

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0401

*Order No. 23-UI-217690 Affirmed ~
Late Request for Hearing Allowed
Ineligible Weeks 30-21 through 32-21
Order No. 23-UI-217691 Modified ~
Overpayment Assessed, Deduction from Future Benefits Required*

PROCEDURAL HISTORY: On September 15, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant did not actively seek work during the weeks including July 25, 2021 through August 14, 2021 (weeks 30-21 through 32-21) and was therefore ineligible to receive unemployment insurance benefits during those weeks (decision # 92826). On October 5, 2021, decision # 92826 became final without claimant having filed a request for hearing. On July 1, 2022, the Department served notice of an administrative decision, based in part on decision # 92826, concluding that claimant received benefits to which she was not entitled and assessing an overpayment of \$915 in regular unemployment insurance (regular UI) benefits and \$900 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department (decision # 93150). On July 18, 2021, claimant filed a late request for hearing on decision # 92826 and a timely request for hearing on decision # 93150.

On February 28, 2023, ALJ Janzen conducted separate hearings on the two administrative decisions. On March 2, 2023, ALJ Janzen issued Order No. 23-UI-217690, allowing claimant's late request for hearing on decision # 92826 and affirming that decision on the merits. Also on March 2, 2023, ALJ Janzen issued Order No. 23-UI-217691, affirming decision # 93150 by concluding that claimant did not have earnings which reduced her weekly benefit amount during the weeks at issue, but that claimant was overpaid regular UI benefits totaling \$915 that she was required to repay to the Department under ORS 657.310 and FPUC benefits totaling \$900 that she was required to repay to the Department. On March 17, 2023, claimant filed applications for review of Orders No. 23-UI-217690 and 23-UI-217691 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 23-UI-217690 and 23-UI-217691. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2023-EAB-0401 and 2023-EAB-0319).

EAB reviewed the entire consolidated hearing record. On *de novo* review and pursuant to ORS 657.275(2), Order No. 23-UI-217690, which allowed claimant's late request for hearing on decision # 92826 and affirmed that decision on the merits, is **adopted**. Additionally, the portion of Order No. 23-UI-217691 concluding that claimant did not have earnings which reduced her weekly benefit amount during the weeks at issue is **adopted**. The remainder of this decision addresses claimant's overpayment of benefits and the applicable repayment requirements.

FINDINGS OF FACT: (1) On April 4, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant's weekly benefit amount was \$305. Claimant subsequently claimed benefits for the weeks including July 25, 2021 through August 14, 2021 (weeks 30-21 through 32-21). These are the weeks at issue. For each of the weeks at issue, the Department paid claimant \$305 in regular UI benefits and \$300 in FPUC benefits.

(2) At all times relevant to this decision, claimant was employed with a company called Beauty Barrage (the employer). Prior to the weeks at issue, claimant last worked full-time for the employer during the second week of March 2020. After that point, the employer curtailed its operations due to the COVID-19 pandemic. Claimant continued to work reduced, somewhat sporadic hours for the employer through at least July 27, 2021.

(3) Under the Department's rules, an individual is not required to perform work-seeking activities as a requirement for benefit eligibility if they meet the definition of "temporarily unemployed" during a given week.¹ If the individual meets the definition of "temporarily unemployed" for a given week, they can indicate their status by checking a box on the weekly claim form. The Department's weekly claim forms typically explain the definition of "temporarily unemployed" to individuals.

(4) When claimant claimed benefits for each the weeks at issue, claimant marked the box on the weekly claim form indicating that she was temporarily unemployed. Claimant marked this box because the work the employer was offering her was "very limited" and "wasn't consistent," and she therefore believed that she was temporarily unemployed. Order No. 23-UI-217691, Audio Record at 16:55 to 17:25. When she marked the box indicating that she was temporarily unemployed, claimant was not given an explanation of that term.

(5) Claimant neither performed work seeking activities during the weeks at issue, nor indicated that she had done so when she claimed benefits for the weeks at issue. However, because claimant marked the "temporarily unemployed" box on her weekly claims, the Department paid her benefits for the weeks at issue.

(6) On September 15, 2021, the Department issued decision # 92826, concluding that claimant was not eligible to receive benefits for the weeks at issue because she did not actively seek work during those weeks. This decision was based in part on the Department's determination that claimant was not "temporarily unemployed" during the weeks at issue.

¹ See OAR 471-030-0036(5)(b) (effective December 8, 2019 through August 1, 2020 and December 27, 2020 through September 25, 2021).

CONCLUSIONS AND REASONS: Claimant was paid benefits to which she was not entitled and is therefore liable for an overpayment of \$915 in regular UI and \$900 in FPUC benefits. However, the overpayments were the result of an error not caused by claimant making a false statement, misrepresentation of a material fact or failure to disclose a material fact, and claimant therefore is only required to make repayment via deduction from future benefits.

Overpayment of regular UI benefits. ORS 657.310(1) 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, regardless of the individual’s knowledge or intent. *Id.*

ORS 657.315(1) provides, in relevant part, that an individual who has been overpaid benefits because of an error not caused by the individual’s false statement, misrepresentation of a material fact or failure to disclose a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding the individual is not eligible for the benefits, is liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final.

Because the Department paid claimant benefits for the weeks at issue, the Department had the burden to establish that benefits should not have been paid. *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).

The Department paid claimant regular UI benefits during the weeks at issue because claimant marked the “temporarily unemployed” box when she claimed the weeks at issue, but they later determined that she was not eligible for benefits for those weeks because she was not temporarily unemployed and did not actively seek work. Order No. 23-UI-217690 affirmed that decision and, as noted above, EAB has affirmed Order No. 23-UI-217690. Therefore, claimant was overpaid \$915 in regular UI benefits.

Order No. 23-UI-217691 concluded that “[c]laimant caused the overpayment because she incorrectly reported that she was temporarily laid off or temporarily unemployed during the weeks in issue,” and that claimant therefore was required to repay those benefits to the Department or have them deducted from future benefits, per ORS 657.310. Order No. 23-UI-217691 at 3–4. The record does not support this conclusion.

In order for ORS 657.310 to apply, the overpayment in question must have been caused by the claimant having made a false statement or misrepresentation of a material fact, or having failed to disclose a material fact. Claimant was not “temporarily unemployed” under OAR 471-030-0036(5)(b), and her indicating as such on the claim forms for the weeks at issue resulted in payment of benefits she was not entitled to, thereby creating the overpayments at issue in this matter. However, the record does not show that claimant’s erroneously indicating that she was temporarily unemployed was a false statement or misrepresentation of a material fact.

Whether claimant was temporarily unemployed is a question of law, not fact. ORS 657.310 applies only when a misrepresentation of *fact* has been made. There is no indication in the record that claimant misrepresented any of the facts of her circumstances when she claimed benefits for the weeks at issue. Instead, claimant erroneously understood herself to be temporarily unemployed based on the circumstances of her employment at the time. Particularly given that claimant was not advised of the legal definition of the term “temporarily unemployed” at the time that she claimed the weeks at issue,² the record does not show that the overpayment of regular UI benefits was the result of claimant having made a misrepresentation of material fact.

The record instead establishes only that she was overpaid benefits because an initial decision by the Department to pay her benefits was subsequently reversed by a decision finding that she was not entitled to those benefits. As such, claimant’s overpayment of regular UI benefits is governed by ORS 657.315 rather than ORS 657.310, and claimant is only required to repay the overpaid regular UI benefits via deduction from any future benefits otherwise payable to her under ORS Chapter 657 for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final.

Overpayment of FPUC benefits. Under the provisions of the CARES Act, 15 U.S.C. § 9023, claimant also received \$900 in FPUC benefits to which she was not entitled because she was not eligible for benefits under state law. *See* U.S. Dep’t of Labor, UIPL 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. The record is not clear as to what part of the overpayment, if any, the Department has waived.

Claimant therefore is liable for the overpayment of \$900 in FPUC benefits 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 she received the FPUC benefits to which she was not entitled.

DECISION: Order No. 23-UI-217690 is affirmed. Order No. 23-UI-217691 is modified, as outlined above.

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

² The Department’s witness testified at hearing that “there’s a pop-up that comes up that says, do not check [the] ‘temporarily unemployed’ box when you file your weekly claim unless your last day of work was within the last four weeks and your employer has given you a return-to-work date within that four weeks.” Order No. 23-UI-217691 Audio Record at 23:15 to 23:35.” However, the Department did not rebut claimant’s assertion that she was not advised of how “temporarily unemployed” was defined when she filed her claims for the weeks at issue.

DATE of Service: April 27, 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”.**

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.