

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1113

Modified
Overpayment Assessed, No Penalties

PROCEDURAL HISTORY: On September 16, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant willfully made a misrepresentation to obtain benefits, and assessing an overpayment of \$16,848 in regular unemployment insurance (regular UI) benefits, \$648 in Pandemic Emergency Unemployment Compensation (PEUC), 9,600 in Federal Pandemic Unemployment Compensation benefits (FPUC), a \$8,128.80 monetary penalty, and a 52-week penalty disqualification from future benefits. Claimant filed a timely request for hearing. On October 31, 2022, ALJ Frank conducted a hearing, and on November 2, 2022 issued Order No. 22-UI-206491, affirming the September 16, 2022 administrative decision. On November 6, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) At all times relevant to this decision, claimant had two employers, Western Psychological & Counseling Services, P.C. and the Oregon Department of Human Services (DHS). On or about March 31, 2020, Western Psychological laid claimant off work due to the COVID-19 pandemic. Claimant continued working for DHS.

(2) Western Psychological advised in their layoff notice that claimant may be eligible for unemployment insurance. Claimant was interested in claiming but had never made an unemployment insurance claim before. Claimant read through materials on the Department's website but could not find instructions for claiming in a situation like hers where an individual has two jobs but is laid off from one of them.

(3) On April 3, 2020, claimant filed an initial claim for regular unemployment insurance (regular UI) benefits. Because Western Psychological had laid her off, claimant intended for her claim to apply only to them, although she reported both of her jobs on her initial claim application because the instructions required her to do so. The Department determined that claimant had a valid claim for benefits with a weekly benefit amount of \$648.

(4) On April 9, 2020, the Department sent claimant a Wage and Potential Benefit Report that listed claimant's weekly benefit amount and the wages claimant earned from both employers that were used to determine the claim. Although the Department had determined her claim correctly, claimant thought that the Department had set her weekly benefit amount too high by factoring in wages she had earned from both employers. Claimant thought this was incorrect since she believed her claim pertained only to her work for Western Psychological. Claimant thought she would be entitled to half the weekly benefit amount but suspected the other half was an overpayment. Claimant checked the Department website for clarification without success. She tried calling the Department but could not get through because of high call volume. That day, claimant faxed a direct deposit form to the Department and wrote a note on the form stating, "you are overpaying me," and advising that she was laid off from only one of her jobs. Claimant left her telephone number on the note and asked the Department call her because she could not get through. Claimant did not receive a response. Exhibit 2 at 7.

(5) On multiple occasions during the week of April 12, 2020 through April 18, 2020, claimant attempted to call the Department about whether her benefit amount was too high but could not get through. That week, claimant used the Department's online system to claim benefits for the week of April 5, 2022 through April 11, 2022 (week 15-20). When claimant claimed week 15-20, the system asked her, "Did you work last week or receive any vacation or holiday pay?" Claimant answered "No" to this question because she thought the question only pertained to work for Western Psychological, and she had not worked for that employer since before March 31, 2020. Transcript at 6. On April 20, 2020, claimant again tried calling the Department without success.

(6) The Department paid claimant for week 15-20. Thereafter, claimant claimed benefits each week through October 10, 2020. All told, claimant claimed benefits for the weeks from April 5, 2020 through October 10, 2020 (weeks 15-20 through 41-20). These are the weeks at issue. The Department paid claimant \$648 of regular UI benefits for each of weeks 15-20 through 40-20, \$648 of Pandemic Emergency Unemployment Compensation benefits for week 41-20, and \$600 of FPUC benefits for each of weeks 15-20 through 30-20. Claimant received a total amount of \$16,848 in regular UI benefits ($\$648 \times 26 \text{ weeks} = \$16,848$), \$648 in PEUC benefits ($\$648 \times 1 \text{ week} = \648), and \$9,600 in FPUC benefits ($\$600 \times 16 \text{ weeks} = \$9,600$).

(7) For each of the weeks at issue, claimant answered "No" to the question, "Did you work last week or receive any vacation or holiday pay?" Transcript at 6. However, for each of the weeks at issue, claimant worked for DHS and had earnings that exceeded her weekly benefit amount. If claimant had accurately answered "Yes," the system would have prompted her to report her weekly hours and earnings from DHS, and not paid claimant for any week where her earnings exceeded her weekly benefit amount. As a result, if claimant had accurately answered "Yes," the Department would not have paid claimant benefits for the weeks at issue.

(8) Claimant answered "No" to the question each week because she continued to believe the question only pertained to work for Western Psychological. Claimant also continued to suspect that the Department had processed her claim incorrectly by factoring in wages she had earned from both her employers to determine her weekly benefit amount. As a result, because she believed she was entitled to half of what the Department had paid her for the weeks at issue, claimant set aside half of the money she was paid for the weeks at issue so she could pay it back if it was confirmed that she was overpaid.

(9) In late November 2020, claimant wanted to restart her claim and discovered the Department's website had been updated to allow her to send a ContactUs request for a representative to contact her. Claimant sent a request to be contacted. On November 24, 2020, a representative called claimant and claimant mentioned her mistaken belief that her claim pertained only to Western Psychological. The representative informed claimant that the weekly claim question, for which claimant had answered "No" for each of the weeks at issue, pertained to work claimant performed for any and all employers, not just Western Psychological. On November 25, 2020, claimant had a second call with the representative and provided the Department with her week-by-week earnings from DHS for the weeks at issue. The Department thereafter audited DHS and obtained claimant's earnings information for the weeks at issue directly from DHS.

CONCLUSIONS AND REASONS: Order No. 22-UI-206491 is modified. Claimant received \$16,848 in regular UI benefits, \$648 in PEUC benefits, and \$9,600 in FPUC benefits to which she was not entitled. Claimant is liable to repay the \$16,848 in regular UI benefits or have it deducted from any future benefits otherwise payable to claimant during the five-year period following the date the September 16, 2022 administrative decision becomes final. Claimant is also liable for an overpayment of \$648 in PEUC benefits and \$9,600 in FPUC benefits to be deducted from any future unemployment compensation payable to her under any unemployment compensation law administered by the Department during the three-year period following the date the September 16, 2022 administrative decision becomes final. Claimant is not liable for a monetary penalty or penalty weeks.

Remuneration. An individual is only eligible to receive unemployment insurance benefits if they are an "unemployed" within the meaning of ORS Chapter 657. ORS 657.155(1) ("An unemployed individual shall be eligible to receive benefits with respect to any week . . ."). Under ORS 657.100(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." Here, claimant's weekly earnings from DHS exceeded her weekly benefit amount each week for all of the weeks at issue. Claimant therefore did not constitute an "unemployed individual" per ORS 657.100(1) for any of the weeks at issue and, accordingly, was not eligible for benefits for those weeks under ORS 657.155(1).

Overpayment of Regular UI Benefits. ORS 657.310(1)(a) 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.* Such benefits "may be collected for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final." ORS 657.310(1)(c). In addition, an individual who has been overpaid benefits under ORS 657.215 because the individual made a willful misrepresentation to obtain benefits is liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2)(a). Moreover, 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. "[O]verpaid benefits that are subject to the penalty imposed under [ORS 657.310(2)(a)] may be collected at any time." ORS 657.310(2)(b). Where the Department

has paid benefits, it has the burden to prove benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

The order under review concluded that claimant was overpaid benefits to which she was not entitled because she made false statements on her weekly continued claim forms. Order No. 22-UI-206491 at 6. The record supports this conclusion. The order under review also concluded that claimant's false statements were willfully made to obtain benefits. Order No. 22-UI-206491 at 6-9. The record does not support this conclusion. The order under review is modified as outlined below to reflect that claimant is not liable for a monetary penalty or penalty weeks.

The record shows that for each of the weeks at issue, claimant made a false statement and received benefits to which she was not entitled because she answered "No" to the question "Did you work last week or receive any vacation or holiday pay?" Transcript at 6. The statements were false because for each week, claimant performed work for her employer DHS. The false statements resulted in claimant receiving benefits to which she was not entitled, because if claimant had accurately answered "Yes" and reported her weekly hours and earnings from DHS, the Department would not have paid claimant benefits for the weeks at issue. Claimant answered "No" to the question because she mistakenly believed that the question pertained to her work for Western Psychological, for whom claimant had not worked since before the weeks at issue. Although claimant's false statements were made as the result of an error, ORS 657.310(1)(a) nevertheless applies because the provision is applicable where an individual makes a false statement, regardless of their knowledge or intent.

However, claimant is not liable for a monetary penalty or penalty weeks under ORS 657.310(2)(a) and ORS 657.215. The record fails to show that when claimant answered "No" to the question "Did you work last week or receive any vacation or holiday pay?" that her answers were false statements willfully made to obtain benefits. Transcript at 6. Rather, claimant answered "No" to the question because she mistakenly believed that the question pertained to her work for Western Psychological. Claimant therefore made the false statements because of an error, and not because of willful misrepresentation.

That claimant was operating under a mistaken belief that her claim pertained only to Western Psychological was not illogical under the circumstances and was consistent with her conduct. Upon the onset of the COVID-19 pandemic, Western Psychological laid off claimant and advised in their layoff notice that claimant may be eligible for unemployment insurance. Claimant, who had never made an unemployment insurance claim before, read through materials on the Department's website but could not find instructions for claiming in a situation like hers. When claimant learned her weekly benefit amount was \$648 she thought it was too high and tried unsuccessfully to call the Department. She then faxed the Department a form advising that she was only laid off from one of her jobs and thought she was being overpaid, and requested the Department call her. Claimant tried multiple times from April 12 through 20, 2020 to call the Department, without success.

Claimant then claimed the weeks at issue, and received payments. The claim question did not elaborate on what was meant by "work" and it is not illogical that an inexperienced claimant who was unable to obtain assistance from the Department would view "work" as confined to work performed for the employer who had just laid her off, and which prompted her to file a claim. Nor is it illogical under the circumstances for claimant to continue giving the same answer to the question from week to week, since nothing occurred during the claiming sequence to correct claimant's mistaken belief. The entire time,

claimant set aside half of the benefits she received because she suspected it was overpaid because the Department had processed her claim incorrectly by taking into account her DHS wages. This behavior was consistent with someone operating under a mistaken understanding of how unemployment insurance works. When a Department representative informed claimant that the weekly claim question pertained to work claimant performed for all employers, not only the employer that laid her off, claimant provided her DHS earnings information to the Department the next day. Claimant's prompt disclosure of her DHS earnings once she learned that she should have reported it was consistent with claimant having withheld that information previously because she was mistaken, and not because of a willful misrepresentation to obtain benefits.

Accordingly, claimant made the false statements because of an error, and not willfully to obtain benefits. Claimant therefore was overpaid \$16,848 in regular UI benefits ($\$648 \times 26 \text{ weeks} = \$16,848$) and is liable under 657.310(1)(c) to repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to claimant during the five-year period following the date the September 16, 2022 administrative decision becomes final. Claimant is not liable for a monetary penalty or penalty weeks under ORS 657.310(2)(a) and ORS 657.215.

Repayment of PEUC Benefits. Under the provisions of the CARES Act, 15 U.S.C. § 9025, claimant also received \$648 in PEUC benefits ($\$648 \times 1 \text{ week} = \648) to which she was not entitled because she was not eligible for benefits under state law as explained above. Pursuant to 15 U.S.C. § 9025(e)(2), an individual who receives PEUC 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 \$648 in PEUC benefits she received during the weeks at issue. Under 15 U.S.C. § 9025(e)(3), the Department may recover the PEUC benefits by deduction from any future PEUC payments payable to her or from any future unemployment compensation payable to her under any state or federal unemployment compensation law administered by the Department during the three-year period following the date the September 16, 2022 administrative decision becomes final.

Repayment of FPUC Benefits. Under the provisions of the CARES Act, 15 U.S.C. § 9023, claimant also received \$9,600 in FPUC benefits to which she was not entitled because she 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 15 U.S.C. § 9023(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.

Claimant therefore is liable for the overpayment of \$9,600 in FPUC benefits ($\$600 \times 16 \text{ weeks} = \$9,600$) she received during the weeks at issue. Under 15 U.S.C. § 9023(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 date the September 16, 2022 becomes final.

In sum, the order under review is modified. Claimant is liable for an overpayment of \$16,848 in regular UI benefits and is liable to repay the benefits or have the amount of the benefits deducted from future benefits payable during the five-year period following the date the September 16, 2022 administrative decision becomes final. Claimant is liable for an overpayments of \$648 in PEUC benefits and \$9,600 in FPUC benefits to be deducted from future benefits payable during the three-year period following the date the September 16, 2022 administrative decision becomes final. Claimant is not liable for a monetary penalty or penalty weeks.

DECISION: Order No. 22-UI-206491 is modified, as outlined above.

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

DATE of Service: January 12, 2023

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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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