

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0392

Reversed & Remanded

PROCEDURAL HISTORY: On January 21, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant received benefits to which she was not entitled, and assessing an overpayment of \$516 in regular unemployment insurance (regular UI) benefits and \$2,400 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department via deduction from future benefits payable (decision # 155455). Claimant filed a timely request for hearing. On March 9, 2023, ALJ Frank conducted a hearing, and on March 15, 2023 issued Order No. 23-UI-219191, affirming decision # 155455. On April 3, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

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 her 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.

The parties may offer new information, such as the new information contained in claimant's written argument, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) On March 22, 2020, claimant's employer filed claimant's initial claim for benefits. The Department determined that claimant's weekly benefit amount was \$648.¹ Claimant's benefits were to be paid under the Department's Work Share program.

¹ In her written argument, claimant expressed concern about the calculation of her weekly benefit amount, suggesting that it should be "much higher than [\$]648." Claimant's Written Argument at 1. The determination of claimant's weekly benefit amount is outside of the scope of this appeal, and is not addressed further in this decision. However, for an explanation of

(2) The employer claimed benefits on claimant’s behalf for the weeks including May 17, 2020 through June 13, 2020 (weeks 21-20 through 24-20). These are the weeks at issue. For each of the weeks at issue, the Department paid claimant \$129 in regular UI benefits and \$600 in FPUC benefits.

(3) During the weeks at issue, claimant worked for employer Multnomah Education Service District (MESD). During at least some of the weeks at issue, claimant also worked part-time for two other employers.

(4) Some time after paying claimant benefits for the weeks at issue, the Department determined that MESD had incorrectly reported claimant’s earnings for the weeks at issue, and that claimant was not actually eligible for regular UI or FPUC benefits during the weeks at issue because she had earnings in excess of her weekly benefit amount.

CONCLUSIONS AND REASONS: Order No. 23-UI-219191 is set aside and this matter remanded for further development of the record.

At issue in this case is the question of whether claimant was paid regular UI and FPUC benefits to which she was not entitled. The answer to that question turns on whether, under the applicable authorities, claimant’s earnings during each of the weeks at issue rendered her ineligible for benefits. The order under review found that the earnings reported by MESD for the weeks at issue “exceeded the threshold under which claimant was eligible for Workshare [*sic*] benefits,” and on that basis concluded that claimant was not eligible to receive either regular UI or FPUC benefits for any of the weeks at issue, thus affirming the overpayment assessed in decision # 155455. Order No. 23-UI-219191 at 2, 4. The record as developed does not support this conclusion.

Remuneration. ORS 657.150(6) states:

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.

ORS 657.380(1) states:

(1) Notwithstanding any other provision of this chapter, for the purposes of ORS 657.370 to 657.390, an individual is unemployed and eligible to receive shared work benefits with respect to any week if, in addition to meeting all other eligibility requirements of this chapter, the Director of the Employment Department finds that:

how a weekly benefit amount is determined, claimant may wish to consult pages 1–2 of the Department’s Unemployment Insurance Claimant Handbook, found at [https://www.oregon.gov/employ/Documents/UIPUB350\(English\)11-5-19.pdf](https://www.oregon.gov/employ/Documents/UIPUB350(English)11-5-19.pdf). See also ORS 657.150.

(a) During the week the individual is employed as a member of an affected group in an approved plan that was approved prior to the week and is in effect for the week.

(b) During the week the individual's normal weekly hours of work were reduced, in accordance with an approved plan, at least 20 percent but not more than 40 percent, with a corresponding reduction in wages.

ORS 657.385 states:

(1) An individual who is eligible for shared work benefits under ORS 657.370 to 657.390 shall be paid, with respect to any week of unemployment, a weekly shared work unemployment insurance benefit amount. Such amount shall be equal to the individual's regular weekly benefit amount multiplied by the nearest full percentage of reduction of the individual's regular weekly hours of work, as set forth in the employer's plan. The benefit payment under ORS 657.370 to 657.390, if not a multiple of one dollar, shall be rounded to the nearest dollar, and an even one-half dollar shall be rounded to the next higher multiple of one dollar.

(2) The provisions of ORS 657.150(6) shall not apply to earnings from the shared work employer of an individual eligible for payments under ORS 657.370 to 657.390 unless the resulting payment would be less than the regular benefit payment for which the individual would otherwise be eligible under ORS 657.150(6) without regard to shared work unemployment insurance benefits.

(3) Except as otherwise provided by ORS 657.370 to 657.390, all provisions of this chapter and rules adopted by the Director of the Employment Department apply to ORS 657.370 to 657.390. The director may adopt such rules as the director considers necessary to carry out the purposes of ORS 657.370 to 657.390.

Former OAR 471-030-0079(6) (effective January 11, 2019 through December 27, 2020) states:

Continued claims for shared work benefits shall be completed by the shared work employer and submitted to the Employment Department no later than seven days following the end of the week for which benefits, waiting week credit, non-compensable credit week, or any combination of these is claimed. Shared work employees must provide the employer all information needed in order to submit a timely continued claim for shared work benefits. **Such information may include, but is not limited to, information about work and earnings for another employer,** missed opportunities to work, or vacation or sick time used during the week being claimed.

(emphasis added).

The order under review supported its conclusion that claimant was overpaid benefits by stating that “[a]t hearing, neither party disputed the earnings figures furnished by claimant’s employer.” Order No. 23-UI-219191 at 2. While it is true that neither claimant nor the Department’s witness directly disputed the earnings figure that MESD apparently supplied, this statement presents several problems that must be remedied on remand.

First, while decision # 155455 contains a schedule of adjustments which purports to show the earnings figures that MESD reported for claimant for the weeks at issue, that schedule was neither admitted as an exhibit nor read into the record in its entirety. Thus, the record as currently developed does not actually show the earnings that MESD reported for claimant for any of the weeks at issue other than week 21-20. Audio Record at 9:25. On remand, the ALJ should develop the record to clearly show the amounts of earnings that MESD reported for claimant for each of the weeks at issue. The Department may wish to submit any documentation it received from MESD to support its assertions that claimant had excess earnings during the weeks at issue. Additionally, although MESD is not a party to this decision, claimant may wish to ask a witness from MESD to appear at the remand hearing in order to provide testimony on her earnings for the weeks at issue. If claimant wishes to do so, she should follow the instructions on the notice of the remand hearing regarding calling witnesses.

Next, the record on remand should be clarified to distinguish between wages that claimant earned from MESD, and wages that claimant earned from other employers, during the weeks at issue. The order under review, relying on the definition of “unemployed” under ORS 657.100(1),² concluded that “[d]ue to excess remuneration from employment during the weeks claimed, claimant was not ‘unemployed’ and was, therefore, ineligible to receive benefits under the Employment Department’s Workshare [*sic*] program.” Order No. 23-UI-219191 at 2.

However, for purposes of the Work Share program, ORS 657.380(1) defines “unemployed” differently. In pertinent part, it determines that an individual is “unemployed and eligible to receive shared work benefits with respect to any week if” the individual is “employed as a member of an affected group in an approved plan” and if, during the week at issue, “the individual’s normal weekly hours of work were reduced, in accordance with an approved plan, at least 20 percent but not more than 40 percent, with a corresponding reduction in wages.” Further, under ORS 657.385(2), the provisions of ORS 657.150(6), which otherwise governs how weekly benefits are reduced when a claimant has earned wages during that week, do not apply to wages earned with the Work Share employer “unless the resulting payment would be less than the regular benefit payment for which the individual would otherwise be eligible under ORS 657.150(6) without regard to shared work unemployment insurance benefits.”

Thus, the standard rules that govern wages earned during a week in which benefits are claimed do not apply to wages earned with a Work Share employer during a week in which the shared work plan is in effect, as was apparently the case for the four weeks at issue in this matter. As a result, an individual who earns more than their weekly benefit amount in wages from the Work Share employer during a given week in which a shared work plan is active is still considered “unemployed,” and therefore still potentially eligible for benefits for that week. This interpretation is supported by ORS 657.380(1)(b) in particular, which requires an individual to be working between 60% to 80% of their normal schedule with the work share employer, and earning a proportionate reduction in wages, in order to be eligible for benefits.

² 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. ORS 657.100(1).

By contrast, determining an individual to be ineligible under ORS 657.100(1) due to having earned more than their weekly benefit amount in wages from a Work Share employer would frustrate the functioning of the Work Share program. For example, if an individual had base-year wages of \$30,000, they would be eligible for a weekly benefit amount of \$375.³ If they continued to work full time at that same rate of pay for their Work Share employer, and subsequently claimed Work Share benefits during weeks in which their employer reduced their hours and wages by 20%, their reduced weekly wages would be approximately \$461.54,⁴ which is more than their weekly benefit amount. Thus, if ORS 657.100(1) applied to their circumstances, they would not be eligible for Work Share benefits despite meeting all of the eligibility requirements of ORS 657.380(1). Such an outcome would be contrary to the purpose of the Work Share program.

What remains unclear, however, is how wages from other employers earned during the weeks at issue affect claimant's eligibility for benefits. *Former* OAR 471-030-0079(6) requires that Work Share claimants provide their employers with information necessary to file weekly claims on their behalf, and that such information can include "information about work and earnings for another employer." The language of this rule, when read in tandem with ORS 657.385(2), suggests that earnings from other employers should be considered under the "standard" earnings analysis. On remand, the ALJ should inquire as to the Department's interpretation of the rules applicable to such circumstances, and how the Department applied them to claimant's circumstances for the weeks at issue.

Finally, on remand, the ALJ should develop the record to show what claimant's gross earnings were from each of her three employers during the weeks at issue. Any resulting deductions from claimant's benefits for any of the weeks at issue, including deductions which would render her ineligible for any benefits for one or more weeks, should be calculated using the criteria applicable to either Work Share wages or non-Work Share wages, as appropriate.

Overpayment of regular UI benefits and FPUC benefits. Because the question of what claimant's earnings were during the weeks at issue, either with MESD or other employers, is not yet resolved, the record as developed is currently insufficient to support a finding that claimant was ineligible for benefits for any of the weeks at issue. As such, a determination as to whether claimant was overpaid benefits for any of the weeks at issue cannot be made until that question is resolved.

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 what claimant's earnings were for each of the weeks at issue, and whether they rendered her ineligible for benefits under the Department's Work Share program during any of those weeks, Order No. 23-UI-219191 is reversed, and this matter is remanded.

DECISION: Order No. 23-UI-219191 is set aside, and this matter remanded for further proceedings consistent with this order.

³ *See* ORS 657.150(4)(a).

⁴ $\$30,000 / 52 \text{ weeks} \times 0.8 = \sim \461.54 .

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

DATE of Service: May 10, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-219191 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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 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.

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