

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0213**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On December 6, 2022, the Oregon Employment Department (the Department) served notice of a Wage and Potential Benefit Report (WPBR) concluding, in relevant part, that claimant had base year wages totaling \$26,573.04. Claimant filed a timely request for hearing. On January 24, 2023, ALJ Kaneshiro conducted a hearing, and on January 26, 2023 issued Order No. 23-UI-213736, modifying the WPBR by concluding that claimant had an additional \$40,162.41 in base-year wages that should be added to her claim. On February 13, 2023, the Department filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB considered the Department’s written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Claimant did not earn any wages in the third or fourth quarters of 2021.

(2) In or around February 2022, claimant began working for Orchard Brokerage, LLC (the employer). Per the terms of the employer’s compensation plan, claimant received a base salary plus a “guaranteed monthly bonus payment” for the first three months of her employment. Exhibit 2 at 7. The employer paid their employees on the 15<sup>th</sup> and last day of each month. After three months, claimant continued being paid her base salary twice per month. However, per the employer’s compensation plan, she began to earn commissions. The commissions were paid on the 15<sup>th</sup> of the following month in which the commissions were earned.

(3) During the first quarter of 2022 (January 1, 2022 through March 31, 2022), the employer paid claimant base-salary wages totaling \$4,166.68.

(4) During the second quarter of 2022 (April 1, 2022 through June 30, 2022), the employer paid claimant base-salary and “guaranteed monthly bonus” wages totaling \$23,773.08.

(5) During June 2022, claimant earned two commissions in the amounts of \$4,158.33 and \$12,231.00. The employer paid claimant the first of these commissions on July 15, 2022, per the terms of their

compensation plan. Due to “an accounting/payroll error,” the employer paid claimant the second of these commissions late, on July 19, 2022. Exhibit 2 at 13.

(6) On December 1, 2022, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant had a monetarily valid claim with a base year of the third quarter of 2021 through the second quarter of 2022 (July 1, 2021 through June 30, 2022).

(7) At the time she filed her initial claim, the Department determined that claimant had base-year wages in the amounts of \$3,830.76 from the employer for the first quarter of 2022, and \$22,742.28 from another employer, Pika Energy, Inc., for the second quarter of 2022. These amounts were reflected in the WPBR that the Department issued on December 6, 2022.

(8) In mid-December 2022, the Department conducted an investigation to determine whether claimant worked for Pika Energy, Inc., and ultimately determined that she did not.<sup>1</sup>

**CONCLUSIONS AND REASONS:** Claimant is not entitled to add wages paid to her in July 2022 to her base year. Order No. 23-UI-213736 is set aside and this matter remanded for further development of the record.

ORS 657.150 provides, in relevant part:

\* \* \*

(2)(a) To qualify for benefits an individual must have:

(A) Worked in subject employment in the base year with total base year wages of \$1,000 or more and have total base year wages equal to or in excess of one and one-half times the wages in the highest quarter of the base year; and

(B) Have earned wages in subject employment equal to six times the individual’s weekly benefit amount in employment for service performed subsequent to the beginning of a preceding benefit year if benefits were paid to the individual for any week in the preceding benefit year.

(3) If the wages paid to an individual are not based upon a fixed period of time or if wages are paid at irregular intervals or in such manner as not to extend regularly over the period of employment, for the purposes of subsections (2) to (5) of this section, the individual’s wages shall be allocated in accordance with rules prescribed by the Director of the Employment Department. Such rules shall, insofar as possible, produce results the same as those that would exist if the individual had been paid wages at regular intervals. The director may adopt rules to

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<sup>1</sup> EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). A copy of the information has been provided to the parties with this decision as EAB Exhibit 1. 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.

attribute hours of work to an individual if the individual is not paid on an hourly basis or if the employer does not report the number of hours worked.

(4)(a) An eligible individual's weekly benefit amount shall be 1.25 percent of the total wages paid in the individual's base year. However, such amount shall not be less than the minimum, nor more than the maximum weekly benefit amount.

\* \* \*

OAR 471-030-0010 (January 11, 2018) provides that, for purposes of ORS 657.150(2) and (4), wages shall be assigned to the calendar quarter in which they are paid, in the same manner that taxes are payable pursuant to OAR 471-031-0070(1).

OAR 471-030-0021 (January 11, 2018) provides:

(1) When an individual is paid at irregular intervals as described in ORS 657.150(3), the individual shall be considered to have been paid on the first of the month for the time worked the previous month, except that where an agreement provides that the employer shall pay wages at some future date, the date specified by the agreement shall be used for base year wage allocation purposes.

(2) An individual who is paid at least once every 35 days is deemed to have been paid at regular intervals.

Although the December 6, 2022 WPBR determined that claimant had a monetarily valid claim, claimant appealed that decision due to her assertion that the commissions she earned in June 2022 should be included in her wage determination. *See* Exhibit 2 at 1. The order under review agreed, concluding that "the claim determination should have reflected... earnings in the amount of \$40,162.41" that claimant earned in the second quarter of 2022. Order No. 23-UI-213736 at 2–3. The order under review determined this figure by adding together the \$23,773.08 in base-salary and "guaranteed monthly bonus" wages that claimant was paid in the second quarter of 2022 and the \$16,389.33 in combined commissions that claimant earned in June 2022, but was paid in July 2022. However, the record does not support the conclusion that claimant's commissions paid in July 2022 should have been added to her base-year wages.

For purposes of allocating wages to a base year, wages are typically assigned to the calendar quarter in which they are *paid*, rather than earned, under OAR 471-030-0010. In a written statement claimant submitted in advance of the hearing, claimant suggested that her circumstances should qualify for an exception such that the commission wages in question should be assigned to the month in which they were earned, rather than paid. Exhibit 2 at 1. Claimant advanced two theories to support this assertion. First, claimant noted that "after June 1, [her] commissions were variable and irregular" and therefore were "irregular payment[s]" that would constitute being paid at "irregular intervals" under ORS 657.176(3) and OAR 471-030-0021(1). Exhibit 2 at 1. Second, claimant asserted that the second of the two commissions she earned in June 2022, which was paid on July 19, 2022 because of an accounting error, was paid on a "non conforming date, and thereby irregular." Exhibit 2 at 1.

Claimant's suggestion that "irregular payments" merit allocation of wages to the month in which they are earned is not supported by the language of OAR 471-030-0021(1). That rule states, in relevant part, that when an individual is paid at irregular intervals, they are considered to have been paid on the first of the month for the time worked the *previous* month. Under that rule, if claimant was paid at irregular intervals, any work she performed in June 2022 would be considered to have been paid on July 1, 2022. The rule does not benefit claimant because July 1, 2022 is the first day of the third quarter of 2022 and outside claimant's base year. Claimant's argument suggests that the rule instead be interpreted to mean that work performed during a given month will be considered to have been paid on the first of the *same month* in which the work was performed. In this interpretation, claimant would be considered paid on June 1, 2022 for work she performed in June 2022, thus allowing the pay to be allocated to the second quarter of 2022. This interpretation is inconsistent with principles of statutory construction because it requires one to read the phrase "for the time worked the *previous* month" out of the rule. Further, this interpretation is inconsistent with ORS 657.150(3), which states that rules prescribed by the Department to implement the provisions of that paragraph "shall, insofar as possible, produce results the same as those that would exist if the individual had been paid wages at regular intervals." In other words, the intent of OAR 471-030-0021 was not to contravene the general requirement found in OAR 471-030-0010 that wages are assigned to the calendar quarter in which they are paid, not earned.

Furthermore, even if ORS 657.150(3) and OAR 471-030-0021 permitted wages paid at "irregular intervals" to be allocated to the calendar *quarter* in which they were earned, rather than paid, the record does not show that claimant was paid at "irregular intervals," as that term is defined under 657.150(3). Claimant suggested that her commissions were "variable and irregular," presumably owing to the unpredictable nature of commission-based sales work. However, regardless of how frequently she *earned* commissions, or in what amounts, claimant was *paid* the commissions she earned on the 15<sup>th</sup> of each month. Therefore, claimant was paid at least once every 35 days, which under OAR 471-030-0021(2) constitutes payment at "regular intervals." Similarly, the fact that one of claimant's commission checks was four days late due to a payroll error does not contravene this definition. Per the terms of the employer's compensation plan, claimant was paid commissions at the regular interval of the 15<sup>th</sup> of the month following the month in which claimant earned the commissions. An error resulting in claimant receiving a payment four days late on a single occasion did not transform the employer's payment schedule into one in which payments were made at irregular intervals.

For the reasons explained above, claimant's commissions earned in June 2022 and paid in July 2022 should not be allocated to the second quarter of 2022, but should be allocated to the third quarter, which began on July 1, 2022. Because claimant's base year ends in the second quarter of 2022, those wages should not be considered base year wages used to determine her benefit amount.

However, an unexplained inconsistency remains in the record. The WPBR shows wages in the amount of \$22,742.28 paid by Pika Energy, Inc., for the second quarter of 2022. *See* Exhibit 1 at 4. The order under review accordingly found that claimant earned this amount from Pika Energy, Inc. in the second quarter of 2022. Order No. 23-UI-213736 at 2. However, in December 2022, the Department determined that claimant never worked for Pika Energy, Inc. EAB Exhibit 1 at 1. The outcome of this investigation was allegedly based on a conversation with claimant on or around December 13, 2022 in which claimant denied having worked for them. EAB Exhibit 1 at 1. While this evidence suggests that claimant's wages for the second quarter of 2022 should consist exclusively of wages paid by Orchard Brokerage, LLC, at

hearing no testimony was taken regarding this matter. On remand, the ALJ should develop the record regarding whether claimant had an employment relationship with Pika Energy, Inc. and earned any wages from them which should be included in claimant's WPBR.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant worked for or was paid wages by Pika Energy, Inc., Order No. 23-UI-213736 is reversed, and this matter is remanded.

**DECISION:** Order No. 23-UI-213736 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: April 11, 2023**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-213736 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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# Understanding Your Employment Appeals Board Decision

## English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

## Simplified Chinese

注意 – 本判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**

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**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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