

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0854

Affirmed
Overpayment and Penalties

PROCEDURAL HISTORY: On July 16, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing a \$7,194.00 overpayment that claimant was required to repay, a \$1,438.80 monetary penalty, and a 45-week penalty disqualification from future benefits. Claimant filed a timely request for hearing. On August 17, 2021 and September 29, 2021,¹ ALJ Murdock conducted a hearing, and on October 1, 2021 issued Order No. 21-UI-176152, modifying the July 16, 2021 administrative decision by concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing overpayments of \$3,594.00 in regular unemployment insurance (UI) benefits and \$3,600.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay, a \$1,438.80 monetary penalty, and a 49-week penalty disqualification from future benefits. On October 20, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of administrative decision # 121805, issued on January 29, 2021, as necessary to complete the record under OAR 471-040-0090(1)(a). The additional evidence has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

FINDINGS OF FACT: (1) On May 12, 2020, claimant filed an initial claim for benefits. The Department established that claimant's weekly benefit amount was \$599.00, and the maximum weekly benefit amount in effect at the time was \$648.00.

¹ Neither claimant nor the employer appeared for the continued hearing on September 29, 2021.

(2) Claimant claimed benefits for the weeks from May 31, 2020 through July 11, 2020 (weeks 23-20 through 28-20) using the Department's online claims system. Those are the weeks at issue. When claimant claimed the weeks at issue, he was advised to provide true and accurate information to the best of his knowledge, and that any information he provided that was false or misleading was considered fraud and punishable by law. Claimant was also required to verify his answers before certifying them as true and accurate before submitting claims for the weeks at issue. The Department paid claimant \$599.00 in regular UI benefits and \$600.00 in FPUC benefits for each of the weeks at issue.

(3) On June 1, 2020, claimant began working for In prosperity PEO Services, LP (the employer) as a delivery driver. During that week, claimant performed services for the employer, for which he earned \$197.68. On June 3, 2020, claimant separated from the employer because he was experiencing a "flare up" of a medical condition that made it impossible for him to perform the duties required by the job. Transcript at 6. At the employer's behest, claimant submitted a resignation letter explaining that he was resigning as a result of the medical condition. Exhibit 1 at 17.

(4) On June 7, 2020, when claimant filed a claim for benefits for the week of May 31, 2020 through June 6, 2020 (week 23-20), the weekly certification form asked claimant if he "quit a job," was "fired or suspended from a job," or worked during the previous week. Exhibit 1 at 24. Claimant answered "no" to all three questions, and did not indicate on the weekly certification form that he had worked any hours or earned any pay. Exhibit 1 at 25. The weekly certification form also asked claimant if he was "both physically and mentally able to perform the work that [he] sought," and "capable of accepting and reporting for full-time, part-time, and temporary work," during the previous week. Exhibit 1 at 24. Claimant answered "yes" to both questions. Exhibit 1 at 25.

(5) On June 14, 2020, when claimant filed a claim for benefits for the week of June 7, 2020 through June 13, 2020 (week 24-20), the weekly certification form asked claimant if he was "both physically and mentally able to perform the work that [he] sought," and "capable of accepting and reporting for full-time, part-time, and temporary work," during the previous week. Exhibit 1 at 24. Claimant answered "yes" to both questions. Exhibit 1 at 25.

(6) The Department later learned through an audit process that claimant had been hired by and worked for the employer in early June 2020, and that claimant had a medical condition that prevented him from continuing to work for the employer. The employer reported that claimant voluntarily quit the job on June 3, 2020, and that he had earned \$197.68 during the time that he worked for the employer.

(7) On January 29, 2021, the Department issued decision # 121805, concluding that claimant was unable to work, and therefore ineligible to receive benefits, from May 31, 2020 through June 13, 2020 (weeks 23-20 through 24-20). EAB Exhibit 1 at 1. On February 18, 2021, decision # 121805 became final without claimant having filed a request for hearing. EAB Exhibit 1 at 1; August 17, 2021 Transcript at 27.

(8) On July 6, 2021, the Department issued decision # 115101, concluding that claimant had voluntarily quit working for the employer without good cause and was disqualified from receiving benefits effective May 31, 2020. Exhibit 1 at 4. Claimant filed a timely request for hearing on decision # 115101. On August 19, 2021, OAH issued Order No. 21-UI-172942, affirming decision # 115101. On September 8,

2021, Order No. 21-UI-172942 became final without claimant having filed an application for review with EAB.

CONCLUSIONS AND REASONS: Claimant made misrepresentations of material fact in order to obtain benefits, and is liable for an overpayment of \$3,594.00 in regular UI benefits that he is required to repay the Department, \$3,600.00 in FPUC benefits that he is required to repay via offset of future benefits, a \$1,438.80 monetary penalty, and a 49-week penalty disqualification from future benefits.

Overpayment of Regular UI 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.*

On February 18, 2021, decision # 121805, which addressed claimant's ability to work, became final. On September 8, 2021, decision # 115101, which concluded that claimant had voluntarily quit work without good cause, became final. Therefore, as a matter of law, claimant voluntarily quit work without good cause, and was unable to work during weeks 23-20 and 24-20, and as a result was ineligible for benefits for all of the weeks at issue. As a result, all of the regular UI and FPUC benefits that claimant claimed during the weeks at issue were paid in error. Claimant therefore received \$3,594.00 in regular UI benefits to which he was not entitled as a result of his misrepresentations of material fact, as discussed below. Therefore, under ORS 657.310(1), claimant is liable to repay to the Department the entire amount of overpaid regular UI benefits.

Overpayment of FPUC benefits. Under the CARES Act,² claimant received \$3,600 in FPUC benefits to which he was not entitled because he did not qualify for regular benefits under state law during the weeks at issue. Federal law provides that claimant must repay the FPUC benefits by deduction from any future regular or FPUC benefits to which he 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.³ 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."⁴ Therefore, claimant's liability for repayment of the \$3,600.00 in FPUC benefits is limited to deduction from any future regular or FPUC benefits to which claimant is otherwise entitled, within three years of when the benefits were paid.

² Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, Pub. L. 116-136.

³ Pub. L. 116-136, § 2104(f)(2).

⁴ Pub. L. 116-136, § 2104(f)(3).

Misrepresentation. 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 (January 11, 2018), which provides, in pertinent part:

(1) An authorized representative of the Employment Department shall determine the number of weeks of disqualification under ORS 657.215 according to the following criteria:

(a) 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.

(b) When the disqualification is imposed because the disqualifying act(s) under ORS 657.215 relates to the provisions of 657.176, the number of weeks of disqualification shall be the number of weeks calculated in the same manner as under subsection (a) above, or four weeks, whichever is greater.

(c) When the disqualification is imposed because the disqualifying act(s) relates to the provisions of ORS 657.155 (other than work and/or earnings), the number of weeks of disqualification shall be the number of weeks calculated in the same manner as under subsection (a) above, or the number of weeks in which a disqualifying act(s) occurred, whichever is greater.

(d) When the disqualification is imposed because the disqualifying act(s) under ORS 657.215 relates to the provisions of 657.176 and a failure to accurately report work and/or earnings, the number of weeks of disqualification shall be the number of weeks calculated in the manner set forth in subsection (a) plus four weeks.

(e) When the disqualification is imposed because the disqualifying act(s) relates to the provisions of ORS 657.155 (other than work and/or earnings) and a failure to accurately report work and/or earnings, the number of weeks of disqualification shall be the number of weeks calculated in the manner set forth in subsection (a) plus the number of weeks in which a disqualifying act(s) occurred relating to the provisions of 657.155 (other than work and earnings).

* * *

(7) The department will review the number of occurrences of misrepresentation when applying the penalty as described in ORS 657.310(2). An occurrence shall be counted each time an individual willfully makes a false statement or representation, or willfully fails to report a material fact to obtain benefits. The department shall use the date the individual failed to report a material fact or willfully made a false statement as the date of the occurrence. For an individual subject to disqualification by administrative action under 657.215, the penalty will be:

(a) For the first or second occurrence within 5 years of the occurrence for which a penalty is being assessed, 15 percent of the total amount of benefits the individual received but to which the individual was not entitled.

(b) For the third or fourth occurrence within 5 years of the occurrence for which a penalty is being assessed, 20 percent of the total amount of benefits the individual received but to which the individual was not entitled.

(c) For the fifth or sixth occurrence within 5 years of the occurrence for which a penalty is being assessed, 25 percent of the total amount of benefits the individual received but to which the individual was not entitled.

(d) 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.

(e) In cases of forgery or identity theft, 30 percent of the amount of benefits the individual received but to which the individual was not entitled.

* * *

When claimant filed his weekly claim for week 23-20, he failed to disclose that he had either voluntarily quit or been discharged⁵ from a job that week, had worked and earned wages that week, or was unable to work that week. Therefore, claimant made misrepresentations of material fact, or otherwise failed to report material facts, when claiming benefits. Further, the record shows that claimant made the misrepresentations willfully for the purpose of obtaining benefits.

At hearing, claimant testified that he “was sick during the time” that he claimed the week of benefits and “whipped right through” the questions without paying attention to what he was doing, characterizing the misreported facts as an “error.” August 17, 2021 Transcript at 29. However, claimant also testified that he “just answered yes” to all of the questions on the weekly certification because he was in “a lot of pain” as a result of his medical condition. August 17, 2021 Transcript at 33. This statement is contradicted by the weekly certification itself, which shows that claimant did *not* answer “yes” to all of the questions; rather, claimant answered “no” to questions 1A, 1B, 1C, 2, and 4, and “yes” to questions 3A, 3B, and 3C. Exhibit 1 at 25. That is

⁵ The record contains conflicting evidence regarding the nature of the separation and whether claimant either quit or was discharged on June 3, 2020. There is no indication in the record that claimant separated from the employer due to a lack of work. As such, the separation would have been potentially disqualifying under ORS 657.176 in either circumstance.

precisely the set of answers that claimant would have needed to give on the weekly certification to avoid raising concerns about his eligibility for benefits that week. *See* Exhibit 1 at 24. Further, claimant contradicted himself at hearing by testifying that he failed to report his earnings for that week not because he misunderstood the question or failed to read it, but because he “didn’t think it would have been that big of a [deal].” August 17, 2021 Transcript at 29. Finally, during the fact-finding interview with the Department investigator who later issued decisions # 121805 and 115101, claimant was asked, “Were you worried if you reported the work sep[aration] or that you couldn’t work that it could potentially deny your benefit’s [sic],” and claimant responded, “Yeah I got a mortgage to pay and I’m already screwed as it is.” Exhibit 1 at 22.

In sum, the record shows that claimant likely was aware that he was answering the questions on the weekly certification for week 23-20 falsely in order to avoid raising concerns about his eligibility for benefits, and did not answer the questions falsely as a matter of simple error. For that reason, claimant willfully made misrepresentations of material fact for the purposes of obtaining benefits that week.

The order under review correctly concluded that claimant should be assessed 49 penalty weeks. Order No. 21-UI-176152 at 6. Here, the assessment of penalty weeks results primarily from claimant’s failure to disclose a work separation and to accurately report work and/or earnings. Therefore, the calculation under OAR 471-030-0052(1)(d) controls, which is the calculation under OAR 471-030-0052(1)(a) plus four additional weeks. The total amount of overpaid benefits, including FPUC benefits,⁶ is \$7,194.00. When divided by the maximum weekly benefit amount in effect at the time that claimant filed his initial claim (\$648.00), rounded off to the nearest two decimal places, multiplied by four, and rounded up to the nearest whole number, the result is 45 weeks. Therefore, with the addition of the four weeks required under OAR 471-030-0052(1)(d), claimant is liable for 49 penalty weeks.

The order under review also correctly concluded that claimant was subject to a 20 percent monetary penalty for “three to four occurrences of willful misrepresentation.” Order No. 21-UI-176152 at 6. As discussed above, the record conclusively shows that claimant made three⁷ separate willful misrepresentations of material fact—regarding his separation from work, ability to work, and earnings—on his weekly certification for week 23-20. Therefore, the 20 percent monetary penalty rate under OAR 471-030-0052(7)(b) applies. As a result, claimant is liable for a monetary penalty of \$1,438.80, which is 20 percent of the total overpayment amount.

For the above reasons, claimant made a misrepresentation of material fact in order to obtain benefits, and is therefore liable for an overpayment of \$3,594.00 that he is required to repay to the Department, an

⁶ At hearing, the Department representative testified that effective June 4, 2021, the Department was required to include FPUC benefits in the calculation of penalties for misrepresentation. Audio Record September 29, 2021 at 8:15. *See generally* May 5, 2021 U.S. Dep’t of Labor UI Program Letter No. 20-21.

⁷ The record does not contain sufficient evidence to conclude that claimant made a willful misrepresentation of material fact regarding his ability to work during week 24-20. Whether claimant did so during week 24-20 does not affect the outcome in this matter, because the result would be either three or four separate “occurrences” of willful misrepresentation, and the 20 percent penalty rate under OAR 471-030-0052(7)(b) would therefore apply either way. As such, EAB does not reach a conclusion as to whether claimant made a willful misrepresentation on his weekly certification for week 24-20.

overpayment of \$3,600.00 in FPUC that is required to be deducted from any future benefits he is otherwise eligible for, a 49-week penalty disqualification, and a \$1,438.80 monetary penalty.

DECISION: Order No. 21-UI-176152 is affirmed.

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

DATE of Service: November 24, 2021

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

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.

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