

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0741

Order No. 23-UI-228110 ~ Affirmed, Late Request for Hearing Dismissed
Order No. 23-UI-228244 ~ Reversed, Request for Hearing Timely ~ No Overpayment
Application for Review of Order No. 23-UI-228261 Dismissed ~ Moot

PROCEDURAL HISTORY: On June 24, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was therefore disqualified from receiving unemployment insurance benefits effective May 31, 2020 (decision # 151529). On July 14, 2021, decision # 151529 became final without claimant having filed a request for hearing. On March 4, 2022, the Department served notice of an administrative decision, based in part on decision # 151529, concluding that claimant received benefits to which he was not entitled and assessing an overpayment of \$7,579 in regular unemployment insurance (regular UI) benefits, \$14,752 in Pandemic Emergency Unemployment Compensation (PEUC), and \$12,000 in Federal Pandemic Unemployment Compensation (FPUC) that claimant was required to repay to the Department (decision # 150327). On March 24, 2022, the Department issued an administrative decision denying claimant's March 23, 2022 request to waive recovery of the overpayments (decision # 102146). On March 29, 2022, claimant filed timely requests for hearing on decisions # 150327¹ and 102146, and a late request for hearing on decision # 151529. On May 23, 2023, notice was mailed to the parties that hearings were scheduled for June 12, 2023 to determine whether claimant had good cause to file his late request for hearing on decision # 151529 and, if so, the merits of decision 151529; whether claimant filed a timely request for hearing or had good cause to file a late request for hearing on decision # 150327 and, if so, the merits of decision # 150327; and the merits of decision # 102146.

On June 12, 2023, ALJ Lucas conducted hearings on all three matters. At the hearing on decision # 151529, the employer failed to appear, and the Department submitted an Attestation in lieu of attending the hearing. On June 16, 2023, ALJ Lucas issued Order No. 23-UI-228110, dismissing claimant's request for hearing on decision # 151529 as late without good cause and leaving decision # 151529 undisturbed. On June 20, 2023, ALJ Lucas issued Order No. 23-UI-228244, concluding that claimant

¹ Though claimant's request for hearing was filed on March 18, 2022, within 20 days of the issuance of decision # 150327, the timeliness of that request was noticed as an issue to be addressed at hearing, and it was found to be timely. Order No. 23-UI-228244 at 12.

filed a timely request for hearing on decision # 150327, and modifying decision # 150327 by concluding that claimant was not overpaid PEUC benefits, but that claimant received benefits to which he was not entitled and assessing an overpayment of \$4,306 in regular UI benefits and \$4,800 in FPUC benefits that claimant was required to repay to the Department. Also on June 20, 2023, ALJ Lucas issued Order No. 23-UI-228261, affirming decision # 102146 on the merits. On July 3, 2023, claimant filed applications for review with the Employment Appeals Board (EAB) of Orders No. 23-UI-228110, 23-UI-228244, and 23-UI-228261.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 23-UI-228110, 23-UI-228244, and 23-UI-228261. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2023-EAB-0740, 2023-EAB-0741, and 2023-EAB-0742).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), Order No. 23-UI-228110 is **adopted**.

Further, based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of Order No. 23-UI-228244 concluding that claimant's request for hearing on decision # 150327 was timely is **adopted**. The rest of this decision addresses the merits of decision # 150327, and Order No. 23-UI-228261.

FINDINGS OF FACT: (1) HV Station LLC employed claimant beginning approximately March 15, 2020. On March 16, 2020, the employer placed claimant on indefinite furlough due to COVID-19 restrictions on the employer's operations.

(2) On March 20, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department determined it to be a monetarily valid claim for regular UI benefits with a weekly benefit amount of \$476.

(3) On June 1, 2020, the employer texted claimant asking if he was ready to return to work, to which claimant replied, "[Y]es." Order No. 23-UI-228244 Transcript at 26. Claimant asked the employer what their "COVID guidelines" were going to be, to which the employer responded, "[T]his isn't going to be a good fit," and ended the conversation. Order No. 23-UI-228244 Transcript at 26. The employer did not attempt to communicate with claimant, other than in this instance, after March 16, 2020, and claimant did not work for the employer again. Claimant did not understand this interaction to be a separation from employment or declination of an offer of employment.

(4) On his claim for the week of May 31, 2020 through June 6, 2020 (week 23-20), claimant was asked if, during that week, he had quit or been fired from a job, or declined to accept an offer of employment. Claimant answered in the negative to these questions, and as a result, was paid benefits for that week and weeks thereafter without further investigation.

(5) Claimant filed weekly claims for benefits for the weeks of May 31, 2020 through August 15, 2020 (weeks 23-20 through 33-20). The Department paid claimant \$476 in regular UI benefits each week for weeks 23-20 through 27-20, and \$321 each week for weeks 28-20 through 33-20, totaling \$4,306. The Department paid claimant FPUC benefits of \$600 each week for weeks 23-20 through 30-20, totaling \$4,800. Each of these payments occurred on or before August 17, 2020.

(6) From June 7, 2020 through August 15, 2020, claimant received \$2,160 in remuneration for work performed on or after June 7, 2020 for a different employer.

(7) On June 24, 2021, the Department issued decision # 151529, concluding that claimant voluntarily quit working for that employer on June 1, 2020, and was therefore disqualified from receiving benefits effective May 31, 2020 and until he received payment from an employer in the amount of four times his weekly benefit amount for work performed after that date. Four times claimant's weekly benefit amount of \$476 was \$1,904.

(8) Claimant made weekly claims for the weeks of August 16, 2020 through December 26, 2020 (weeks 34-20 through 52-20) and the weeks of January 3, 2021 through June 19, 2021 (weeks 01-21 through 24-21) and the Department paid claimant for these weeks a total of \$3,273 in regular UI benefits, \$14,752 in PEUC, and \$7,200 in FPUC. Each of these payments was made on or after August 24, 2020.

(9) On March 4, 2022, the Department issued decision # 150327, determining claimant was ineligible to receive benefits for the weeks of May 31, 2020 through December 26, 2020 (weeks 23-20 through 52-20) and the weeks of January 3, 2021 through June 19, 2021 (weeks 01-21 through 24-21). These are the weeks at issue. Decision # 150327 also assessed an overpayment of \$7,579 in regular UI benefits, \$14,752 in PEUC, and \$12,000 FPUC paid for the weeks at issue, which claimant was required to repay to the Department. Decision # 150327 did not allege that claimant's ineligibility for benefits was the result of willful misrepresentation or fraud.

CONCLUSIONS AND REASONS: The Department was not authorized to amend the original decisions allowing benefits for weeks 23-20 through 08-21 or assess an overpayment for those weeks. Claimant was not overpaid benefits. Claimant's application for review of Order No. 23-UI-228261 is dismissed as moot.

Lack of Authority to Amend Allowing Decisions for Weeks 23-20 through 08-21. ORS 657.267 provides:

(1) *An authorized representative shall promptly examine each claim for waiting week credit or for benefits and, on the basis of the facts available, make a decision to allow or deny the claim.* Information furnished by the claimant, the employer or the employer's agents on forms provided by the Employment Department pursuant to the authorized representative's examination must be accompanied by a signed statement that such information is true and correct to the best of the individual's knowledge. *Notice of the decision need not be given to the claimant if the claim is allowed* but, if the claim is denied, written notice must be given to the claimant. If the claim is denied, the written notice must include a statement of the reasons for denial, and if the claim is denied under any provision of ORS 657.176, the notice must also set forth the specific material facts obtained from the employer and the employer's agents that are used by the authorized representative to support the reasons of the denial. The written notice must state the reasons for the decision.

(2) If the claim is denied under any provision of ORS 657.176, written notice of the decision must be given to the employing unit, or to the agent of the employing unit, that, in the opinion of

the Director of the Employment Department, is most directly involved with the facts and circumstances relating to the disqualification.

(3) Notice of a decision that was wholly or partially based on information filed with the director in writing within 10 days after the notice provided for in ORS 657.265 must be given to any employing unit or agent of the employing unit that filed the information.

(4) *If a decision to allow payment made pursuant to this section does not require notice, that decision may be amended by an authorized representative.* The amendment must be made by written notice informing the recipient of the right of appeal pursuant to ORS 657.269. ***The amendment must be issued within one year of the original decision to allow payment, except in cases of alleged willful misrepresentation or fraud.*** A decision requiring notice, made pursuant to this section, may be amended unless it has become a final decision under ORS 657.269.

(Emphasis added.)

ORS 657.176 provides, in relevant part:

* * *

(2) An individual shall be disqualified from the receipt of benefits until the individual has performed service in employment subject to this chapter or the equivalent law of another state or Canada or as defined in ORS 657.030 (2) or as an employee of the federal government, for which remuneration is received that equals or exceeds four times the individual's weekly benefit amount subsequent to the week in which the act causing the disqualification occurred, if the authorized representative designated by the director finds that the individual:

* * *

(c) Voluntarily left work without good cause[.]

* * *

Order No. 23-UI-228244 concluded that claimant was overpaid \$4,306 in regular UI benefits and \$4,800 in FPUC for the weeks of May 31, 2020 through August 15, 2020 (weeks 23-20 through 33-20). Order No. 23-UI-228224 at 23-24. The record does not demonstrate that the Department had authority to amend its original decision to allow payment to a decision denying claimant benefits, and therefore assess an overpayment, for those weeks.

The Department made its original decisions under ORS 657.267(1) to allow payment of claimant's weekly claims for benefits for the weeks of May 31, 2020 through August 15, 2020 (weeks 23-20 through 33-20), by paying each of these claims, on or before August 17, 2020. Because a decision to allow benefits does not require notice to claimant pursuant to ORS 657.267(1), the Department may only amend decisions allowing benefits (*i.e.*, by denying benefits) within one year of the decision to allow, in the absence of "alleged willful misrepresentation or fraud." ORS 657.267(4).

The Department issued decision # 151529 on June 24, 2021, disqualifying claimant from benefits effective May 31, 2020, as the result of a work separation. By law, such a disqualification ends when an individual has “performed service in employment . . . for which remuneration is received that equals or exceeds four times the individual’s weekly benefit amount subsequent to the week in which the act causing the disqualification occurred[.]” ORS 657.176(2). Decision # 151529 did not amend the Department’s original decisions to allow claimant’s claims each week for weeks 23-20 through 33-20 because it did not purport to assess whether claimant had requalified for benefits each week and, accordingly, whether each weekly claim was allowed or denied on that basis.

On March 4, 2022, the Department issued decision # 150327, concluding that claimant was not entitled to receive the benefits he received for the weeks including May 31, 2020 through August 15, 2020 (weeks 23-20 through 33-20) based on the disqualification imposed in decision # 151529. Decision # 150327 effectively constituted a decision to deny those weekly claims based on the Department’s implicit conclusion that claimant *remained* disqualified from receiving benefits during those weeks. Decision # 150327 therefore constituted an amendment to each original decision to allow payment of those weekly claims by now denying them. However, because more than a year had elapsed since the decisions to allow these weekly claims had been made by paying them, the Department lacked authority to amend them pursuant to ORS 657.267(4), unless alleging willful misrepresentation or fraud.

Decision # 150327 alleged that claimant was being denied benefits for the weeks at issue because he “failed to disclose a material fact.” Order No. 23-UI-228244 Exhibit 1 at 1. At hearing, the Department’s representative testified that “it was determined by the Department that there was . . . no misrepresentation involved.” Order No. 23-UI-228244 Transcript at 24. As the Department did not allege that the amended decision to deny benefits for the weeks at issue was based on willful misrepresentation or fraud, either in decision # 150327 or at hearing, the Department was therefore subject to the one-year limitation on amending the original decisions to allow benefits imposed by ORS 657.267(4). Accordingly, the Department lacked authority to amend the original decisions which allowed benefits to decisions denying claimant benefits for weeks 23-20 through 33-20, and in turn, to assess an overpayment of benefits for those weeks. Therefore, claimant was not overpaid benefits for weeks 23-20 through 33-20.

Similarly, the Department’s original decisions to allow benefits for the weeks claimed from August 16, 2020 through December 26, 2020 (weeks 34-20 through 52-20) and January 3, 2021 through February 27, 2021 (weeks 01-21 through 08-21) were all issued more than a year prior to the issuance of decision # 150327. Because more than a year had elapsed since the decisions to allow these weekly claims were made by paying them, the Department did not have authority to amend those decisions allowing benefits to decisions denying benefits and assessing an overpayment for those weeks in decision # 150327. Accordingly, claimant was not overpaid benefits for weeks 34-20 through 52-20 and weeks 01-21 through 08-21.²

However, each of the original decisions to allow benefits for claims for the weeks of February 28, 2021 through June 19, 2021 (weeks 09-21 through 24-21) were made by issuing payments less than a year

² Order No. 23-UI-228244 concluded that claimant was not overpaid benefits for weeks 34-20 through 52-20 and weeks 01-21 through 08-21 for other reasons. Order No. 23-UI-228244 at 23-24.

prior to the issuance of decision # 150327. Accordingly, the Department was not barred by ORS 657.267(4) from amending those decisions through the issuance of decision # 150327.

Overpayment for Weeks 09-21 through 24-21. 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. ORS 657.310(1)(a). In addition, an individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2). Where the Department has paid benefits, it has the burden to prove benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Order No. 23-UI-228244 concluded that claimant requalified for benefits effective August 16, 2020, and was therefore eligible to receive, and therefore was not overpaid, benefits for the weeks of August 16, 2020 through December 26, 2020 (weeks 34-20 through 52-20) and January 3, 2021 through June 21, 2021 (weeks 01-21 through 24-21). Order No. 23-UI-228244 at 23-25. As previously stated, the Department was barred by ORS 657.267(4) from amending the original decisions allowing benefits, and therefore to deny benefits and assess an overpayment, for weeks 34-20 through 52-20 and 01-21 through 08-21. However, the record supports the conclusion of Order No. 23-UI-228244 as to the weeks over which the Department was not barred from amending earlier claims decisions, February 28, 2021 through June 21, 2021 (weeks 09-21 through 24-21).

Claimant was disqualified from receiving benefits because decision # 151529 determined that he voluntarily quit work without good cause. This disqualification became effective May 31, 2020. Claimant reported earnings to the Department for work performed after the week of May 31, 2020 on his weekly claims. By August 15, 2020, these earnings totaled \$2,160. Because this amount exceeded four times claimant's weekly benefit amount, or \$1,904, claimant requalified for benefits effective August 16, 2020. In the absence of other disqualifications or ineligibility, claimant was therefore entitled to all of the benefits he received for the weeks of August 16, 2020 through December 26, 2020 (weeks 34-20 through 52-20) and the weeks of January 3, 2021 through June 19, 2021 (01-21 through 24-21) and was not overpaid benefits for those weeks.

For these reasons, Order No. 23-UI-228244 is reversed. Claimant was not overpaid benefits for any of the weeks at issue.

Waiver. Because Order No. 23-UI-228244 is reversed and claimant is no longer liable for an overpayment of benefits, claimant's March 23, 2022 request for waiver of recovery of that overpayment is moot. Claimant's application for review of Order No. 23-UI-228261, which affirmed denial of that waiver, therefore presents no justiciable controversy. A ruling on the merits of the waiver denial would have no practical effect on claimant's rights or obligations. Accordingly, the application for review of Order No. 23-UI-228261 is dismissed.

DECISION: Order No. 23-UI-228110 is affirmed, Order No. 23-UI-228244 is reversed, and Order No. 23-UI-228261 is dismissed.

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

DATE of Service: August 14, 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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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.

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