

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0397

Modified
Overpayment Not Assessed

PROCEDURAL HISTORY: On October 12, 2022, 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 \$1,495.00 in regular unemployment insurance (regular UI) and \$6,000.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits, a \$2,248.50 monetary penalty, and 47 penalty weeks (decision # 193315). Claimant filed a timely request for hearing. On February 28 and March 14, 2023, ALJ Mott conducted a hearing at which the employer failed to appear. On March 15, 2023, ALJ Mott issued Order No. 23-UI-219182, modifying decision # 193315 by concluding that claimant was liable for an overpayment of \$136.00 in regular UI benefits and \$600 in FPUC benefits but had not made a willful misrepresentation of material fact and therefore was not liable for a monetary penalty or a disqualification from future benefits. On April 4, 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 portions of the order under review concluding that claimant did not have earnings which reduced her weekly benefit amount during the weeks of April 5 through 11, 2020 (week 15-20), April 19 through June 6, 2020 (weeks 17-20 through 23-20), and June 14 through 20, 2020 (week 25-20), and that claimant did not make a willful misrepresentation of material fact in order to obtain benefits, are **adopted**. The remainder of this decision addresses claimant's remuneration during the week of March 29, 2020 through April 4, 2020 (week 14-20) and whether benefits were overpaid for that week.

FINDINGS OF FACT: (1) On April 2, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant’s weekly benefit amount was \$151.00.

(2) Claimant claimed benefits for week 14-20, the week at issue. The Department paid claimant \$136.00 in regular benefits and \$600.00 in FPUC benefits for the week at issue. Claimant’s regular UI benefits were reduced for the week at issue because she had reported \$140.00 in wages when she claimed benefits for that week. Claimant earned these wages for work she performed that week for employer Umpqua Valley Nursing (“Umpqua”).

(3) On April 16, 2020, claimant received a direct-deposit payment from Umpqua in the amount of \$355.81.

(4) On or around June 17, 2020, the Department mailed a “Benefits Earning Audit” to Umpqua, requesting a week-by-week accounting of all gross wages they paid claimant, and all hours that claimant worked, during each week of the second quarter of 2020. Exhibit 1 at 8.

(5) When Umpqua reported claimant’s total wages for the second quarter of 2020, they reported that they had paid her \$742.59 in gross wages for that quarter.¹ March 14, 2023 Transcript at 20.

(6) On August 20, 2020, Umpqua returned the audit form to the Department. On their response, Umpqua indicated that claimant’s rate of pay was \$14.62 per hour and that they paid her bi-weekly. Exhibit 1 at 8. Umpqua also indicated on their response that claimant had worked 21 hours and earned \$307.02 in gross wages during week 14-20, and that she had worked 4.25 hours and earned \$62.16 in gross wages during week 15-20. Exhibit 1 at 8. Umpqua did not indicate that claimant worked any additional hours, or earned any additional wages, during any of the other weeks in the second quarter of 2020.

(7) The Department used Umpqua’s response to the Benefits Earning Audit, in part, to determine that claimant had earned in excess of her weekly benefit amount for the week at issue and therefore had been overpaid benefits for that week.

(8) Oregon’s minimum wage for the Portland metropolitan area during the week at issue was \$12.50 per hour.²

CONCLUSIONS AND REASONS: Claimant did not have earnings in excess of her weekly benefit amount during week 14-20, and therefore was not overpaid benefits for that week.

Remuneration. ORS 657.100(1) states:

¹ Under ORS 657.571, employers are required to submit quarterly tax reports to the Department which, in turn, requires employers to submit a “quarterly report of employees’ wages and hours of work[.]” OAR 471-031-0085 (August 1, 2004). This process is distinct and separate from the Benefits Earning Audit that Umpqua submitted to the Department in August 2020.

² See former OAR 471-030-0017(2)(h)(i) (effective January 11, 2018 through December 13, 2022); ORS 653.025(2)(d).

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 657.150(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.

The order under review found that claimant earned \$307.20 from employment with Umpqua during week 14-20, and on that basis concluded that she had “received remuneration that made her ineligible for benefits” during that week. Order No. 23-UI-219182 at 2, 7. In so finding, the order under review weighed two conflicting sources of reporting regarding claimant’s wages for the week at issue: Umpqua’s response to the Benefits Earning Audit in August 2020, versus claimant’s report on her weekly claim that she earned \$140.00 that week. The order under review determined that Umpqua’s reported figure was more likely accurate because “it can reasonably be inferred that employer records are kept in the regular course of business,” because “a claimant might make the mistake of reporting net [rather than gross] earnings,” and because claimant had received a deposit from Umpqua in the amount of \$355.81 on April 16, 2020, “which is nearer to the \$307.02 reported by that employer for week 14-20.” Order No. 23-UI-219182 at 3–4. This determination is not supported by substantial evidence.

In fact, the evidence as to whether claimant’s or Umpqua’s earnings figure for week 14-20 was correct is equally balanced. Claimant did not provide any corroborating evidence to show that her reported wages of \$140.00 was correct for week 14-20. However, the suggestions that claimant might have reported her net (rather than gross) earnings, and that employer wage records are more accurate because they are kept in the course of business, are speculative and unsupported by evidence in the record.

Umpqua was not present to provide testimony at the hearing, and the record does not show that the investigator who assessed the overpayment in decision # 193315 ever personally verified the accuracy of the figure that Umpqua submitted in August 2020. While the figure that Umpqua deposited into claimant’s account on April 16, 2020 might have encompassed wages she earned during weeks 14-20 or 15-20, or both, the record does not actually show the dates of the associated pay period or the gross amount of pay that claimant received for that period. The record *does* show an unexplained discrepancy between the wages that Umpqua reported on their August 2020 report (\$369.18) and the wages they reported for claimant on their payroll tax report for the same quarter (\$742.59), thereby casting doubt on the accuracy of Umpqua’s payroll records for claimant.

Because the Department paid claimant benefits for the week at issue, it bears the burden of proof to show that benefits should not have been paid.³ As the evidence regarding claimant's wages earned during week 14-20 is equally balanced, the Department has not met its burden. Therefore, the record fails to show that claimant did not accurately reported her wages for the week at issue.

The record also shows that claimant's benefits were, based on the wages she reported, correctly reduced for the week at issue. 10 times the applicable minimum wage rate for the week at issue is \$125.00, which is larger than 1/3 of claimant's weekly benefit amount. Claimant earned \$15.00 more than \$125.00 during the week at issue, and the Department therefore correctly reduced her benefit that week by \$15.00. Accordingly, claimant's benefits were correctly paid for the week at issue, and claimant was not overpaid regular UI or FPUC benefits for that week.

DECISION: Order No. 23-UI-219182 is modified, as outlined above.

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

DATE of Service: May 11, 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.

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³ *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the Department has paid benefits it has the burden to prove benefits should not have been paid).



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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