

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0363

Modified
Overpayment, No Penalties

PROCEDURAL HISTORY: On January 10, 2023, 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 an overpayment of \$3,297.00 in regular unemployment insurance (regular UI) benefits and \$2,100.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department, a \$1,349.25 monetary penalty, and a 52-week penalty disqualification from future benefits (decision # 200117). Claimant filed a timely request for hearing. On March 10, 2023, ALJ Scott conducted a hearing at which both employers failed to appear, and on March 15, 2023 issued Order No. 23-UI-219112, modifying decision # 200117 by concluding that claimant was overpaid \$460.00 in regular UI benefits that claimant was required to repay to the Department, but that claimant did not make willful misrepresentations of fact in order to obtain benefits, and therefore was not liable for a monetary penalty or a penalty disqualification from future benefits. On March 24, 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.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the majority of the order under review, including the portions concluding that claimant did not make willful misrepresentations of fact, and that claimant was not liable for an overpayment for benefits paid during the weeks including April 4, 2021 through May 8, 2021 (weeks 14-21 through 18-21), is **adopted**. The remainder of this decision addresses the calculation of claimant's remuneration during the weeks

including May 16, 2021 through May 29, 2021 (weeks 20-21 through 21-21) and the resulting calculation of overpaid regular UI benefits during those weeks.

FINDINGS OF FACT: (1) On December 27, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant’s weekly benefit amount for regular UI benefits was \$471.

(2) Claimant performed work for Spring Creek Gardens, Inc. (“Spring Creek”) during weeks 20-21 and 21-21. These are the weeks at issue. Spring Creek paid claimant \$18.00 per hour for his work.

(3) During week 20-21, Spring Creek reimbursed claimant for money that claimant spent on a toolkit. Claimant worked 18.25 hours for Spring Creek during week 21-21.

(4) When claimant claimed benefits for each of the weeks at issue, he indicated on the respective weekly claim forms that he had worked 16 hours and earned \$288.00. Claimant was uncertain of the exact amount of hours he had worked during those weeks and did not have access to that information at the time he filed his weekly claims, so he estimated his hours and earnings. The Department subsequently paid claimant his full regular UI weekly benefit amount for each of the weeks at issue.¹

(5) On October 14, 2022, Spring Creek submitted to the Department a “Report of Hours Worked” form. Exhibit 3 at 17. In pertinent part, Spring Creek indicated on the form that claimant had worked 24 hours and earned \$432 during week 20-21, and had worked 18.25 hours and earned \$328.50 during week 21-21.

CONCLUSIONS AND REASONS: Claimant had remuneration in the amount of \$288 during week 20-21 and \$328.50 during week 21-21. Claimant’s earnings during week 21-21 reduced claimant’s weekly benefit amount by \$29.00. Claimant was overpaid regular UI benefits in the amount of \$29.00 for week 21-21 and must repay that amount to the Department.

ORS 657.150(6) states:

An eligible unemployed individual who has employment in any week shall have the individual’s weekly benefit amount reduced by the amount of earnings paid or payable that exceeds whichever is the greater of the following amounts:

- (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.

ORS 657.152 states that, notwithstanding any other provision of ORS chapter 657 to the contrary, any amount of unemployment compensation payable to any individual for any week, if not an even dollar amount, shall be rounded to the next lower full dollar amount.

¹ Although the Department also paid claimant \$300 in FPUC benefits for each of the weeks at issue, claimant was not overpaid FPUC benefits, and as such those benefits are not discussed further in this decision.

On September 1, 2020, the Governor signed Senate Bill 1701, which, in relevant part, temporarily modified ORS 657.150(6) as follows:

An eligible unemployed individual who has employment in any week shall have the individual's weekly benefit amount reduced by the amount of earnings paid or payable that exceeds whichever is the greater of the following amounts:

(a) **\$300**; or

(b) One-third of the individual's weekly benefit amount.

(emphasis added).

In effect, this allowed claimants to earn \$300 in gross earnings during a week before having their weekly benefit amount reduced dollar-for-dollar by any amount earned over \$300. This temporary change in the statute was effective September 6, 2020 through January 1, 2022 (weeks 37-20 through 52-21).

Former OAR 471-030-0017 (Effective January 11, 2018 through December 13, 2022) stated:

(1) Definitions. For purposes of applying ORS 657.100 and 657.150, and as used in this rule:

* * *

(b) "Earnings" means remuneration;

(c) Where an employer-employee relationship exists, "remuneration" means compensation resulting from the employer-employee relationship, including wages, salaries, incentive pay, sick pay, compensatory pay, bonuses, commissions, stand-by pay, and tips;

* * *

(2) For purposes of section (1) of this rule, except for agricultural labor and domestic service, remuneration shall include the value, determined pursuant to OAR 471-031-0055(3), of compensation paid in any medium other than cash.

* * *

OAR 471-031-0055 (December 25, 2005) states:

(1) Subject to the provisions of section (2), the term "wages" includes the cash value of all remuneration paid in any medium other than cash, except for agricultural labor and domestic service and the specific exemptions enumerated in ORS 657.115 to 657.140.

* * *

(3) The cash value of non-cash remuneration shall be either:

(a) The amount of non-cash remuneration which is carried on the employer's payroll, provided such amount is comparable to values prevailing in the community[.]

* * *

The order under review found that claimant “did not dispute that [Spring Creek’s] figures” regarding his earnings for weeks 20-21 and 21-21 were accurate, and on that basis concluded that claimant earned \$432 in week 20-21 and \$328 in week 21-21. Order No. 23-UI-219112 at 3. The record does not support this conclusion. The record shows that Spring Creek reported that claimant had earned \$432 in week 20-21 and \$328.50 in week 21-21. Claimant did not dispute the earnings that Spring Creek reported for week 21-21. However, claimant testified at hearing that Spring Creek reimbursed him for a toolkit that he had bought that week, but that Spring Creek later told him they had “screwed up” and reported that as wages for the week. Audio Record at 51:48 to 52:18.

The record does not show the amount of the reimbursement that the employer issued to claimant for the toolkit during week 20-21. In the absence of that information, it is reasonable to infer that claimant’s originally reported hours and wages for that week (16 hours and \$288.00) were correct, and that the difference between that figure and the total wages that Spring Creek reported for the week was the amount of the reimbursement. The record is also unclear as to whether claimant was permitted to *keep* the toolkit, such that they might be considered noncash remuneration under OAR 471-031-0055. In the absence of evidence to show that the toolkit constituted remuneration, however, the most likely explanation is that the employer did not permit claimant to keep the toolkit, and it was therefore not considered noncash remuneration. Therefore, claimant’s actual wages for week 20-21 were, more likely than not, \$288.

The order under review also erred in failing to apply the temporary modifications to ORS 657.150(6) under S.B. 1701, which was in effect during the weeks at issue, instead deducting claimant’s earnings for the weeks at issue from 1/3 of claimant’s weekly benefit amount. Order No. 23-UI-219112 at 3. Claimant’s weekly benefit amount was \$471. Because \$300 is more than 1/3 of \$471, \$300 is the correct figure to use when determining any deductions from claimant’s benefits for the weeks at issue.

For week 20-21, claimant earned less than \$300. Therefore, claimant’s benefit amount for that week is not reduced, and claimant was not overpaid any benefits for that week. For week 21-21, claimant earned \$328.50. \$328.50 exceeds \$300 by \$28.50. Therefore, for week 21-21, claimant was only eligible for regular UI benefits in the amount of \$442, as weekly benefit amounts must be rounded down to the nearest dollar under 657.152. Claimant is therefore liable for an overpayment of \$29.00 in regular benefits for that week.

DECISION: Order No. 23-UI-219112 is modified, as outlined above.

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

DATE of Service: May 5, 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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