

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1218

Order No. 23-UI-238136 ~ Reversed and Remanded
Order No. 23-UI-238139 ~ Reversed and Remanded
Order No. 23-UI-237953 ~ Late Application for Review Allowed ~ Reversed
Request to Reopen Allowed ~ Merits Hearing Required
Order No. 23-UI-237955 ~ Late Application for Review Allowed ~ Reversed
Request to Reopen Allowed ~ Merits Hearing Required

PROCEDURAL HISTORY: On September 29, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not actively seeking work for the weeks of July 25, 2021 through September 25, 2021 (weeks 30-21 through 38-21) and was therefore ineligible to receive unemployment insurance benefits for those weeks (decision # 74601). On October 19, 2021, decision # 74601 became final without claimant having filed a request for hearing. On November 12, 2021, the Department served notice of an administrative decision concluding that claimant was not actively seeking work for the week of October 3, 2021 through October 9, 2021 (week 40-21) and was therefore ineligible to receive unemployment insurance benefits for that week (decision # 125058). On December 2, 2021, decision # 125058 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 # 74601, concluding that claimant received benefits to which she was not entitled and assessing an overpayment of \$1,610 in regular unemployment insurance (regular UI) benefits that claimant was liable to repay to the Department through deduction from future benefits, and \$1,500 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was liable to repay to the Department (decision # 162852). Also on July 1, 2022, the Department served notice of an administrative decision, based in part on decision # 125058, concluding that claimant received benefits to which she was not entitled and assessing an overpayment of \$230 in regular UI benefits that claimant was liable to repay to the Department (decision # 161842). On July 21, 2022, decisions # 162852 and 161842 became final without claimant having filed requests for hearing. On July 24, 2022, claimant filed late requests for hearing on decisions # 74601, 161842, 125058, and 162852.

ALJ Kangas considered claimant's requests, and on August 8, 2022 issued Orders No. 22-UI-200037, 22-UI-200036, 22-UI-200018, and 22-UI-200012, dismissing claimant's requests for hearing on decisions # 74601, 161842, 125058, and 162852, respectively, as late, subject to claimant's right to renew the requests by responding to an appellant questionnaire by August 22, 2022. On August 22,

2022, claimant filed a timely response to the appellant questionnaire. On November 2, 2022, the Office of Administrative Hearings (OAH) mailed letters stating that Orders No. 22-UI-200037, 22-UI-200036, 22-UI-200018, and 22-UI-200012 were cancelled and that hearings would be scheduled to determine whether claimant had good cause to file her requests for hearing late and, if so, the merits of decisions # 74601, 161842, 125058, and 162852.

On December 22, 2022, notice was mailed to claimant that a consolidated hearing on decisions # 74601, 161842, 125058, and 162852 was scheduled for January 5, 2023. On January 5, 2023, ALJ Monroe convened a hearing at which claimant failed to appear, and on January 11, 2023 issued Orders No. 23-UI-212283, 23-UI-212284, 23-UI-212289, and 23-UI-212285, dismissing claimant's late requests for hearing on decisions # 74601, 161842, 125058, and 162852, respectively, due to claimant's failure to appear. On January 17, 2023, claimant filed timely requests to reopen the January 5, 2023 hearing. On October 4, 2023, ALJ Lucas conducted two consolidated hearings, one on decisions # 74601 and 125058 and one on decisions # 161842 and 162852. On October 6, 2023, ALJ Lucas issued Orders No. 23-UI-237953 and 23-UI-237955, denying claimant's requests to reopen as to decisions # 74601 and 125058, and leaving Orders No. 23-UI-212283 and 23-UI-212289 undisturbed. On October 10, 2023, ALJ Lucas issued Order No. 23-UI-238136, allowing claimant's request to reopen and claimant's late request for hearing on decision # 161842, and modifying decision # 161842 by assessing an overpayment of \$230 in regular UI benefits that claimant was liable to repay through deduction from future benefits pursuant to ORS 657.315. Also on October 10, 2023, ALJ Lucas issued Order No. 23-UI-238139, allowing claimant's request to reopen and claimant's late request for hearing on decision # 162852, and affirming decision # 162852 on the merits.¹ On October 26, 2023, Orders No. 23-UI-237953 and 23-UI-237955 became final without claimant having filed applications for review with the Employment Appeals Board (EAB). On October 27, 2023, claimant filed timely applications for review of Orders No. 23-UI-238136 and 23-UI-238139 and late applications for review of Orders No. 23-UI-237953 and 23-UI-237955 with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 23-UI-237953, 23-UI-238136, 23-UI-237955, 23-UI-238139. For case-tracking purposes, this decision is being issued in quadruplicate (EAB Decisions 2023-EAB-1215, 2023-EAB-1216, 2023-EAB-1217, and 2023-EAB-1218, respectively).

Based on a *de novo* review of the entire consolidated record in this case, and pursuant to ORS 657.275(2), the portions of Orders No. 23-UI-238136 and 23-UI-238139 allowing claimant's requests to reopen and claimant's late requests for hearing on decisions # 161842 and 162852 are **adopted**. The rest of this consolidated decision addresses claimant's requests to reopen the hearings on decisions # 74601 and 125058, and the overpayments assessed in decisions # 161842 and 162852.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is the written statement included with claimant's applications for review and has been marked as EAB Exhibit 1, and a copy provided to

¹ Order No. 23-UI-238139 stated that it modified decision # 162852 "to conclude that the overall payment was not due to claimant providing a false statement or misrepresentation of a material fact or not disclosing a material fact." Order No. 23-UI-238139 at 13. However, as decision # 162852 did not conclude that claimant caused the overpayment and did not require her to repay the overpayment except through deduction from future benefits pursuant to ORS 657.315, Order No. 23-UI-238139 affirmed decision # 162852.

the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 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 exhibit will remain in the record.

FINDINGS OF FACT: (1) On June 6, 2021, 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 \$230. Thereafter, claimant filed weekly claims for the weeks including July 25, 2021 through August 28, 2021, September 12, 2021 through September 25, 2021, and October 3, 2021 through October 9, 2021 (weeks 30-21 through 34-21, 37-21 through 38-21, and 40-21). These are the weeks at issue.

(2) For each of the eight weeks at issue, claimant was paid \$230 in regular UI benefits, for a total of \$1,840. For each of weeks 30-21 through 34-21, claimant was also paid \$300 in FPUC benefits, for a total of \$1,500.

(3) On September 29, 2021 and November 12, 2021, the Department issued decisions # 74601 and 125058, together concluding that claimant was ineligible to receive benefits for the weeks at issue because she had not been actively seeking work during those weeks. The overpayments later assessed in decisions # 161842 and 162825 were based on claimant's ineligibility for benefits as determined by decisions # 74601 and 125058.

(4) On December 22, 2022, OAH mailed a notice to claimant of a consolidated hearing on decisions # 74601, 161842, 125058, and 162852 scheduled for January 5, 2023 at 8:15 A.M. Claimant received the notice sometime after January 5, 2023. Claimant did not attend the January 5, 2023 hearing because she was unaware it was being held.

(5) After receiving the December 22, 2022 hearing notice, claimant called the Office of Administrative Hearings (OAH) for assistance in understanding the document because she had some difficulty comprehending written English. Claimant understood from that conversation that the hearing was scheduled for January 13, 2023.

(6) On January 13, 2023, claimant discovered that no hearing was taking place that day and was told by OAH that the hearing had actually been scheduled for January 5, 2023. Claimant filed request to reopen on January 17, 2023.

(7) Order No. 23-UI-237953, mailed to claimant on October 6, 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-237953 at 4. Order No. 23-UI-237953 further stated in its Certificate of Mailing, "Any appeal from this Order must be filed on or before October 26, 2023 to be timely."

(8) Order No. 23-UI-237955, mailed to claimant on October 6, 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-237955 at 4. Order No. 23-UI-237955

further stated in its Certificate of Mailing, “Any appeal from this Order must be filed on or before October 26, 2023 to be timely.”

(9) Claimant did not receive Orders No. 23-UI-237953 and 23-UI-237955 in the mail prior to October 27, 2023. On October 27, 2023, claimant received Order No. 23-UI-237955, and filed applications for review of Orders No. 23-UI-237953 and 23-UI-237955.

CONCLUSIONS AND REASONS: Claimant’s late applications for review of Orders No. 23-UI-237953 and 23-UI-237955 are allowed. Orders No. 23-UI-237953 and 23-UI-237955 are set aside, claimant’s requests to reopen the January 5, 2023 hearing on decisions # 74601 and 125058 are allowed, and the matters are remanded for hearings to determine whether claimant had good cause to file her late requests for hearing on decisions # 74601 and 125058 and, if so, the merits of those decisions. Orders No. 23-UI-238136 and 23-UI-238139 are set aside and the matters remanded for further proceedings.

Late applications for review of Orders No. 23-UI-237953 and 23-UI-237955. 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).

The applications for review of Orders No. 23-UI-237953 and 23-UI-237955 were due October 26, 2023. Because claimant’s applications for review of those orders were filed October 27, 2023, the applications for review were late.

Claimant included a written statement with her late applications for review which described the circumstances that prevented timely filing. Claimant wrote on the application for review form that had been attached to Order No. 23-UI-237955, “I been having a lot of issues getting my mail. I talk to [an OAH representative]. She told me I had to send this by 10/26 but I got it today,” and dated the application “10/27/2023.” EAB Exhibit 1 at 2. It can reasonably be inferred from this statement that claimant’s applications for review of Orders No. 23-UI-237955 and 23-UI-237953 were delayed because claimant did not receive those decisions in the mail by October 26, 2023. Claimant’s failure to receive Orders No. 23-UI-237953 and 23-UI-237955 prior to the deadline for timely filing constituted a circumstance beyond claimant’s reasonable control that prevented timely filing. That circumstance ceased on October 27, 2023, when she received Order No. 23-UI-237955, and possibly Order No. 23-UI-237953. Because she filed the applications for review of Orders No. 23-UI-237953 and 23-UI-237955 on October 27, 2023, she did so within a “reasonable time” of when the circumstance that prevented timely filing ceased. Accordingly, claimant’s late applications for review of Orders No. 23-UI-237953 and 23-UI-237955 are allowed.

Requests to reopen the hearings on decisions # 74601 and 125058. ORS 657.270(5) provides that any party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and shows good cause

for failing to appear. “Good cause” exists when the requesting party’s failure to appear at the hearing arose from an excusable mistake or from factors beyond the party’s reasonable control. OAR 471-040-0040(2) (February 10, 2012). The party requesting reopening shall set forth the reason(s) for missing the hearing in a written statement, which the Office of Administrative Hearings (OAH) shall consider in determining whether good cause exists for failing to appear at the hearing. OAR 471-040-0040(3).

Orders No. 23-UI-237953 and 23-UI-237955 concluded that claimant’s failure to appear at the hearing on decisions # 74601 and 125058 “was [not] due to an excusable mistake or factors beyond claimant’s reasonable control.” Order No. 23-UI-237953 at 4; Order No. 23-UI-237955 at 4. The record does not support this conclusion.

Notice of the January 5, 2023 hearing on decisions # 74601, 161842, 125058, and 162852 was mailed to claimant on December 22, 2022. Claimant gave conflicting testimony as to when she received the notice, alternately saying that she received it *before* and *after* January 5, 2023. Order No. 23-UI-237953 Audio Record at 22:40; Order No. 23-UI-238136 Transcript at 6-7.² It can reasonably be inferred from other evidence in the record that claimant’s conflicting testimony was the result of her inability to remember precisely what date the notice was received, but that it was received after January 5, 2023. Claimant wrote in her January 17, 2023 request to reopen that she had “talk[ed] to someone in the hearing department and this person scheduled me for today Jan 13 at 8:30[.]” Exhibit 6 at 1. She also testified that she was “not sure” of the date she received the notice but, “It was after [January 5, 2023] because I called them and – and I asked them. And they said it’s past so I need to fill out some more papers.” Order No. 23-UI-238136 Transcript at 6. This testimony and the timing of claimant’s actions in the weeks following January 5, 2023 suggest that, more likely than not, she did not receive the hearing notice prior to the hearing. Claimant testified that the mailing address on the notice was correct but that she had been having problems receiving her mail, suggesting that the delay in delivery of the notice was not attributable to claimant. Order No. 23-UI-238136 Transcript at 7. Therefore, claimant’s failure to receive the hearing notice prior to the hearing was a factor beyond her reasonable control that prevented her appearance. Accordingly, claimant’s requests to reopen the January 5, 2023 hearing on decisions # 74601 and 125058 are allowed, and hearings to determine whether claimant’s late requests for hearing on decisions # 74601 and 125058 should be allowed and, if so, the merits of those decisions, are required.

Overpayments assessed in decisions # 161842 and 162852. 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.

Orders No. 23-UI-238136 and 23-UI-238139 concluded that claimant was overpaid benefits for the weeks at issue. Order No. 23-UI-238136 at 10; Order No. 23-UI-238139 at 13. However, these

² This conflicting testimony apparently led to conflicting conclusions in Orders No. 23-UI-238136 and 23-UI-238139 that claimant had good cause to reopen the January 5, 2023 hearing, while Orders No. 23-UI-237953 and 23-UI-237955 concluded that claimant did not have good cause to reopen that hearing. As a practical matter, it is not possible for claimant to both *have* and *not have* good cause for failing to appear at a single hearing.

overpayments were predicated on decisions # 74601 and 125058 concluding that claimant was ineligible to receive benefits for the weeks at issue, and claimant's appeals of those decisions have been remanded for further proceedings, as explained above. It is therefore appropriate to also set aside Orders No. 23-UI-238136 and 23-UI-238139, and remand the matters to accompany claimant's ongoing appeals of decisions # 74601 and 125058, since it is possible those decisions could be modified or reversed on remand, thereby affecting whether claimant was overpaid benefits for the weeks at issue.

In sum, claimant's late applications for review of Orders No. 23-UI-237953 and 23-UI-237955 are allowed. Orders No. 23-UI-237953 and 23-UI-237955 are reversed, claimant's requests to reopen the January 5, 2023 hearings on decisions # 74601 and 125058 are allowed, and the matters are remanded for hearings to determine whether claimant's late requests for hearing on decisions # 74601 and 125058 should be allowed and, if so, the merits of those decisions. Orders No. 23-UI-238136 and 23-UI-238139 are also reversed, and the matters remanded for further proceedings reflecting the outcome of claimant's remand hearings on decisions # 74601 and 125058.

DECISION: Claimant's late applications for review of Orders No. 23-UI-237953 and 23-UI-237955 are allowed. Orders No. 23-UI-237953 and 23-UI-237955 are set aside, claimant's requests to reopen the January 5, 2023 hearing on decisions # 74601 and 125058 are allowed, and the matters are remanded for hearings to determine whether claimant had good cause to file her late requests for hearing on decisions # 74601 and 125058 and, if so, the merits of those decisions. Orders No. 23-UI-238136 and 23-UI-238139 are set aside and the matters remanded for further proceedings consistent with this order.

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

DATE of Service: December 20, 2023

NOTE: The failure of any party to appear at the hearings on remand will not reinstate Orders No. 23-UI-237953, 23-UI-238136, 23-UI-237955, or 23-UI-238139, or return these matters to EAB. Only timely applications for review of the subsequent orders will cause these matters to return to EAB.

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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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