

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1049

Modified – Overpayment and Penalties

PROCEDURAL HISTORY: On January 27, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant willfully made misrepresentations and failed to report material facts to obtain benefits, and assessing an overpayment of \$7,995 in Pandemic Unemployment Assistance (PUA) benefits and \$8,100 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department, a \$4,828.50 monetary penalty, and a 52-week penalty disqualification from future benefits. Claimant filed a timely request for hearing. On August 16, 2023, ALJ Nyberg conducted a hearing, and on August 28, 2023, issued Order No. 23-UI-234451, modifying the January 27, 2022 administrative decision by concluding that claimant was overpaid \$4,100 in PUA benefits and \$6,000 in FPUC benefits that he was required to repay to the Department, and was liable for a \$3,030 monetary penalty, and a 52-week penalty disqualification from future benefits. On September 18, 2023, the Department filed an application for review with the Employment Appeals Board (EAB). On September 18, 2023, the deadline to file an application for review of Order No. 23-UI-234451 passed. On October 4, 2023, claimant filed a late application for review of Order No. 23-UI-234451 with EAB.

WRITTEN ARGUMENT: EAB considered the Department's written argument in reaching this decision. In it, the Department pointed out that, contrary to a conclusion of the order under review, claimant did not claim and was not paid benefits for the weeks of March 14, 2021 through March 20, 2021 (week 11-21) and April 4, 2021 through April 10, 2021 (week 14-21). The argument included information from Employment Department records showing that claimant did not claim weeks 11-21 or 14-21 and characterized that information as new. However, that information is contained in the evidentiary record and is available to be considered because it was already received into evidence. *See* Exhibit 1 at 49.

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 received benefits to which he was entitled and therefore was not overpaid benefits for the weeks including October 4, 2020 through February 13, 2021 (weeks 41-20 through 06-21), that claimant's earnings from his gem business amounted to

remuneration for purposes of unemployment insurance law, and that claimant failed to report his earnings for each of the weeks at issue willfully to obtain benefits is **adopted**.

The remainder of this decision concerns claimant's overpayment of benefits for the weeks at issue in this case (the weeks of February 14, 2021 through March 13, 2021 (weeks 07-21 through 10-21), March 21, 2021 through April 3, 2021 (weeks 12-21 through 13-21), and April 11, 2021 through July 3, 2021 (weeks 15-21 through 26-21)), and relates to the appropriate computation of claimant's monetary penalty and weeks of penalty disqualification from benefits.

FINDINGS OF FACT: (1) Claimant had a gem business. Government restrictions imposed following the onset of the COVID-19 pandemic limited claimant's ability to operate his gem business. On October 30, 2020, claimant filed an initial application for PUA benefits. The Department determined claimant to have a valid claim for PUA benefits with a weekly benefit amount of \$205. The maximum weekly benefit amount in effect for a claim with a first effective week of claimant's claim was \$648.¹

(2) Claimant claimed PUA benefits for the weeks including February 14, 2021 through March 13, 2021 (weeks 07-21 through 10-21), the weeks of March 21, 2021 through April 3, 2021 (weeks 12-21 through 13-21), and the weeks of April 11, 2021 through July 3, 2021 (weeks 15-21 through 26-21).² These are the weeks at issue.

(3) Claimant received \$205 in PUA benefits for each of the weeks at issue for a total of \$3,690 in PUA benefits. Claimant received \$300 in FPUC benefits for each of the weeks at issue for a total of \$5,400.

(4) Claimant did not claim or receive PUA or FPUC benefits for the weeks of March 14, 2021 through March 20, 2021 (week 11-21) and April 4, 2021 through April 10, 2021 (week 14-21).

(5) For each of the weeks at issue, claimant received earnings from his gem business that exceeded his weekly benefit amount. For each of the weeks at issue, claimant failed to report these earnings to the Department on his weekly claim forms. Claimant failed to report his earnings for each of the weeks at issue willfully to obtain benefits.³

(6) Order No. 23-UI-234451, mailed to claimant on August 28, 2023, stated, "You may appeal this decision by filing the attached form Application for Review with the Employment Appeals Board within 20 days of the date that this decision is mailed." Order No. 23-UI-234451 at 8. Order No. 23-UI-234451

¹ EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

² Claimant also claimed and received benefits for the weeks including October 2, 2020 through February 13, 2021 (weeks 41-20 through 06-21). However, as concluded by Order No. 23-UI-234451, which conclusion this decision adopts, claimant received benefits to which he was entitled and therefore was not overpaid benefits for weeks 41-20 through 06-21. *See* Order No. 23-UI-234451 at 4.

³ This decision adopts the portion of Order No. 23-UI-234451 that concluded that claimant's earnings amounted to remuneration and that he failed to report his earnings for each of the weeks at issue willfully to obtain benefits. *See* Order No. 23-UI-234451 at 3, 7.

also stated on its Certificate of Mailing, “Any appeal from this Order must be filed on or before September 18, 2023 to be timely.”

(7) On September 18, 2023, the Department filed a timely application for review of Order No. 23-UI-234451 with EAB. On October 4, 2023, claimant filed a late application for review of Order No. 23-UI-234451 with EAB.

CONCLUSIONS AND REASONS: Claimant’s late application for review of Order No. 23-UI-234451 is dismissed. Order No. 23-UI-234451 is modified. Claimant was overpaid \$3,690 in PUA benefits and \$5,400 in FPUC benefits and is liable under 657.310(1)(a) and (2)(b) to repay these benefits or have the amount of the benefits deducted from any future benefits otherwise payable, and such overpayment may be collected by the Department at any time. Claimant is also subject to a \$2,727 monetary penalty and a 36-week penalty disqualification from receipt of future benefits.

Claimant’s Application for Review. An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a “reasonable time” upon a showing of “good cause.” ORS 657.875; OAR 471-041-0070(2). “Good cause” means that factors or circumstances beyond the applicant’s reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

Claimant’s application for review of Order No. 23-UI-234451 was due by September 18, 2023. Because claimant did not file his application for review until October 4, 2023, the application for review was late. Claimant’s application for review did not include a written statement describing the circumstances that prevented claimant from filing the application for review by the September 18, 2023 deadline. Accordingly, claimant did not show good cause for the late application for review, and claimant’s late application for review is dismissed.

However, EAB conducted a review of this case based on the Department’s timely-filed application for review.

Overpayment of PUA benefits. Overpayment of PUA benefits is governed by 15 U.S.C. § 9021(d)(4). That provision states that “[i]n the case of individuals who have received amounts of pandemic unemployment assistance to which they were not entitled, the State shall require such individuals to repay the amounts of such pandemic unemployment assistance to the State agency,” unless the state agency waives repayment. Under guidance issued by the United States Department of Labor, “if the overpayment amount is not subject to waiver, the State agency must recover the amount of PUA to which an individual was not entitled in accordance with the same procedures as apply to recovery of overpayments of regular [unemployment insurance] paid by the State.” U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20, Change 4 (January 8, 2021) (UIPL 16-20, Change 4), at I-26.

Regarding the procedures that apply to recovery of overpayments of regular unemployment insurance, ORS 657.310(1)(a) 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.* Further, ORS 657.310(2)(b) provides that overpayments that are subject to a monetary penalty for willful misrepresentation may be collected at any time. Pursuant to UIPL 16-20, Change 4, ORS 657.310(1)(a) and (2)(b) set forth the applicable state procedure for recovery of PUA benefits in this case.

The order under review concluded that claimant claimed and received benefits for weeks 11-21 and 14-21. Order No. 23-UI-234451. The record does not support this conclusion, and for that reason, this decision is modifying Order No. 23-UI-234451. Rather, the record supports that, as relevant to this decision, claimant claimed and received benefits as to weeks 07-21 through 10-21, 12-21 through 13-21, and 15-21 through 26-21. These are the weeks at issue.

Claimant received PUA benefits to which he was not entitled for the weeks at issue. Per UIPL 16-20, Change 4, disqualifying income provisions of applicable state law apply to claims for PUA. *See* UIPL 16-20 at I-17. An individual is not eligible to receive unemployment insurance benefits if they are not unemployed. ORS 657.155(1)(e) (“An *unemployed individual* shall be eligible to receive benefits with respect to any week”) (emphasis added). Per ORS 657.100(1), emphasis added, 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.*

For each of the weeks at issue, claimant received earnings from his gem business that exceeded his weekly benefit amount. This decision adopts the conclusion in Order No. 23-UI-234451 that claimant's earnings for each of the weeks at issue amounted to remuneration. *See* Order No. 23-UI-234451 at 3. Thus, for each week, claimant received remuneration that exceeded his weekly benefit amount and was not unemployed within the meaning of ORS 657.100(1). Therefore, claimant was not eligible to receive PUA benefits for any of the weeks at issue.

For each of the weeks at issue, claimant failed to report his earnings to the Department on his weekly claim forms. Therefore, ORS 657.310(1)(a) applies because the PUA benefits claimant received for the weeks at issue were received because claimant failed to disclose a material fact. As discussed in the “Willful Misrepresentation and Penalty Disqualification” section below, ORS 657.310(2)(b) also applies because claimant's overpayment is subject to a monetary penalty for willful misrepresentation. Accordingly, claimant was overpaid \$205 in PUA benefits for each of the weeks at issue for a total PUA overpayment of \$3,690. Per ORS 657.310(1)(a) and (2)(b), claimant is liable to repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable, and such overpayment may be collected by the Department at any time.

Overpayment of FPUC benefits. Under the provisions of the CARES Act, 15 U.S.C. § 9023, claimant also received FPUC benefits to which he was not entitled. FPUC is a federal benefits program that provided eligible individuals with \$300 per week, in addition to their regular UI or PUA weekly benefit amount, during the period of December 27, 2020 through September 4, 2021 (weeks 53-20 through 35-21). *See* U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 15-20 (April 4, 2020) at 6, (UIPL 15-20). Individuals were eligible to receive the full \$300 FPUC benefit if they were eligible to receive at least one dollar of regular UI benefits for the claimed week. IPL 15-20 at I-5.

Because claimant was not eligible for at least one dollar of PUA benefits for the weeks at issue, he also was ineligible to receive FPUC benefits for those weeks. *See* U.S. Dep’t of Labor, Unemployment Insurance Program Letter 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.”).

Accordingly, claimant was overpaid \$300 in FPUC benefits for each of the weeks at issue for a total FPUC overpayment of \$5,400. 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 he received the FPUC benefits to which he was not entitled.

United States Department of Labor guidance documents elaborate that while an FPUC overpayment may be offset by other State and Federal unemployment benefits payable during this three-year period, State agencies “must recover the amount of FPUC to which an individual was not entitled in accordance with the same procedures as apply to recovery of overpayments of regular [UI] paid by the State.” IPL 15-20 at I-7. “After three years, a State may continue to recover FPUC overpayments through means other than benefit offsets, according to State law.” IPL 15-20 at I-7. Therefore, because the provision of state law governing claimant’s PUA overpayment is ORS 657.310(1)(a) and (2)(b), claimant is liable to repay the amount of his FPUC overpayment or have it deducted from any future benefits otherwise payable, and such overpayment may be collected by the Department at any time.

Willful Misrepresentation and Penalty Disqualification. Under ORS 657.215, “[a]n individual is disqualified for benefits for a period not to exceed 52 weeks whenever the Director of the Employment Department finds that the individual has willfully made a false statement or misrepresentation, or willfully failed to report a material fact, to obtain any benefits[.]” The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052 (January 11, 2018), which provides, in pertinent part:

(1) An authorized representative of the Employment Department shall determine the number of weeks of disqualification under ORS 657.215 according to the following criteria:

(a) When the disqualification is imposed because the individual failed to accurately report work and/or earnings, the number of weeks of disqualification shall be determined by dividing the total amount of benefits overpaid to the

individual for the disqualifying act(s), by the maximum Oregon weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the individual's disqualifying act(s), rounding off to the nearest two decimal places, multiplying the result by four rounding it up to the nearest whole number.

* * *

As concluded by Order No. 23-UI-234451, which this decision adopts, claimant failed to report his earnings for each of the weeks at issue willfully to obtain benefits. *See* Order No. 23-UI-234451 at 3, 7. Therefore, claimant is subject to the penalty disqualification period set forth by ORS 657.215. Under the calculation method set forth in OAR 471-030-0052(1)(a), the total amount of overpaid PUA and FPUC benefits was \$9,090 and the maximum weekly benefit amount in effect during the first effective week of the initial claim was \$648. The \$9,090 overpayment divided by \$648, multiplied by 4, and then rounded up to the nearest whole number equals 57.

However, it appears the Department used a different computation method than that set forth under OAR 471-030-0052(1)(a). At hearing, when asked how the Department calculated the penalty weeks assessed in this case, the witness for the Department testified “Oh, uh, those are two weeks. Uh two penalty weeks for each, uh, each week that he received, uh, benefits while he had earnings.” Transcript at 7. OAR 471-030-0052(4) authorizes the Department to determine the number of penalty weeks using a different method, so long as the total numbers of penalty weeks assessed does not exceed 52. *See* OAR 471-030-0052(4) (“Notwithstanding section (1), (2), and (3), an authorized representative of the Employment Department may determine the number of weeks of disqualification according to the circumstances of the individual case, but not to exceed 52 weeks.”).

Applying the computation method described by the Department witness of assessing two penalty weeks for each of the 18 weeks at issue equals 36 penalty weeks. Accordingly, claimant is subject to a 36-week penalty disqualification from receipt of future benefits.

Monetary Penalty. Under ORS 657.310(2)(a), 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. Per federal guidance, a monetary penalty of at least 15 percent is applicable to the amount of an individual’s FPUC overpayment as well. U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 20-21 (May 5, 2021) at 4-5.

The percentage of the monetary penalty is determined by applying the provisions of OAR 471-030-0052(7), which provides, in pertinent part:

The department will review the number of occurrences of misrepresentation when applying the penalty as described in ORS 657.310(2). An occurrence shall be counted each time an individual willfully makes a false statement or representation, or willfully fails to report a material fact to obtain benefits. The department shall use the date the individual failed to report a material fact or willfully made a false statement as the date of the occurrence. For an individual subject to disqualification by administrative action under 657.215, the penalty will be:

* * *

(d) For the seventh or greater occurrence within 5 years of the occurrence for which a penalty is being assessed, 30 percent of the total amount of benefits the individual received but to which the individual was not entitled.

* * *

Here, claimant willfully failed to report his earnings to obtain benefits for each of the weeks at issue. These amount to 18 total occurrences. Therefore, the monetary penalty is 30% of the total PUA and FPUC overpayment. Claimant's total PUA and FPUC overpayment is \$9,090. Thirty percent of that figure is \$2,727. Thus, claimant is subject to a monetary penalty of \$2,727.

In summary, Order No. 23-UI-234451 is modified. Claimant was overpaid \$3,690 in PUA benefits and \$5,400 in FPUC benefits and is liable under ORS 657.310(1)(a) and (2)(b) to repay those benefits or have the amount of the benefits deducted from any future benefits otherwise payable, and such overpayment may be collected by the Department at any time. Claimant is also subject to a \$2,727 monetary penalty, and a 36-week penalty disqualification from receipt of future benefits.

DECISION: Order No. 23-UI-234451 is modified, as outlined above.

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

DATE of Service: November 2, 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.

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.