

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-1292**

*Modified*  
*Late Request for Hearing Allowed*  
*Overpayment, No Penalties*

**PROCEDURAL HISTORY:** On January 5, 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 \$302 in Pandemic Emergency Unemployment Compensation (PEUC) benefits and \$600 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was liable to repay to the Department, a \$135.30 monetary penalty, and a 6-week penalty disqualification from future benefits. On January 25, 2022, the January 5, 2022 administrative decision became final without claimant having filed a request for hearing. On June 16, 2022, claimant filed a late request for hearing on the January 5, 2022 administrative decision.

ALJ Kangas considered claimant's request, and on August 29, 2022 issued Order No. 22-UI-201537, dismissing claimant's request for hearing as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by September 12, 2022. On September 6, 2022, claimant filed a timely response to the appellant questionnaire. On December 20, 2022, the Office of Administrative hearings (OAH) mailed a letter to the parties stating that Order No. 22-UI-201537 was vacated and that a hearing would be scheduled to determine whether claimant's late request for hearing should be allowed and, if so, the merits of the January 5, 2022 administrative decision. On April 3, 2023, ALJ Monroe conducted a hearing at which the employer failed to appear, and on April 24, 2023 issued Order No. 23-UI-222947, allowing claimant's late request for hearing and affirming the January 5, 2022 administrative decision on the merits. On May 14, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** To the extent the statements accompanying claimant's application for review constituted written argument, such argument was not considered because claimant did not include a statement declaring that he provided a copy of his argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing is **adopted**. The rest of this decision addresses whether claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits and whether an overpayment, monetary penalty, or penalty disqualification should be assessed.

**FINDINGS OF FACT:** (1) On June 18, 2020, claimant filed an initial application for unemployment insurance benefits. The Department determined that claimant had a monetarily valid claim for regular unemployment insurance (regular UI) benefits with a weekly benefit amount of \$151. After claimant exhausted his regular UI benefits, claimant was paid PEUC benefits with the same weekly benefit amount.

(2) United Salad Co. employed claimant as a warehouse loader from approximately April 28, 2021 until May 17, 2021, when they discharged claimant. Claimant earned \$17 per hour.

(3) During the week of May 2, 2021 through May 8, 2021 (week 18-21), claimant earned \$458.66 working for the employer.

(4) During the week of May 9, 2021 through May 15, 2021 (week 19-21), claimant earned \$336.09 working for the employer.

(5) Claimant filed weekly claims for the weeks including May 2, 2021 through May 15, 2021 (weeks 18-21 through 19-21). These are the weeks at issue. Claimant was paid \$151 in PEUC benefits and \$300 in FPUC benefits each week, for a total of \$302 in PEUC benefits and \$600 of FPUC benefits. When claimant claimed benefits for each of the weeks at issue, he reported that he had not worked or earned wages.

(6) The employer did not pay claimant until his separation from employment. Claimant thought the paycheck he received was for an amount greater than what he had actually earned, and that he was paid extra because the employer was "righting their wrong that they had done to [claimant]." Audio Record at 1:54:30. Claimant reported on his weekly claims that he had not worked or earned wages during the weeks at issue because he had not yet been paid by the employer and misunderstood when remuneration was reportable in that situation.

(7) Claimant had previously reported earnings from other employment on weekly claims, most recently for the week of March 21, 2021 through March 27, 2021 (week 12-21).

(8) On June 1, 2021, the Department sent claimant a questionnaire asking claimant about his work for the employer. Claimant wrote his responses on the questionnaire and returned it to the Department. Claimant wrote in his response that he worked for the employer from April 29, 2021 until he was suspended on May 13, 2021, and "let go" on May 17, 2021. Exhibit 3 at 12. The questionnaire asked, "What are your hours and earnings?" to which claimant responded, "N/A." Exhibit 3 at 12. Claimant gave this response because he no longer worked for the employer.

**CONCLUSIONS AND REASONS:** Claimant was overpaid \$302 in PEUC benefits and \$600 in FPUC benefits that he is required to repay to the Department, but did not willfully make a misrepresentation

and fail to report a material fact to obtain benefits, and therefore is not subject to a monetary penalty or penalty disqualification.

The order under review concluded that claimant was overpaid \$302 in PEUC benefits and \$600 in FPUC benefits for the weeks at issue because he failed to report earnings which exceeded his weekly benefit amount for those weeks. Order No. 23-UI-237672 at 5, 8. The record supports this conclusion. The order further concluded that because claimant testified that he worked and earned wages during the weeks at issue, but failed to report on his weekly claims that he had been working or earned wages, he willfully failed to report material facts to obtain benefits and was therefore subject to a monetary penalty and penalty disqualification. Order No. 23-UI-237672 at 10. The record does not support this conclusion.

**Remuneration.** In relevant part, OAR 471-030-0017(1)(b) (January 11, 2018) defines “earnings” as “remuneration.” Subpart (1)(c) of the administrative rule defines “remuneration” as “compensation resulting from the employer-employee relationship” and includes “wages, salaries, incentive pay, sick pay, compensatory pay, bonuses, commissions, stand-by pay, and tips.”

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), 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.

The employer reported to the Department that claimant earned \$458.66 during week 18-21 and \$336.09 during week 19-21.<sup>1</sup> Claimant testified that he received his only paycheck from the employer after separating from employment, which was for more than he believed he had earned. Audio Record 1:54:20. Claimant was asked at hearing whether he had “any reason to believe that [the earnings reported by the employer] were incorrect for the time period that [he] worked there,” and did not specify any way in which he disagreed with the amounts reported. Audio Record at 1:53:45. Claimant further testified he did not remember how much the employer paid him. Audio Record at 1:54:10. The employer’s pay records, presumably kept in the ordinary course of business, are entitled to greater weight than claimant’s lack of recollection of how much he was paid. Therefore, more likely than not, claimant earned \$458.66 during week 18-21 and \$336.09 during week 19-21. Claimant’s wages exceeded his \$151 weekly benefit amount in each of the weeks at issue, and he therefore did not meet the statutory definition of “unemployed.” Because claimant was not unemployed during the weeks at issue, he was not entitled to unemployment insurance benefits under state law.

**Overpayment of PEUC benefits.** Under the provisions of the CARES Act, 15 U.S.C. § 9025, claimant received \$302 in PEUC benefits during the weeks at issue to which he was not entitled because he was not eligible for benefits under state law. See U.S. Dep’t of Labor, Unemployment Insurance Program

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<sup>1</sup> The employer submitted earnings information specifically for week 19-21, and for the second quarter of 2021. Given the dates of claimant’s employment, the Department concluded that the employer was reporting that the difference between the second quarter earnings and the earnings for week 19-21 constituted claimant’s week 18-21 earnings. Audio Record at 1:13:53.

Letter No. 17-20 (April 10, 2020) at I-8 (“An individual is not entitled to receive PEUC for a week if the individual is ineligible for benefits for the week due to a disqualification under the applicable state law.”). Pursuant to 15 U.S.C. § 9025(e)(2), an individual who receives PEUC 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 Department did not waive repayment here because it determined claimant was at fault for the overpayment.

Claimant was therefore overpaid \$302 in PEUC benefits he received during the weeks at issue. Under 15 U.S.C. § 9025(e)(3), the Department may recover the PEUC benefits by deduction from any future PEUC payments payable to claimant or from any future unemployment compensation payable to him under any state or federal unemployment compensation law administered by the Department during the three-year period following the date he received the PEUC benefits to which he was not entitled.

United States Department of Labor guidance documents elaborate that while a PEUC overpayment may be offset by other State and Federal unemployment benefits payable during this three-year period, State agencies “must recover the amount of PEUC 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.” U.S. Dep’t of Labor, UIPL 17-20, at I-11. “After three years, a State may continue to recover PEUC overpayments through means other than benefit offsets, according to State law.” UIPL 17-20 at I-11; see also U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 17-20, Change 1 (May 13, 2020) at I-8 (“[15 U.S.C. § 9025(e)(3)] requires benefit offset as one method of recovery, but states can also use other means to recover PEUC overpayments as allowable under state or Federal law[.]”).

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 within five years following the week in which the decision establishing the overpayment became final. 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.*

Because the overpayment was caused by claimant’s failure to report his earnings on weekly claims, recovery of such an overpayment under state law is governed by ORS 657.310(1). Therefore, claimant is liable to repay the amount of his PEUC overpayment, including via deduction from any future benefits otherwise payable to claimant under ORS Chapter 657 during the five-year period following the date that decision the January 5, 2022 administrative decision becomes final.

**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 weekly benefit amount, during the weeks at issue. *See* U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 15-20, Change 4 (March 26, 2021) at 2. Individuals were eligible to receive the full \$300 FPUC benefit if they were eligible to receive at least one dollar of unemployment insurance benefits for the claimed week under state law. UIPL 15-20 (April 4, 2020) at I-5.

Because claimant was not eligible for at least one dollar of unemployment insurance benefits for each of the two weeks at issue, he also was ineligible to receive FPUC benefits for those weeks. *See* UIPL 15-20 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.”). Claimant was therefore overpaid the \$600 in FPUC benefits he was paid for the weeks at issue.

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.” UIPL 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.” UIPL 15-20 at I-7. Therefore, because the provision of state law governing claimant’s FPUC overpayment is ORS 657.310(1), claimant is liable to repay the amount of his FPUC overpayment or have it deducted from any future benefits otherwise payable to claimant under ORS Chapter 657 during the five-year period following the date the January 5, 2022 administrative decision becomes final.

**Misrepresentation.** An individual who willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. ORS 657.215. 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 resulting overpayment. ORS 657.310(2).

The record shows that claimant worked for the employer during weeks 18-21 and 19-21 but failed to report on his weekly claims for those weeks that he worked or had earnings. After the Department learned of this work, they sent claimant a questionnaire on June 1, 2021, which claimant completed and returned. Claimant wrote in his response that he worked for the employer from April 29, 2021 until he was suspended on May 13, 2021, and “let go” on May 17, 2021. Exhibit 3 at 12. The questionnaire asked, “What are your hours and earnings?” to which claimant responded, “N/A.” Exhibit 3 at 12. At hearing, the Department asserted that they believed claimant’s failure to report his earnings on his weekly claims was done willfully to obtain benefits because he again failed to disclose those earnings in his questionnaire response, and because claimant had previously reported earnings from other employers on weekly claims as recently as week 12-21, evincing that claimant understood his reporting obligations. Audio Record at 1:25:20.

It is reasonable to infer that since the questionnaire asked about earnings in the present tense, and claimant no longer worked for the employer when the questionnaire was sent, claimant’s answer of “N/A” was merely intended to convey that he no longer worked for the employer, rather than to conceal the amount of any prior earnings. While claimant reported earnings on weekly claims from other employment in the recent past, claimant testified, “There was a time that I thought you were supposed to claim until you got your first check.” Audio Record at 1:56:45. This suggests that, due to claimant’s short tenure with the employer and the fact that he was not paid until he separated from employment, he may not have understood that he had to report his work and wages when claiming weeks 18-21 and 19-21, as opposed to after he was paid. The Department bears the burden of proving willful misrepresentation by a preponderance of evidence in cases where it has already paid benefits. *See*

*Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). Because the evidence as to whether claimant willfully failed to report his earnings to obtain benefits, rather than inadvertently failing to report them due to a misunderstanding, is no more than equally balanced, the Department has not met its burden. Accordingly, the record shows that claimant did not willfully make a misrepresentation and fail to report a material fact to obtain benefits, and he is therefore not subject to a monetary penalty or penalty disqualification.

In sum, claimant was overpaid \$302 in PEUC benefits and \$600 in FPUC benefits for the weeks at issue that he is liable to repay the Department or have deducted from any future benefits otherwise payable to claimant under ORS Chapter 657 during the five-year period following the date the January 5, 2022 administrative decision becomes final. Claimant is not subject to a monetary penalty or penalty disqualification.

**DECISION:** Order No. 23-UI-222947 is modified, as outlined above.

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

**DATE of Service: December 7, 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](https://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](mailto: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”.**

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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.

**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](http://www.Oregon.gov/Employ/eab)

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