant received during the weeks at issue. The Department’s witness testified at hearing that claimant called the Department on June 9, 2020 to report that she had earnings¹ of \$640 per week, which the employer had paid as “paid time off,” during each of the weeks at issue. Audio Record at 9:53 to 10:47. However, claimant testified to earnings which differed from the Department’s testimony. Claimant testified that she received two checks covering two separate pay periods: March 26, 2020 through April 25, 2020, and April 26, 2020 through May 25, 2020. Audio Record at 17:00. Claimant further explained that the two checks covered the period of April 12, 2020 through May 23, 2020. Audio Record at 15:15. Finally, claimant testified that the first check was for \$1,045.00, and the second check was for \$2,134.67. Audio Record at 28:18 to 19:04. From this testimony, it can be determined that the first check paid earnings that accrued during the period of April 12, 2020 through April 25, 2020, and that the second check paid earnings that accrued during the period of April 26, 2020 through May 23, 2020. Consequently, according to claimant, her remuneration was \$522.20 each week for the period of April 12, 2020 through April 25, 2020, and \$533.67 each week for the period of April 26, 2020 through May 23, 2020.²

¹ Per OAR 471-030-0017(b) (January 11, 2018), “earnings” means “remuneration.” Per OAR 471-030-0017(c), “Where an employer-employee relationship exists, ‘remuneration’ means compensation resulting from the employer-employee relationship, including wages, salaries, incentive pay, sick pay, compensatory pay, bonuses, commissions, stand-by pay, and tips.”

² Per OAR 471-030-0017(3)(d), “If the dates of sale or service [that claimant performed for the employer] are not clearly established, allocation shall be made upon a reasonable estimate provided by the claimant. If the individual cannot or will not provide a reasonable estimate, the remuneration shall be allocated equally over the period during which services were rendered or products were sold.”

However, the record shows that the amounts claimant provided at hearing, which were lower than her WBA, were actually her net, and not gross, earnings for those weeks. During the hearing, claimant testified that the figures she reported were from her notes regarding the checks that she had received; she also indicated that she had been reviewing her bank account statement during the hearing. Audio Record at 28:18 to 29:04. Moreover, claimant did not directly assert that the \$640.00 per week amount provided by the Department's witness was incorrect, but instead explained at hearing that during the June 9, 2020 call to the Department, she reported the entire check amounts to the Department representative, who allocated the checks on a weekly basis. Audio Record at 24:00 to 24:42.

The totality of the evidence—claimant's reference to her bank statement (which would only reflect the net deposit amount), the Department's estimate of claimant's earnings, and the effective tax rate of approximately 17% to 19% that would result if claimant was paid a gross of \$640 per week and a net of \$522.20 to \$533.67 per week—all support the inference that claimant testified to her net earnings per week, rather than her gross earnings. Because a claimant's remuneration is based on their gross earnings³, the record shows that claimant's earnings exceeded her WBA for each of the weeks at issue.

During the weeks at issue, claimant earned at least her weekly benefit amount every week. She therefore was not "unemployed" and was not eligible to receive any amount of unemployment insurance benefits for any of those weeks. Claimant was therefore overpaid \$6,912.00.

Repayment of regular benefits. 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.*

ORS 657.315(1) provides, in relevant part, that an individual who has been overpaid benefits because of an error not caused by the individual's false statement, misrepresentation of a material fact or failure to disclose a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding the individual is not eligible for the benefits, is liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final.

The order under review further concluded that, because claimant's earnings exceeded her WBA for all of the weeks at issue, she was not entitled to receive regular benefits for those weeks, and would therefore be liable to have the overpaid amount deducted from future benefits per ORS 657.315(1). Order No. 20-UI-156298 at 3. The record does not support this conclusion. Rather, the evidence in the record indicates that benefits for weeks 16-20 and 17-20 were paid erroneously because claimant was not, at the time she claimed those weeks, aware that the employer would pay her for that period of time. As such, because claimant made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of her knowledge or intent, regarding her

³ Per ORS 657.105(1), "wages" means "all remuneration for employment, including the cash value, as determined by the Director of the Employment Department under the regulations of the director, of all remuneration paid in any medium other than cash." (emphasis added). Per ORS 657.117(1), "wages" includes "The amount of any tax imposed upon an employee and paid by an employer pursuant to sections 3121(a)(6) and 3306(b)(6) of the Internal Revenue Code."

earnings for weeks 16-20 and 17-20, per ORS 657.310(1) she is liable to either repay the \$1,104.00 in regular benefits she received or have that amount deducted from any future benefits otherwise payable to her under ORS chapter 657.

By contrast, the record indicates that benefits for weeks 18-20 through 21-20 were erroneously paid due to the Department's error rather than claimant's false statement or misrepresentation of a material fact, or failure to disclose a material fact. During the hearing, the Department's witness testified that when claimant reported earnings of \$1,045 for week 18-20, her claim was put in "suspense," holding payment of benefits until the issue raised by the reported earnings was resolved. Audio Record at 30:05.

Therefore, because the Department knew that claimant had earnings which exceeded her WBA for weeks 18-20 through 21-20 before it paid benefits for any of those weeks, it had the opportunity to deny payment of those benefits and prevent overpayment. As the overpayment of \$2,208.00 for those weeks was not caused by claimant's misstatement of material fact, she is liable only to have that amount deducted from any future benefits otherwise payable to her under ORS chapter 657.

Repayment of FPUC Benefits. Under the CARES Act,⁴ claimant received \$3,600 in FPUC benefits to which she was not entitled because she did not qualify for benefits under state law, as explained above. As the order under review concluded, federal law provides that claimant must repay the FPUC benefits by deduction from any future regular or FPUC benefits to which claimant is otherwise entitled. An individual who receives FPUC payments to which the individual was not entitled must repay those benefits, unless the Department waives such repayment if it determines that payment of those benefits was without fault on the part of the individual, and such repayment would be contrary to equity and good conscience.⁵ The record does not show that the Department has waived repayment here. The CARES Act also provides, in relevant part, "The [Department] shall recover the amount to be repaid, or any part thereof, by deductions from any [FPUC benefits] payable to such individual . . . during the 3-year period after the date such individuals received the payment of the [FPUC benefits] to which they were not entitled, in accordance with the same procedures as apply to the recovery of overpayments of regular unemployment benefits paid by the State."⁶ Therefore, claimant's liability for repayment of the \$3,600 in FPUC benefits is limited to deduction from any future regular or FPUC benefits to which claimant is otherwise entitled.

In sum, claimant is liable for an overpayment of \$1,104 in regular benefits to be repaid or deducted from future benefits; for an overpayment of \$2,208 in regular benefits to be deducted from future benefits only; and for an overpayment of \$3,600 in FPUC benefits to be deducted from future benefits only.

DECISION: Order No. 20-UI-156298 is modified, as outlined above.

S. Alba and D. P. Hettle.

DATE of Service: December 23, 2020

⁴ Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, Pub. L. 116-136.

⁵ Pub. L. 116-136, § 2104(f)(2).

⁶ Pub. L. 116-136, § 2104(f)(3).

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

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
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.