

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0631

Order No. 22-UI-193616 ~ Affirmed – Ineligible Weeks 21-20 through 22-20
Order No. 22-UI-193620 ~ Modified – Eligible Weeks 26-20 through 32-20
Order No. 22-UI-193622 ~ Modified – Overpayment Reduced

PROCEDURAL HISTORY: On September 15, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from May 17, 2020 through August 15, 2020 (weeks 21-20 through 33-20) and therefore was not eligible for unemployment insurance benefits for those weeks and until the reason for the denial had ended (decision # 133356). Also on September 15, 2020, the Department served notice of an administrative decision concluding that claimant was not available for work from March 22, 2020 through August 15, 2020 (weeks 13-20 through 33-20) and therefore was not eligible for benefits for those weeks and until the reason for the denial had ended (decision # 114151). On October 5, 2020, decisions # 133356 and 114151 became final without claimant having filed requests for hearing. On January 21, 2021, the Department served notice of an administrative decision, based in part on decisions # 133356 and 114151, assessing an overpayment of \$4,674 in regular unemployment insurance (regular UI) benefits and \$10,200 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department (decision # 104739). On February 10, 2021, decision # 104739 became final without claimant having filed a request for hearing.

On February 12, 2021, claimant filed late requests for hearing on decisions # 133356, 114151, and 104739. ALJ Kangas considered claimant's request regarding decision # 114151, and on April 1, 2021, issued Order No. 21-UI-163919, dismissing that request as late without a showing of good cause, subject to claimant's right to renew the request by responding to an appellant questionnaire by April 15, 2021. On April 13, 2021, claimant filed a timely response to the appellant questionnaire. On June 17, 2021, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 21-UI-163919 was vacated and that a new hearing would be scheduled to determine whether claimant's late request for hearing on decision # 114151 should be allowed, if so, the merits of that decision.

On May 5, 2022, ALJ Scott conducted a hearing on decisions # 133356, 114151, and 104739. On May 13, 2022, ALJ Scott issued Order No. 22-UI-193616, allowing claimant's late request for hearing on decision # 133356 and modifying decision # 133356 by concluding that claimant was not available for

work from May 17, 2020 through May 30, 2020 (weeks 21-20 through 22-20) and therefore not eligible for benefits for those weeks. Also on May 13, 2022, ALJ Scott issued Order No. 22-UI-193620, allowing claimant's late request for hearing on decision # 114151 and modifying decision # 114151 by concluding that claimant was not available for work from June 21, 2020 through August 8, 2020 (weeks 26-20 through 32-20) and therefore not eligible for benefits for those weeks. Also on May 13, 2022, ALJ Scott issued Order No. 22-UI-193622, allowing claimant's late request for hearing on decision # 104739 and modifying decision # 104739 by concluding that claimant received \$2,214 in regular UI benefits and \$4,200 in FPUC benefits to which he was not entitled and was liable to repay to the Department by deduction from future benefits.

On June 1, 2022, claimant filed applications for review of Orders No. 22-UI-193616, 22-UI-193620, and 22-UI-193622 with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 22-UI-193616, 22-UI-193620, and 22-UI-193622. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2022-EAB-0631, 2022-EAB-0633, and 2022-EAB-0634).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

Based on a *de novo* review of the entire consolidated record in these cases, and pursuant to ORS 657.275(2), Order No. 22-UI-193616, which allowed claimant's late request for hearing on decision # 133356 and modified decision # 133356 by concluding that claimant was not available for work from May 17, 2020 through May 30, 2020 (weeks 21-20 through 22-20) because he was outside his normal labor market area and therefore not eligible for benefits for those weeks, is **adopted**. Additionally, the portions of Orders No. 22-UI-193620 and 22-UI-193622 that allowed claimant's late requests for hearings on decisions # 114151 and 104739 are **adopted**. The remainder of this consolidated decision addresses the merits of decisions # 114151 and 104739.

FINDINGS OF FACT: (1) Beginning prior to October 2019, Asula Chiropractic and Wellness Center Inc. employed claimant as a massage therapist. Claimant's employment with the employer was a traditional employer-employee relationship in which the wages claimant earned from the employer earned him credit toward monetary eligibility under the regular unemployment insurance program. Claimant also performed services as a massage therapist in a self-employed capacity separate from his work for the employer.

(2) Starting in the fall of 2019, claimant stopped working full-time work for the employer. Claimant informed the employer's owner that he intended to focus on his self-employment venture full-time, and he and the owner agreed claimant would work for the employer in a less than full-time capacity, mainly covering shifts for other therapists who called out sick. From around September 2019 through mid-March 2020, claimant worked only one or two shifts per pay period for the employer.

(3) In mid-March 2020, following the onset of the COVID-19 pandemic, the employer temporarily closed their clinic in order to comply with government restrictions. Because the clinic closed, claimant

temporarily stopped working for the employer. At that time, claimant also stopped performing his separate self-employment services.

(4) On March 25, 2020, claimant filed an initial claim for regular unemployment insurance (regular UI) benefits. The Department determined that claimant had earned sufficient wages from the employer in the base year period of his initial claim to qualify him for a monetarily valid claim for regular UI benefits with a weekly benefit amount of \$246.¹

(5) On May 4, 2020, some pandemic-related restrictions were lifted and the employer reopened the clinic where claimant worked. On May 13, 2020, the employer sent claimant a return-to-work agreement. Claimant filled out the agreement, indicating that he intended to remain on call to work as a substitute filling in when other therapists called out.

(6) On May 17, 2020 claimant took a trip to California to visit family and friends. On June 1, 2020, claimant's trip to California ended and he returned to Portland, Oregon, which was where the employer's clinic was located, and was determined by the Department to be claimant's normal labor market area.

(7) On a number of occasions between June 16, 2020 and August 2020, the employer sent emails to claimant offering him full-time shifts at the clinic. Claimant did not accept any of the offered work because he was pursuing his self-employment venture and could not work full-time shifts for the employer while doing so.

(8) Claimant claimed benefits for the weeks from March 22, 2020 through August 15, 2020 (weeks 13-20 through 33-20). The Department assigned claimant waiting-week credit for week 13-20, paid claimant benefits for weeks 14-20 through 32-20, and did not pay claimant benefits for week 33-20 because claimant earned more than his weekly benefit amount during that week.²

(9) The Department paid claimant a total of \$4,674 in regular UI benefits for weeks 14-20 through 32-20. The Department also paid claimant \$600 per week in FPUC benefits for weeks 14-20 through 30-20, for a total of \$10,200 in FPUC benefits.

CONCLUSIONS AND REASONS: Claimant was available for work from June 21, 2020 through August 8, 2020 (weeks 26-20 through 32-20), and is eligible for benefits for those weeks. Claimant is liable for an overpayment of \$492 to be deducted from future benefits payable and an overpayment of \$1,200 in FPUC benefits to be deducted from future benefits payable.

¹ Because claimant was monetarily eligible for regular UI benefits, the Department determined that he was not eligible for Pandemic Unemployment Assistance (PUA) benefits. The Department made this determination because, although claimant had engaged in a self-employment venture alongside his traditional employment for the employer, and PUA was a benefits program intended, in part, to assist self-employed individuals, under federal law PUA is not available to individuals who are eligible for regular UI benefits.

² As to week 13-20, individuals receive unpaid credit for the first week of benefits that they claim and for which they meet all applicable eligibility requirements. *See* ORS 657.155(d). As to week 33-20, Individuals are not considered "unemployed," and therefore are not eligible for benefits, during any week in which they earn remuneration greater than or equal to their weekly benefit amount. *See* ORS 657.100(1).

Order No. 22-UI-193620 – Available for Work. This portion of this decision relates to the portion of Order No. 22-UI-193620 concluding that claimant was not available for work from June 21, 2020 through August 8, 2020 (weeks 26-20 through 32-20) and therefore not eligible for benefits for those weeks.

To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). For an individual to be considered “available for work” for purposes of ORS 657.155(1)(c), they must be:

(a) Willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, unless such part time or temporary opportunities would substantially interfere with return to the individual’s regular employment; and

* * *

(d) Physically present in the normal labor market area as defined by section (6) of this rule, every day of the week * * *.

OAR 471-030-0036(3) (effective December 8, 2019) & OAR 471-030-0036(3) (August 2, 2020 through December 26, 2020).

However, Oregon temporary rules set out unemployment insurance provisions applicable to the unique situations arising due to COVID-19 and the actions to slow its spread. *Former temporary* OAR 471-030-0070(5) (effective March 8, 2020 through September 12, 2020) provides that a person will not be deemed unavailable for work because:

* * *

(d) They normally work less than full-time and are only available for less than full-time work.

Claimant received waiting week credit for week 13-20 and benefits for weeks 14-20 through 32-20, and the Department therefore had the burden to prove that claimant should not have received credit or been paid benefits for those weeks. *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).

Order No. 22-UI-193620 concluded that claimant was not available for work during weeks 26-20 through 32-20, and therefore ineligible for benefits for those weeks, because work was available at the employer’s clinic beginning mid-June 2020 and throughout July and August 2020 in the form of full-time shifts but claimant was unwilling to work those shifts. Order No. 22-UI-193620 at 6-7. However, the record does not support the conclusion that claimant was not available for work during weeks 26-20 through 32-20.

Typically, an individual who is not willing to work full time is not considered available for work under OAR 471-030-0036(3)(a). However, under *former temporary* OAR 471-030-0070(5), if claimant

normally worked less than full-time and was only available for less than full-time work during weeks 26-20 through 32-20, he would not be considered unavailable for work because of his unwillingness to work full-time. Here, the record shows that claimant normally worked less than full-time for the employer because beginning in the fall of 2019, claimant and the employer agreed that claimant would work for the employer in a less-than-full-time capacity on an as-needed basis. The record shows this less than full-time work arrangement continued into the spring of 2020 and after the employer's clinic reopened in May 2020. This is because during the period of September or October 2019 through mid-March 2020, claimant worked only one or two shifts per pay period for the employer, and upon agreeing to return to work on May 13, 2020, claimant indicated that he intended merely to remain on call to work as a substitute filling in when other therapists called out. The record additionally shows that during weeks 26-20 through 32-20, when claimant declined the employer's offers of work in the form of full-time shifts, claimant was only available for less than full-time work because he was pursuing his self-employment venture and not available to work full-time.

The record therefore shows that claimant normally worked less than full-time and was only available for less than full-time work during weeks 26-20 through 32-20 and, under temporary OAR 471-030-0070(5)(d), was available for work during those weeks. Claimant therefore was eligible for benefits for those weeks. As to weeks 13-20 through 25-20, the Department did not otherwise assert, in connection with decision # 114151 and Order No. 22-UI-193620, any other basis for claimant to be ineligible for benefits for those weeks. However, in connection with decision # 133356 and per Order No. 22-UI-193616, which this consolidated decision has adopted, claimant was unavailable for work and therefore ineligible for benefits for weeks 21-20 and 22-20. Finally, as to week 33-20, the record shows that claimant was ineligible for benefits because his earnings for that week exceeded his weekly benefit amount. The record therefore shows that claimant was eligible for waiting week credit or benefits for weeks 13-20 through 20-20 and 23-20 through 32-20.

Order No. 22-UI-193622 – Overpayment of Regular UI Benefits. This portion of this decision relates to the portion of Order No. 22-UI-193622 concluding that claimant received \$2,214 in regular UI benefits and \$4,200 in FPUC benefits to which he was not entitled and therefore was liable repay the Department.

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.

Order No. 22-UI-193622 concluded that claimant was overpaid \$2,214 in regular UI benefits and \$4,200 in FPUC benefits because, per Order No. 22-UI-193616, claimant was outside of his normal labor market area in California and not available for work for weeks 21-20 and 22-20, and per Order No. 22-UI-193620, claimant was not available for work for weeks 26-20 through 32-20 because he declined the employer's offers of full-time work during those weeks. Order No. 22-UI-193622 at 5. However, the record does not show that claimant was overpaid benefits in the amounts stated in Order No. 22-UI-193622.

As discussed above, under temporary OAR 471-030-0070(5)(d), claimant was available for work during weeks 26-20 through 32-20 and therefore was eligible for benefits for those weeks. Accordingly, claimant was not overpaid regular UI benefits for weeks 26-20 through 32-20. However, because claimant was *not* available for work, and therefore not eligible for benefits, for weeks 21-20 through 22-20, claimant was overpaid benefits for those weeks. The record shows that when claimant claimed benefits for weeks 21-20 and 22-20, the Department paid claimant benefits but then subsequently reversed that decision when it issued decision # 133356, which determined that claimant was not available for work for those weeks because he was outside his normal labor market area. Claimant therefore was overpaid benefits for weeks 21-20 and 22-20 under ORS 657.315(1) because an initial decision to pay benefits was subsequently reversed by a decision finding claimant was not eligible for the benefits.

Accordingly, claimant was overpaid \$246 in regular UI benefits for each of weeks 21-20 and 22-20, for a total regular UI overpayment of \$492. Per ORS 657.315(1), claimant is liable to have the \$492 he received in regular UI benefits during the weeks at issue deducted from any future benefits otherwise payable to him under ORS Chapter 657 during the five-year period following the date decision # 104739 becomes final.

Overpayment of FPUC Benefits. Because claimant was not eligible for benefits for weeks 21-20 and 22-20, as discussed above, claimant also was overpaid \$600 in FPUC benefits for each of weeks 21-20 and 22-20, for a total FPUC overpayment of \$1,200. Under the provisions of the CARES Act, Pub. L. 116-136, claimant received the \$1,200 in FPUC benefits to which he was not entitled because he was not eligible for benefits under state law as explained above. *See* U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 15-20 (April 4, 2020) at I-7 ("If an individual is deemed ineligible for regular compensation in a week and the denial creates an overpayment for the entire weekly benefit amount, the FPUC payment for the week will also be denied. And the FPUC overpayment must also be created."). Pursuant to Pub. L. 116-136, § 2104(f)(2), an individual who receives FPUC payments to which the individual was not entitled is liable to repay those benefits, unless the Department waives such repayment because it determines that the payment of those benefits was without fault on the part of the individual and such repayment would be contrary to equity and good conscience. The record does not show the Department has waived repayment here. Therefore, claimant is liable for the overpayment of \$1,200 in FPUC benefits he received for weeks 21-20 and 22-20. Under Pub. L. 116-136, § 2104(f)(3)(A), the Department may recover the FPUC benefits by deduction from any future FPUC payments payable to claimant or from any future unemployment compensation payable to claimant under any state or federal unemployment compensation law administered by the Department during the three-year period following the week decision # 104739 becomes final.

In sum, claimant was available for work and therefore eligible for waiting week credit or benefits for weeks 13-20 through 20-20 and 23-20 through 32-20. Claimant was *not* available for work during weeks 21-20 and 22-20 and therefore was ineligible for benefits for those weeks. Claimant was also ineligible for benefits for week 33-20 because of excess earnings. Because claimant received benefits for which he was not eligible for weeks 21-20 through 22-20, claimant is liable for an overpayment of \$492 in regular UI benefits to be deducted from future benefits payable during the five-year period following the date decision # 112944 becomes final. Claimant is also liable for an overpayment of \$1,200 in FPUC benefits to be deducted from future benefits payable during the three-year period following the date decision # 112944 becomes final.

DECISION: Order No. 22-UI-193616 is affirmed. Order No. 22-UI-193620 is modified, as outlined above. Order No. 22-UI-193622 is modified, as outlined above.

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

DATE of Service: September 2, 2022

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.

NOTE: The Department may defer recovery or completely waive the overpaid amount if certain standards are met. To make a request for Waiver of Overpayment Recovery, call 503-947-1995 or email OED_Overpayment_unit@employ.oregon.gov . You must submit waiver applications that correspond to the program for which you were overpaid benefits. **If you were overpaid benefits under both state and federal benefits programs you will need to file two separate waiver applications.** To access a State UI Overpayment Waiver application go online to <https://unemployment.oregon.gov/waivers> and click the link for “State UI Overpayment Waiver”. To access a Federal Program Overpayment Waiver application go online to <https://unemployment.oregon.gov/waivers> and click the link for “Federal Program Overpayment Waiver”.

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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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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