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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0771

Affirmed in Part; Reversed & Remanded in Part
Late Requests for Hearing Allowed

PROCEDURAL HISTORY: On August 25, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause and was disqualified from receiving unemployment insurance benefits effective March 22, 2020 based on the work separation (decision # 72111). On August 26, 2020, the Department served notice of an administrative decision, based in part on decision # 72111, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing a $2,265 overpayment of regular unemployment insurance benefits, a $9,000 overpayment of Federal Pandemic Unemployment Compensation (FPUC), a $339.75 monetary penalty, and 14 penalty weeks. On September 14, 2020, decision # 72111 became final without claimant having filed a request for hearing. On September 15, 2020, the August 26, 2020 administrative decision became final without claimant having filed a request for hearing.

On February 18, 2021, claimant filed late requests for hearings on decision # 72111 and the August 26, 2020 administrative decision. On August 20, 2021, the Office of Administrative Hearings (OAH) served notice of a consolidated hearing on September 1, 2021 to consider claimant's late requests for hearings on decision # 72111 and the August 26, 2020 administrative decision and, if allowed, the merits of those decisions. On September 1, 2021, ALJ Scott conducted a hearing. On September 8, 2021, ALJ Scott issued Order No. 21-UI-174250, allowing claimant's late request for hearing on decision # 72111 and reversing decision # 72111 by concluding that claimant was discharged, not for misconduct, and was not disqualified from receiving benefits. Also on September 8, 2021, ALJ Scott issued Order No. 21-UI-174279, allowing claimant's late request for hearing on the August 26, 2020 administrative decision and reversing that decision by concluding that claimant did not willfully make a misrepresentation or fail to report a material fact to obtain benefits, and was not overpaid benefits, assessed penalty weeks or a

monetary penalty. On September 27, 2021, the employer filed applications for review of Orders No. 21-UI-174250 and 21-UI-174279 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 21-UI-174250 and 21-UI-174279. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2021-EAB-0771 and 2021-EAB-0772).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching this decision.

EVIDENTIARY MATTER:[1] At hearing, the employer sought to admit an eight-page documentary exhibit that consisted of (1) six pages of claimant's timesheet records for the period from January 6, 2020 through March 27, 2020; (2) a one-page summary prepared by the employer of a March 31, 2020 telephone conversation between the employer and claimant ("the March 31 summary"); and (3) a March 31, 2020 letter from the employer to claimant (the "March 31 letter"). Transcript at 43-44. The employer asserted that they faxed these documents to the parties on August 31, 2021, the day before the hearing. Transcript at 45. The ALJ refused to admit the documents into evidence because the employer had not provided them to the parties and the ALJ "far enough in advance of the hearing, for us to receive them." Transcript at 45. However, the notice of consolidated hearing provided that any documents the parties wished to have considered at the hearing had to be provided to all parties and the ALJ "prior to the date of the scheduled hearing." *See also* OAR 471-040-0023(4) (August 1, 2004). Because the record shows that that the employer provided their documentary exhibit prior to the scheduled September 1, 2021 hearing, and because the documents were relevant and material, the ALJ erred in not admitting the documents into evidence.

Furthermore, even if the employer had not provided the documentary exhibit to the parties prior to the scheduled hearing, OAR 471-040-0023(5) permits the ALJ to receive documentary evidence at the hearing itself "if inclusion of the evidence in the record is necessary to conduct a full and fair hearing." While the record shows that the ALJ's decision not to admit the six pages of claimant's timesheets may have been harmless error inasmuch as the parties' testimony adequately covered the relevant substance of the timesheets, the record does not contain testimony addressing the two March 31, 2020 documents. Because these two documents are relevant and material to determine the nature of the work separation, their inclusion in the record was necessary for a full and fair hearing. As such, the ALJ erred in denying their admission for this reason. On remand, the employer's nine-page evidentiary exhibit should be admitted into evidence for the ALJ's consideration.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portions of the orders under review allowing claimant's late requests for hearing are **adopted**.

[1] At hearing, the ALJ identified and admitted the following exhibits into evidence: Exhibit 1 - administrative decision # 72111 and the August 26, 2020 administrative decision; Exhibit 2 - claimant's requests for hearing; Exhibit 3 - claimant's documentary exhibit; and Exhibit 4 - the Department's documentary exhibit. Audio Record at 09:04 to 09:19. However, the ALJ did not mark Exhibit 1 and Exhibit 2. In addition, it appears that the ALJ mistakenly marked claimant's documentary exhibit as "Exhibit 4" and the Department's documentary exhibit as "Exhibit 3," then referred to both exhibits by these mistaken markings in Orders No. 21-UI-174250 and 21-UI-174279, respectively. Order No. 21-UI-174250 at 1; Order No. 21-UI-174279 at 2. As a clerical matter, EAB has marked Exhibit 1 and Exhibit 2. Furthermore, in this decision, EAB treated Exhibit 3 as the claimant's documentary exhibit, and Exhibit 4 as the Department's documentary exhibit, consistent with the way the ALJ identified them at hearing.

FINDINGS OF FACT: (1) Liberty Spine & Pain Center PC employed claimant, last as a medical assistant, beginning October 25, 2019. During his period of employment, claimant was a full-time student at Western Oregon University and his medical assistant job was his main source of income for living and school expenses. Claimant also provided after hours cleaning services to the employer through his commercial cleaning business, called "Deluxe Maintenance Services."

(2) Prior to March 16, 2020, claimant worked anywhere from 20 to 27 hours per week for the employer as a medical assistant.

(3) From March 16, 2020 to March 20, 2020, claimant worked approximately 35 hours for the employer as a medical assistant.

(4) From March 24, 2020 through March 27, 2020 claimant worked approximately 22 hours for the employer as a medical assistant.

(5) On March 27, 2020, after the conclusion of his shift, claimant had a conversation with the employer's office manager. Claimant did not work for the employer again as a medical assistant after March 27, 2020. Claimant filed an initial claim for unemployment insurance benefits and indicated on his claim that the employer had laid him off due to lack of work. The employer was unaware that claimant had filed a claim for benefits.

(6) On March 31, 2020, claimant had a telephone conversation with the employer's office manager. During that conversation, claimant informed the office manager that Deluxe Maintenance Services would no longer be providing cleaning services for the employer.

(7) On April 24, 2020, the Department mailed a Form 220 (Notice of Claim Filed Request for Separation Information) to the employer that sought information to help the Department determine claimant's eligibility for benefits. On April 26, 2020, the employer's office manager completed the Form 220 and indicated that claimant's "Last Day Worked" and "Separation Date" were March 27, 2020. Exhibit 4 at 12. The employer returned the Form 220 to the Department on April 27, 2020.

(8) Claimant claimed benefits for the weeks including March 22, 2020 through August 8, 2020 (weeks 13-20 through 32-20). The Department denied benefits for the weeks including March 22, 2020 through April 4, 2020 (weeks 13-20 through 14-20), and July 19, 2020 through August 8, 2020 (weeks 30-20 through 32-20). The Department paid claimant regular benefits and FPUC benefits for the weeks including April 5, 2020 through July 18, 2020 (weeks 15-20 through 29-20).

CONCLUSIONS AND REASONS: Orders No. 21-UI-174250 and 21-UI-174279 are reversed and this matter remanded for further development of the record.

The first issue in this case is the nature of claimant's work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The record shows that the parties disagreed about the nature of the work separation. Claimant asserted that during a conversation with the employer on March 27, 2020, the employer laid him off as medical assistant due to a lack of work. Transcript at 38. The employer's office manager testified that although a March 27, 2020 conversation with claimant occurred, it was related to the employer's concerns with Deluxe Maintenance Services, not a lay off, and that claimant quit his medical assistant position on March 31, 2020 due to numerous grievances he had with the employer. Transcript at 55. The order under review weighed the conflicting evidence before accepting claimant's version of events, reasoning that "claimant was more definite during his testimony about dates and about what was said, and [the office manager] needed to correct her own testimony more than once concerning dates . . . ." Order No. 21-UI-174250 at 5. The order under review concluded that the work separation was a discharge on March 27, 2020 because claimant was willing to continue working as a medical assistant after that date, but the employer would not allow him to do so. Order No. 21-UI-174250 at 5.

However, additional inquiry is needed to determine the nature of the work separation. Although the order under review correctly noted that the office manager had to correct her testimony during the hearing regarding certain dates, the record shows that the office manager's date-related "confusion" did not involve what happened during her March 27, 2020 and March 31, 2020 conversations with claimant. Order No. 21-UI-174250 at 5. Instead, the office manager's testimony was that during a March 20, 2020 conversation with claimant, claimant told the office manager that he wanted to be laid off and that he was going to research his eligibility for unemployment benefits. Transcript at 53. According to the office manager, on March 27, 2020, the office manager and claimant had another conversation that addressed the employer's dissatisfaction with the way claimant's cleaning business was performing. Transcript at 55. However, the office manager testified that after this conversation, she was unaware that claimant would not be returning as a medical assistant and that it was not until her March 31, 2020 conversation with claimant that claimant both quit his medical assistant position with the employer and terminated his cleaning business arrangement with the employer. Transcript at 59. Significantly, both the March 31 summary and the March 31 letter, which were not admitted into evidence at hearing, appear to provide support for the office manager's position. Because the order under review did not previously consider what impact, if any, these two documents had in determining the nature of the work separation, further inquiry is necessary.

On remand, further inquiry should address the circumstances surrounding the March 31 summary and the March 31 letter, including, but not limited to, the timeframe the documents were drafted in relation to the office manager's March 31, 2020 conversation with claimant. Likewise, additional inquiry should address when the March 31, 2020 letter was provided to claimant, and by what means. The record does not show if claimant received the March 31, 2020 letter, and if so, when he received it. The record does not show if the letter included a final paycheck to claimant and, if it did, whether the paycheck was for claimant's work as the employer's medical assistant or for Deluxe Maintenance Services (or both). The record must be developed to show if claimant responded to the letter and if so, how he responded.

In addition to this line of inquiry directed at the impact of the two March 31 documents, further inquiry should also address the circumstances surrounding the employer's April 26, 2020 entries on the Department's Form 220 (Notice of Claim Filed) which reflected that claimant's "Last Day Worked" and his "Separation Date" were both "March 27, 2020." Exhibit 4 at 12. Because these entries appear to be inconsistent with the employer's testimony that claimant quit on March 31, 2020, further questions on remand should be directed at this discrepancy. Once these additional inquiries are completed on remand,

a full and fair determination of whether claimant quit his work as a medical assistant, or was discharged, can be made.

If the additional inquiry on remand shows that the employer discharged claimant, ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a). "'[W]antonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

If it is determined that claimant quit work, ORS 657.176(2)(c) requires a disqualification from unemployment insurance benefits unless the claimant demonstrates, by a preponderance of the evidence, that they had good cause for leaving work when they did. "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." OAR 471-030-0038(4). "[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work." OAR 471-030-0038(4).

Finally, if the record on remand shows that claimant was discharged for misconduct or that he quit work without good cause, further inquiry will be necessary to determine whether an overpayment of benefits occurred and, if so, whether claimant willfully made a misrepresentation or failed to report a material fact to obtain the benefits, and if claimant is subject to penalty weeks and a monetary penalty. ORS 657.310(1); ORS 657.310(2); ORS 657.215; OAR 471-030-0052 (January 11, 2018). The Department concluded, based on decision # 72111, that claimant willfully misrepresented that the employer had laid him off on March 27, 2020 and, as a result, that he was subsequently overpaid a total of $11,265 in regular and FPUC benefits, and that a monetary penalty and penalty weeks were appropriate. Order No. 21-UI-174279 reversed this determination based on Order No. 21-UI-174250's conclusion that claimant was discharged, not for misconduct, and as such no willful misrepresentation or overpayment of benefits occurred. Order No. 21-UI-174279 at 4-6. However, in light of the need to reverse Order No. 21-UI-174250 and remand the matter for further inquiry as addressed above, Order No. 21-UI-174279 must also be reversed, and the matter remanded, to ensure that any overpayment and misrepresentation decision is consistent with the outcome for Order No. 21-UI-174250, regarding the underlying decision that caused the overpayment.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of the nature of claimant's work separation from the employer, and, if the work separation was disqualifying, whether claimant is liable for an overpayment and penalties, Orders No. 21-UI-174250 and 21-UI-174279 are reversed, and these matters are remanded.

DECISION: Orders No. 21-UI-174250 and 21-UI-174279 are set aside and remanded for further proceedings consistent with this order.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: November 3, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Orders No. 21-UI-174250 or 21-UI-174279 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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