

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1301

Order No. 23-UI-240727 Modified ~ Late Request for Hearing Allowed, Ineligible for PUA
Order No. 23-UI-240937 Affirmed ~ No Overpayment Assessed

PROCEDURAL HISTORY: On October 1, 2021, the Oregon Employment Department (the Department) served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was ineligible for PUA benefits effective March 8, 2020. On October 21, 2021, the October 1, 2021, PUA determination became final without claimant having filed a request for hearing. On February 2, 2022, the Department served notice of an administrative decision based in part on the October 1, 2021, PUA determination, concluding that claimant received \$432 in PUA and \$3,000 in Federal Pandemic Unemployment Compensation (FPUC) benefits to which he was not entitled and must repay (decision # 72035).

On February 14, 2022, claimant filed a late request for hearing on the October 1, 2021, PUA determination and a timely request for hearing on decision # 72035. On October 31, 2023, ALJ Nyberg conducted hearings on both matters. On November 8, 2023, ALJ Nyberg issued Order No. 23-UI-240727, allowing claimant's late request for hearing on October 1, 2021, PUA determination and reversing the determination by concluding that the Department lacked authority to issue the decision that claimant was ineligible for PUA benefits. On November 9, 2023, ALJ Nyberg issued Order No. 23-UI-240937, reversing decision # 72035 by concluding that claimant was not liable for an overpayment of benefits.

On November 28, 2023, the Department filed applications for review of Orders No. 23-UI-240727 and 23-UI-240937 with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 23-UI-240727 and 23-UI-240937. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2023-EAB-1301 and 2023-EAB-1300).

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the portion of Order No. 23-UI-240727 allowing claimant's late request for hearing on the October 1, 2021, PUA determination is **adopted**. The rest of this decision addresses claimant's PUA eligibility and the overpayment of benefits.

FINDINGS OF FACT: (1) On June 4, 2020, claimant filed a claim for benefits. During 2019, claimant had total earnings of \$4,979.35, with high quarter earnings of \$4,544.35, and worked a total of 490 hours.¹ At the time his claim was filed, claimant had no reported earnings for the first quarter of 2020. The Department determined that claimant did not establish a monetarily valid claim for regular unemployment insurance (regular UI) benefits. However, it determined that claimant established a valid claim for PUA benefits with a weekly benefit amount (WBA) of \$205.

(2) Claimant thereafter filed weekly claims, for which he was paid \$205 in PUA benefits and \$600 in FPUC benefits per week for the weeks from April 26 through June 27, 2020 (weeks 18-20 through 26-20). These are the weeks at issue. These benefit payments were made on or before July 1, 2020.²

(3) At some point after the payment of PUA and FPUC benefits for the weeks at issue, the Department learned that claimant had \$2,501.88 in earnings during the first quarter of 2020. Including these earnings, claimant earned a total of \$7,481.23 during the second, third, and fourth quarters of 2019 and the first quarter of 2020, and claimant's high quarter earnings during this period were \$4,544.35.³ Using this updated wage information, the Department determined that claimant had established a monetarily valid claim for regular UI benefits using an alternate benefit year, effective April 26, 2020, with a WBA of \$151.

(4) On October 1, 2021, the Department issued the October 1, 2021, PUA determination, concluding that claimant was ineligible for PUA benefits, including for the weeks at issue, because he was eligible for regular UI benefits.

(5) On January 5, 2022, the Department paid claimant \$151 per week in regular UI benefits and an additional \$600 in FPUC benefits for each of the weeks at issue. However, the Department used portions of these payments to offset previously paid PUA and FPUC benefits that the Department believed had been overpaid, rather than paying them directly to claimant.

(6) On February 2, 2022, the Department issued decision # 72035, concluding that claimant had been overpaid PUA and FPUC benefits which, after deducting the amounts offset on January 5, 2022, totaled \$432 in PUA benefits and \$3,000 in FPUC benefits.

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 facts will remain in the record.

² EAB has taken notice of this fact which is contained in Employment Department records. OAR 471-041-0090(1). 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.

³ EAB has taken notice of these facts which are contained in Employment Department records. OAR 471-041-0090(1). 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 facts will remain in the record.

CONCLUSIONS AND REASONS: Claimant was ineligible for PUA benefits for the weeks at issue and was overpaid benefits for the weeks at issue. However, the Department was not authorized to amend the original decisions allowing payment of benefits for the weeks at issue, and claimant therefore is not liable for the overpayment.

Authority to Amend Allowing Decisions. ORS 657.267, with emphasis added, provides as follows:

(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.

Order No. 23-UI-240727 concluded that the October 1, 2021, PUA determination constituted an amendment to the original decisions allowing the payment of PUA and FPUC benefits to claimant, and that because it was issued more than a year after the decisions allowing the payment of benefits, the Department lacked authority to issue it. Order No. 23-UI-240727 at 4-5. The record does not support this conclusion because decision # 72035, and not the October 1, 2021, PUA determination, constituted the amendment to the original decisions allowing the payment of PUA and FPUC benefits to claimant.

The Department made its original decisions under ORS 657.267(1) to allow the payment of PUA and FPUC benefits for weeks 18-20 through 26-20 by paying each of these claims on or before July 1, 2020. Pursuant to ORS 657.267(1), except in cases of willful misrepresentation or fraud, the Department has one year to amend the decisions to allow benefits.

On February 2, 2022, the Department issued decision # 72035, concluding that claimant was not entitled to the PUA and FPUC benefits he received for the weeks at issue and assessing an overpayment of those benefits. Decision # 72035 therefore served to amend the Department's initial decisions to allow benefits for the weeks at issue to a decision denying benefits for those weeks. In contrast, the October 1, 2021, PUA determination merely concluded that claimant was ineligible to claim benefits under the PUA program, without deciding claimant's entitlement to PUA or FPUC benefits already received. The October 1, 2021, PUA determination therefore did not constitute a decision to amend the initial decisions to pay benefits for the weeks at issue, and the Department was authorized to issue that determination.

For reasons explained in greater detail below, this decision affirms the October 1, 2021, PUA determination because the record shows that claimant was ineligible for PUA benefits for the weeks at issue. Accordingly, claimant was overpaid PUA and corresponding FPUC benefits for the weeks at issue. As the Department's representative testified, however, the overpayment was the result of "Department error," and not the fault of claimant. Order No. 23-UI-240727 Transcript at 13. Pursuant to ORS 657.267(4), the Department lacks authority to amend initial decisions allowing benefits more than one year after those initial decisions were issued in the absence of "willful misrepresentation or fraud."

Federal guidance provides, "The terms and conditions of the state law which apply to claims for regular compensation and extended benefits and the payment thereof shall apply to claims for PUA and the payment thereof except as provided in these operating instructions and any additional guidance issued regarding the PUA program." Unemployment Program Information Letter 16-20 Attachment 1, Section 11(c) (April 5, 2020). Overpayment of PUA benefits is governed by Section 2102(d)(4) of the CARES Act, Pub. L. 116-136, as amended by Section 201(d) of the Continued Assistance Act ("CAA"), which provides 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 amount of such pandemic unemployment to the State agency," unless the state agency waives repayment. However, federal guidance further provides that, "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 ("UIPL") No. 16-20, Change 4 (January 8, 2021) at I-26.

As federal law and guidance do not provide for differing limitations on the Department's ability to amend decisions allowing the payment of benefits, ORS 657.267(4) applies, and the Department therefore lacked authority to amend the original decisions allowing the payment of benefits and, in turn, to assess an overpayment of benefits for the weeks at issue.

Eligibility for PUA Benefits. ORS 657.150 provides, in relevant part:

(1) An individual shall be paid benefits for weeks during the benefit year in an amount that is to be determined by taking into account the individual's work in subject employment in the base year as provided in this section.

(2) (a) To qualify for benefits an individual must have:

(A) Worked in subject employment in the base year with total base year wages of \$1,000 or more and have total base year wages equal to or in excess of one and one-half times the wages in the highest quarter of the base year; and

(B) Have earned wages in subject employment equal to six times the individual's weekly benefit amount in employment for service performed subsequent to the beginning of a preceding benefit year if benefits were paid to the individual for any week in the preceding benefit year.

(b) If the individual does not meet the requirements of paragraph (a)(A) of this subsection, the individual may qualify for benefits if the individual has worked a minimum of 500 hours in employment subject to this chapter during the base year.

* * *

ORS 657.173 provides, in relevant part:

(1) (a) Notwithstanding ORS 657.010 (1), in the case of an individual who is not eligible for benefits under ORS 657.150 (2) using the definition in ORS 657.010 (1), "base year" means the last four completed calendar quarters preceding the benefit year, if use of this alternate definition of "base year" makes the individual eligible for benefits under ORS 657.150 (2).

* * *

To be eligible for PUA benefits, an individual must be a "covered individual" as that term is defined by the CARES Act, as amended. 15 U.S.C. § 9021(b). In pertinent part, a "covered individual" is an individual who "is not eligible for regular compensation or extended benefits . . . or pandemic emergency unemployment compensation[.]" 15 U.S.C. § 9021(3)(A)(i).

The Department initially concluded that claimant's initial claim for regular UI benefits was not monetarily valid when filed because his earnings during the regular base year (the first through fourth quarters of 2019) totaled \$4,979.35, which did not exceed one and one-half times his high quarter earnings of \$4,544.35.⁴ He therefore did not meet the requirements of ORS 657.150(2)(a)(A). Claimant also did not meet the requirements of ORS 657.150(2)(b) because he worked less than 500 hours during the base year. ORS 657.173(1)(a) therefore permitted consideration of an alternate base year, consisting of the second through fourth quarters of 2019 and the first quarter of 2020. At the time the claim was filed, however, the Department did not have any record from employers of claimant having earnings or

⁴ \$4,544.34 x 1.5 = \$6,816.52.

hours worked during the first quarter of 2020. Thus, at that time, claimant was also unable to establish a monetarily valid claim using an alternate base year. Accordingly, the Department found claimant ineligible for regular UI benefits at that time.

The Department subsequently received reports from two employers that claimant had earnings totaling \$2,501.88 during the first quarter of 2020. This increased claimant's alternate base year earnings to \$7,481.23, while one and one-half times his high quarter earnings remained \$6,816.52. Because the alternate base year earnings exceeded \$1,000, and exceeded one and one-half times claimant's high quarter earnings, claimant established a monetarily valid claim for regular UI benefits, effective the second quarter of 2020.

Because claimant was eligible for regular UI benefits beginning in the second quarter of 2020, he was not a "covered individual" for purposes of PUA benefits for the weeks at issue under 15 U.S.C. § 9021(3)(A)(i) and therefore not eligible for PUA benefits for the weeks at issue.

For these reasons, claimant was ineligible for PUA benefits effective April 16, 2020. However, the Department was without authority to assess an overpayment of PUA benefits or corresponding FPUC benefits,⁵ and claimant is not liable for the overpayment assessed in decision # 72035.

DECISION: Order No. 23-UI-240727 is modified, as outlined above. Order No. 23-UI-240937 is affirmed.

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

DATE of Service: January 11, 2024

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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⁵ Though the Department determined claimant was ineligible for the FPUC benefits corresponding to the PUA benefits, the Department determined he was eligible for the same amount of FPUC benefits corresponding to regular UI benefits during the weeks at issue. This decision does not affect claimant's entitlement to the latter FPUC benefits.



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.

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