

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1127

Affirmed
Overpayment Assessed

PROCEDURAL HISTORY: On August 8, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was paid unemployment insurance benefits to which she was not entitled and assessing an overpayment of \$7,951 in regular unemployment insurance (regular UI) benefits that claimant was liable to repay the Department or have deducted from future benefits payable and \$6,000 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was liable to have deducted from future benefits payable (decision # 84051). Claimant filed a timely request for hearing. On September 20, 2022, the Office of Administrative Hearings (OAH) served a notice of hearing that scheduled a hearing on decision # 84051 for October 10, 2022, but which failed to state that one of the issues to be considered was an overpayment of FPUC benefits. On October 10, 2022, ALJ Blam-Linville conducted a hearing on decision # 84051. On October 12, 2022, OAH served a notice of hearing that scheduled a continuation of the hearing previously held for October 31, 2022, and properly stated that one of the issues to be considered was an overpayment of FPUC benefits. On October 31, 2022, ALJ Blam-Linville conducted a continued hearing on decision # 84051, and on November 4, 2022 issued Order No. 22-UI-206675, affirming decision # 84051. On November 12, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Prior to the onset of the COVID-19 pandemic, claimant worked as a licensed medication aide at a nursing facility for nineteen years. In April or May 2020, state authorities closed the facility and evacuated its patients due to concerns regarding COVID-19 infections. The nursing facility no longer had medication aide work for claimant and sent her home. The next day, the nursing facility offered claimant work doing plumbing, painting, and roofing. Claimant declined to return to the nursing facility to perform that work.

(2) On May 5, 2020, claimant filed an initial claim for regular unemployment insurance (regular UI) benefits. On the initial claim application, claimant reported her work separation from the nursing facility as a lack of work.

(3) The Department determined that claimant had a valid claim for regular UI benefits with a weekly benefit amount of \$459. The Department later redetermined claimant's claim and increased her weekly benefit amount by \$155 to \$614. Claimant claimed benefits for the weeks including May 17, 2020 through August 15, 2020 (21-20 through 33-20).

(4) The Department paid claimant \$614 in regular UI benefits for each of weeks 21-20 through 32-20. For week 33-20, the Department paid claimant \$583 because she had earned \$184 that week, and her earnings had the effect of reducing her benefit amount for that week from \$614 to \$583. The Department also paid claimant \$600 in FPUC benefits for each of weeks 21-20 through 30-20. All told, claimant received \$7,951 in regular UI benefits, $((12 \text{ weeks} \times \$614 = \$7,368) + (1 \text{ week} \times \$583 = \$583) = \$7,951)$, for the weeks at issue. Claimant also received a total of \$6,000 in FPUC benefits, $(10 \text{ weeks} \times \$600 = \$6,000)$, for the weeks at issue.

(5) After the Department paid claimant for the weeks at issue, it adjudicated claimant's work separation from the nursing facility. On December 28, 2020, the Department issued decision # 92404. Decision # 92404 concluded that claimant had voluntarily quit working for the nursing facility without good cause and was disqualified from receiving benefits effective May 3, 2020. *See* Exhibit 1 at 18.

(6) Claimant timely requested a hearing on decision # 92404 and OAH noticed a hearing on the decision scheduled for July 13, 2021. Claimant did not appear for the July 13, 2021 hearing and her appeal of decision # 92404 was dismissed. On August 28, 2022, claimant filed a late request to reopen the July 13, 2021 hearing. Following an October 10, 2022 hearing on claimant's reopen request, on October 12, 2022, ALJ Blam-Linville issued Order No. 22-UI-204916, which denied claimant's late request to reopen and left decision # 92404 undisturbed. On November 1, 2022, Order No. 22-UI-204916 became final without claimant having filed an application for review of the order with EAB.¹

CONCLUSIONS AND REASONS: Order No. 22-UI-206675 is affirmed. Claimant received \$7,951 in regular UI benefits and \$6,000 in FPUC benefits to which she was not entitled. Claimant is liable to repay the \$7,951 of regular UI benefits or have it deducted from any future benefits otherwise payable to claimant during the five-year period following the date decision # 84051 becomes final. Claimant is also liable for an overpayment of \$6,000 of FPUC benefits to be deducted from future benefits payable to her under any state or federal unemployment compensation law administered by the Department during the three-year period following the date decision # 84051 becomes final.

Remuneration and Overpayment. 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). Unemployed individuals who are disqualified from receiving unemployment insurance benefits are not eligible to receive benefits. ORS 657.155(1)(e) ("An unemployed individual shall be eligible to receive benefits with respect to any week only if . . . the individual is not disqualified from benefits[.]"). Under ORS 657.176(2)(c), if the Department finds that an individual voluntarily left work without good cause, the individual "shall be disqualified from the receipt of benefits" until the claimant earns four

¹ EAB has taken notice of the facts contained in this paragraph, which are contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information 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 noticed fact will remain in the record.

times their weekly benefit amount for work performed in subject employment starting with the week after the week of the voluntary leaving.

Here, the effect of Order No. 22-UI-204916 becoming final without claimant having filed an application for review with EAB is that its conclusion that decision # 92404 is undisturbed is binding unless claimant files a late application for review of Order No. 22-UI-204916, EAB allows the late application for review, and EAB reverses Order No. 22-UI-204916. Absent this scenario, decision # 92404 and its conclusion that claimant voluntarily quit without good cause and was disqualified from receiving benefits effective May 3, 2020 are binding as a matter of law. Because no application for review of Order No. 22-UI-204916 is pending, this decision proceeds with the premise that Order No. 22-UI-204916 and, in turn, decision # 92404, are binding as a matter of law.

Therefore, because claimant voluntarily quit without good cause, she was disqualified from receiving benefits effective May 3, 2020. The record does not show that she earned four times her weekly benefit amount before she received benefits for the weeks at issue, so there is no indication that claimant's disqualification ended before she received the benefits. Accordingly, claimant was overpaid benefits for the weeks at issue because, as of May 3, 2020, she was disqualified from receiving benefits.

As to the regular UI benefits claimant received for week 33-20, claimant's earnings reduced her benefit amount for that week. Under ORS 657.150(6), "An eligible unemployed individual who has employment in any week shall have the individual's weekly benefit amount reduced, but not below zero, by the amount of earnings paid or payable that exceeds the greater of: (a) Ten times the minimum hourly wage established by the laws of this state; or (b) One-third of the individual's weekly benefit amount." The effect of ORS 657.150(6) is that an individual may earn up to ten times the minimum wage or one-third of their weekly benefit amount (whichever is more) in a week before their weekly benefit payment is affected. Any weekly earnings above that amount reduces their benefit payment for that week dollar for dollar.

For week 33-20, the Department calculated one-third of claimant's weekly benefit amount based on the original determination of \$459, which yielded \$153 (one-third of \$459 = 153). \$153 was more than ten times the minimum wage.² Since claimant earned \$184 in week 33-20, she earned \$31 above one-third of her weekly benefit amount ($\$184 - \$153 = \$31$). Reducing claimant's originally determined weekly benefit amount of \$459 dollar for dollar by \$31 equals a reduced benefit amount of \$428. The Department added the redetermined weekly benefit amount increase of \$155 to the \$428 reduced benefit amount, resulting in claimant receiving a total reduced payment of \$583 for week 33-20. The Department calculated the reduced amount claimant received for week 33-20 correctly per ORS 657.150(6)

Regular UI benefits Overpayment. 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,

² During the weeks at issue, the minimum wage was, at highest, \$13.25 per hour. *See* <https://www.oregon.gov/boli/workers/Pages/minimum-wage-schedule.aspx>. Ten times \$13.25 is \$132.50, which is less than \$153.

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).

Claimant received regular UI benefits to which she was not entitled because when she filed her initial claim, she reported that her work separation was a lack of work, when, based on decision # 92404, claimant had voluntarily quit without good cause. If claimant had accurately reported that she voluntarily quit, the Department would not have paid claimant for the weeks at issue. Therefore, claimant's statement that her work separation was a lack of work constituted a false statement or omission of material fact that caused her to receive Regular UI benefits to which she was not entitled.

The record shows that when she filed her initial claim, claimant sincerely believed she was laid off for lack of work. Although development of a record regarding her separation could have confirmed her belief that there was a lack of work or have shown the separation to be a non-disqualifying quit with good cause, decision # 92404 remains undisturbed. As a result, the conclusion that claimant voluntarily quit work without good cause is binding. Claimant's sincere belief that she did not make a false statement on her initial claim application is immaterial because ORS 657.310(1)(a) provides that its provisions are applicable regardless of the individual's knowledge or intent. As such, claimant made a false statement regarding her work separation and was overpaid \$7,951 in regular UI benefits, ((12 weeks x \$614 = \$7,368) + (1 week x \$583 = \$583) = \$7,951). Claimant 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 decision # 84051 becomes final.

FPUC Benefits Overpayment. Under the provisions of the CARES Act, 15 U.S.C. § 9023, claimant also received \$6,000 in FPUC benefits to which she was not entitled because she did not qualify 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.

At hearing, claimant testified that she submitted an overpayment waiver application to the Department. October 10, 2022 Transcript at 10. The Department's witness agreed she had done so and that the waiver was approved but stated that it did not apply to the overpayments in this case. October 10, 2022 Transcript at 17. Therefore, the record does not show that the Department has waived repayment here. As such, claimant is liable for the overpayment of \$6,000 in FPUC benefits (10 weeks x \$600 = \$6,000) 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 decision # 84051 becomes final.

Claimant is urged to continue to pursue the overpayment waiver process. At hearing, the Department's witness testified that claimant's overpayment waiver application was approved but did not apply to the overpayments in this case. October 10, 2022 Transcript at 17. Claimant is encouraged to contact the Department for clarity as to why her approved overpayment waiver did not apply to the overpayments in this case, a point that the Department's witness may have simply been mistaken about.

Note that if a person is overpaid benefits under both state and federal benefits programs, as was the case here, they need to file two separate waiver applications, one that corresponds to the state programs and one that corresponds to the federal programs. Instructions for where to find the different waiver application forms are contained in a note below. Note further that if claimant submits a waiver application and it is denied, the Department is required to issue an administrative decision on the denial that claimant would have the right to appeal. *See* OAR 471-030-0053(8) (effective January 11, 2018). In addition, if a request for waiver is denied, claimant may submit another waiver application if her situation changes significantly enough to establish that recovery of benefits would be against equity and good conscience. *See* OAR 471-030-0053(6).

In sum, claimant is liable for an overpayment of \$7,951 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 decision # 84051 becomes final. Claimant is liable for an overpayment of \$6,000 in FPUC benefits to be deducted from future benefits payable during the three-year period following the date decision # 84051 becomes final.

DECISION: Order No. 22-UI-206675 is affirmed.

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

DATE of Service: January 20, 2023

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".

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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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