

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0747**

*Modified*  
*Overpayment and Penalties Not Assessed*

**PROCEDURAL HISTORY:** On September 29, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant willfully made misrepresentations and failed to report material facts to obtain benefits, and assessing an \$842 overpayment, a \$210.50 monetary penalty, and a six-week penalty disqualification from future benefits (decision # 205224). Claimant filed a timely request for hearing. On November 16, 2020, ALJ S. Lee conducted a hearing, and on November 20, 2020 issued Order No. 20-UI-156694, modifying the Department's decision by assessing a \$659 overpayment claimant was required to repay to the Department, but not assessing any penalties. On November 28, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant did not declare 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). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that claimant did not willfully make misrepresentations or fail to report material facts to obtain benefits, and therefore was not subject to penalties, is **adopted**. The remainder of this decision will address whether claimant received benefits to which she was not entitled and is liable to repay the Department.

**FINDINGS OF FACT:** (1) On January 16, 2019, claimant filed an initial claim for unemployment insurance benefits (BYE 02-20), and the Department established that claimant's weekly benefit amount for that claim was \$185. On January 21, 2020, claimant filed a second initial claim for unemployment insurance benefits (BYE 02-21), and the Department established that claimant's weekly benefit amount for that claim was \$209.

(2) Claimant claimed and received benefits for each from December 8, 2019 through December 21, 2019, December 29, 2019 through January 4, 2020, February 9, 2020 through February 15, 2020, and February 23, 2020 through February 29, 2020 (weeks 50-19, 51-19, 01-20, 07-20, and 09-20). These are the weeks at issue.

(3) Excel Photo, Inc. (the employer) employed claimant as a portrait assembler during the weeks at issue. The employer paid claimant a wage of \$12.50 per hour, and claimant's hours varied from week to week. The employer paid claimant bi-weekly.

(4) When claimant claimed benefits for the week December 8 through December 14, 2019 (week 50-19), she reported \$0 in earnings. Based on claimant's report, the Department paid her \$185 in benefits.

(5) When claimant claimed benefits for the week December 14 through December 21, 2019 (week 51-19), she reported \$87.50 in earnings. Based on claimant's report, the Department paid her \$185 in benefits.

(6) When claimant claimed benefits for the week December 29, 2019 through January 4, 2020 (week 01-20), she reported \$100.00 in earnings. Based on claimant's report, the Department paid her \$185 in benefits.

(7) When claimant claimed benefits for the week February 9 through February 15, 2020 (week 07-20), she reported \$100.00 in earnings. Based on claimant's report, the Department paid her \$209 in benefits.

(8) When claimant claimed benefits for the week February 23 through February 29, 2020 (week 09-20), she reported \$100.00 in earnings. Based on claimant's report, the Department paid her \$209 in benefits.

(9) During an audit of claimant's claim, the Department obtained the employer's report of claimant's earnings during the weeks at issue and compared that information with claimant's reported earnings during those weeks. Based on the information the Department received from the employer, the Department issued decision # 205224.

(10) After claimant received decision # 205224, she contacted the Department by phone. On October 2, 2020, claimant spoke with a Department representative and explained that the earnings reported by the employer for the weeks at issue were incorrect, and that she was attempting to obtain her paystubs to show that. Exhibit 1. Shortly thereafter, claimant submitted paystubs for the weeks at issue to the Department. On October 7, 2020, a Department representative reviewed the paystubs and made the following entry in Department records:

“Reviewed Claimant's paystubs. They are not in Sunday to Saturday format and are bi-weekly. Unable to tell which weeks or days she worked in.”

Transcript at 7. The Department then requested clarification from the employer regarding the days and weeks claimant worked, and which earnings were attributable to those days and weeks. The employer did not respond.

**CONCLUSIONS AND REASONS:** The Department failed to meet its burden to establish that claimant received benefits to which she was not entitled for any week at issue, and claimant therefore is not liable for an 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.* Where, as here, the Department paid claimant benefits, the Department has the burden to show that those 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).

After finding that the employer's report of claimant's earnings for the weeks at issue was "not correct," Order No. 20-UI-156694 concluded that based on the employer's earnings report and claimant's paystubs, claimant was overpaid \$659 in benefits to which she was not entitled and was liable to repay to the Department. We agree with the order's finding that the employer's report of claimant's earnings for the weeks at issue was incorrect, but disagree with its conclusion that the employer's earnings report and claimant's paystubs show that claimant was overpaid \$659 in benefits.

At hearing, the Department's witness admitted that after considering both the employer's report of claimant's earnings and claimant's paystubs, which it received after it issued decision # 202554, the Department could not determine on which dates claimant worked and which of claimant's earnings were attributable to those dates. Transcript at 7. Order No. 20-UI-156694 included no explanation for how it determined claimant's "**Corrected Wages**" based on the employer's earnings report and claimant's paystubs,<sup>1</sup> and the record simply does not support a reliable determination of claimant's earnings for any week at issue. Absent such a determination, the record fails to show that claimant underreported her earnings for any week at issue, or that she was overpaid benefits for any week at issue.

The Department therefore failed to establish that claimant is liable to repay any of the benefits she received for the weeks at issue, or have any amount of the benefits she received deducted from any future benefits otherwise payable to her under ORS chapter 657.

**DECISION:** Order No. 20-UI-156694 is modified, as outlined above.

S. Alba and D. P. Hettle.

**DATE of Service: December 31, 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,

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<sup>1</sup> Order No. 20-UI-156694 at 2, 7.

Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](https://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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

**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](http://www.Oregon.gov/Employ/eab)

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