

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1318

Order No. 23-UI-241318 – Modified – Overpayment Reduced
Order No. 23-UI-241317 – Reversed & Remanded

PROCEDURAL HISTORY: On June 28, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was paid \$14,302 in regular unemployment insurance (regular UI) and \$10,200 in Federal Pandemic Unemployment Compensation (FPUC) benefits to which he was not entitled and must repay (decision # 85622). Claimant filed a timely request for hearing on decision # 85622. On February 23, 2022, the Department served notice of an administrative decision denying claimant’s requests for waiver of his \$14,302 regular UI overpayment and his \$10,200 FPUC overpayment, as well as denying his waiver requests for a \$3,300 overpayment, a \$7,776 overpayment, a \$673 overpayment, and a \$300 overpayment, each of unknown unemployment insurance program types (decision # 154106). Claimant filed a timely request for hearing on decision # 154106.

On November 17, 2022, the Office of Administrative Hearings (OAH) served two notices of hearing, one scheduling a hearing on decision # 85622 for December 1, 2022 at 9:30 a.m., and the other scheduling a hearing on decision # 154106 for December 1, 2022 at 10:45 a.m. On December 1, 2022, claimant failed to appear for the hearings, and ALJ Scott issued Orders No. 22-UI-208666 and 22-UI-208665, dismissing the hearing requests on decisions # 85622 and 154106 due to claimant’s failure to appear, leaving the administrative decisions undisturbed. On December 15, 2022, claimant filed a timely request to reopen the December 1, 2022 hearings.

On November 8, 2023, ALJ Frank conducted a consolidated hearing on claimant’s request to reopen the December 1, 2022 hearings and, if allowed, the merits of decisions # 85622 and 154106. On November 16, 2023, ALJ Frank issued Orders No. 23-UI-241318 and 23-UI-241317, allowing claimant’s request to reopen the December 1, 2022 hearings and affirming decisions # 85622 and 154106. On December 6, 2023, claimant filed applications for review of Orders No. 23-UI-241318 and 23-UI-241317 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 23-UI-241318 and 23-UI-241317. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2023-EAB-1317 and 2023-EAB-1318).

WRITTEN ARGUMENT: Claimant submitted two written arguments, one received on December 8, 2023 and one received on January 2, 2024. Both arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant’s reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant’s arguments to the extent they were based on the record.

The parties may offer new information into evidence at the remand hearing, such as the letter from Shari’s restaurant claimant attached to one of his written arguments or evidence of claimant’s monthly total household income and monthly household expenses. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

Based on a *de novo* review of the entire consolidated record in these cases, and pursuant to ORS 657.275(2), the portions of the orders under review allowing claimant’s requests to reopen are **adopted**. The remainder of this decision addresses the merits of decisions # 85622 and 154106.

FINDINGS OF FACT: (1) Prior to March 17, 2020, claimant worked as a cook at a Shari’s restaurant and in a computer support role for an employer called Computer Aided Technology. Claimant worked both jobs full-time “to meet the expenses of a . . . a high needs household.” Transcript at 23. In mid-March 2020, Shari’s restaurant closed due to COVID-19 restrictions, and claimant was laid off from his job at Shari’s restaurant for a time. Claimant continued to work for Computer Aided Technology.

(2) On March 17, 2020, claimant filed an initial claim for regular UI benefits. Shari’s restaurant encouraged claimant to file an unemployment insurance claim. Claimant had never done so before. During the “initial setup” of claimant’s claim in March 2020, claimant believed that Department representatives told claimant that he “was eligible to apply for benefits based on the emergency circumstances.” Transcript at 23.

(3) The Department determined that claimant had a monetarily valid claim for regular UI benefits with a weekly benefit amount of \$648. Thereafter, claimant claimed benefits for each of the weeks of March 15, 2020 through August 29, 2020 (weeks 12-20 through 35-20). These are the weeks at issue.

(4) On his weekly claim forms for each of the weeks at issue, claimant failed to report his hours worked and earnings received from Computer Aided Technology. Claimant failed to do so because he thought his claim applied only to the job he had lost as a cook at Shari’s restaurant. Claimant’s weekly earnings from Computer Aided Technology exceeded his weekly benefit amount for each of the weeks at issue. As a result, if claimant had reported his earnings from Computer Aided Technology for each of the weeks at issue, the Department would not have paid him benefits for any of the weeks.

(5) Claimant believed that during the weeks at issue, he “spoke to many OED representatives” who gave him “inconsistent and conflicting information that was difficult to verify and follow up on.” Transcript

at 23-24. Claimant believed he “reconfirmed each time with OED representatives about [his] situation and “was told repeatedly that due to the unusual circumstances, [he] should be okay” and “if there did happen to be a problem with the benefits, it would be flagged in the system immediately” and claimant “would be notified.” Transcript at 24.

(6) The Department paid claimant regular UI benefits in the amount of \$648 for each of weeks 12-20 through 23-20. In June 2020, COVID-19 restrictions relaxed, and Shari’s restaurant gave claimant some part-time work. Claimant reported those hours and earnings when he made his weekly claims and, as a result, for weeks 24-20 through 35-20, the Department paid claimant regular UI benefits but at a reduced amount each week. Specifically, the Department paid claimant \$558 for each of weeks 24-20 through 26-20, \$422 for week 27-20, \$524 for week 28-20, \$490 for week 29-20, \$575 for each of weeks 30-20 through 32-20, \$558 for each of weeks 33-20 and 34-20, and \$575 for week 35-20.

(7) All told, the Department paid claimant \$8,892 in regular UI benefits for weeks 12-20 through 25-20, and \$5,410 in regular UI benefits for weeks 26-20 through 35-20.

(8) The Department paid claimant FPUC benefits in the amount of \$600 for each of weeks 14-20 through 30-20. All told, the Department paid claimant \$7,200 in FPUC benefits for weeks 14-20 through 25-20, and \$3,000 in FPUC benefits for weeks 26-20 through 30-20.

(9) Each of the payments the Department made to claimant for weeks 12-20 through 25-20 were made on or before June 22, 2020. The Department paid claimant for weeks 26-20 through 35-20 on or after June 29, 2020.¹

(10) On June 28, 2021, the Department issued decision # 85622. Decision # 85622 assessed an overpayment of \$14,302 in regular UI benefits and \$10,200 in FPUC benefits that claimant was liable to repay the Department.

(11) On December 20, 2021, the Department issued another administrative decision, which concluded that claimant was liable for a \$3,300 overpayment, a \$7,776 overpayment, a \$673 overpayment, and a \$300 overpayment, each stemming from an unknown unemployment insurance program type.

(12) On July 19, 2021, claimant filed an application for waiver of recovery of his overpayments. On February 23, 2022, the Department issued decision # 154106, denying claimant’s requests for waiver of his \$14,302 regular UI overpayment and his \$10,200 FPUC overpayment, as well as denying his waiver requests for the \$3,300 overpayment, the \$7,776 overpayment, the \$673 overpayment, and the \$300 overpayment.

CONCLUSIONS AND REASONS: Order No. 23-UI-241318 is modified. Claimant is not liable for overpayments relating to weeks 12-20 through 25-20 because ORS 657.267(4) prohibited the Department from amending its initial decisions to allow payment of benefits for those weeks to decisions for those weeks assessing an overpayment that claimant must repay. For weeks 26-20 through

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.

35-20, claimant received \$5,410 in regular UI benefits and \$3,000 in FPUC benefits to which he was not entitled. Claimant is liable to repay the \$5,410 in regular UI benefits or have it deducted from any future benefits otherwise payable to claimant during the five-year period following the date decision # 85622 becomes final. Claimant is also liable for an overpayment of \$3,000 in FPUC benefits to be recovered in accordance with the same procedures as apply to recovery of claimant's regular UI overpayment.

Order No. 23-UI-241317 is set aside, and the matter remanded for further proceedings consistent with this order.

Order No. 23-UI-241318 – Lack of Authority to Amend Allowing Decisions Weeks 12-20 through 25-20. ORS 657.267 provides:

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

(2) If the claim is denied under any provision of ORS 657.176, written notice of the decision must be given to the employing unit, or to the agent of the employing unit, that, in the opinion of the Director of the Employment Department, is most directly involved with the facts and circumstances relating to the disqualification.

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

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

(Emphasis added.)

Order No. 23-UI-241318 concluded that for the weeks at issue, claimant was overpaid \$14,302 in regular UI benefits and \$10,200 in FPUC benefits. Order No. 23-UI-241318 at 6. In so doing, the order established that for weeks 12-20 through 25-20, claimant was overpaid \$8,892-in regular UI benefits and

\$7,200 in FPUC benefits. However, ORS 657.267(4) prohibits the Department from amending its original decisions to allow payment by assessing overpayments for weeks 12-20 through 25-20.

The Department made its original decisions under ORS 657.267(1) to allow payment of benefits for weeks 12-20 through 25-20 by paying each of the claims on or before June 22, 2020. Because the decisions to allow payment did not require notice under ORS 657.267, the Department could only amend the decisions to allow payment within one year of the decisions, absent “alleged willful misrepresentation or fraud.” ORS 657.267(4). Decision # 85622 amended the original decisions to allow payment for weeks 12-20 through 25-20 because it concluded that claimant was overpaid benefits for those weeks due to excess earnings. Decision # 85622 was issued more than one year after the last decision allowing payment for week 25-20 on June 22, 2020.

Accordingly, the Department was prohibited from making the amendments for weeks 12-20 through 25-20. This case is not a case of willful misrepresentation or fraud because the record shows that claimant’s failure to report his hours and earnings for Computer Aided Technology was due to a mistake or misunderstanding regarding what he was obligated to report. Moreover, decision # 85622 did not assert that claimant received the overpaid benefits due to willful misrepresentation or fraud. Decision # 85622 was issued by the Department not as a willful misrepresentation overpayment subject to recovery under ORS 657.310(2), but as a claimant fault but non-fraud overpayment subject to recovery under ORS 657.310(1). Thus, the one-year limitation on amending decisions under ORS 657.267(4) applies, and the Department was not permitted to amend the original decisions allowing the payment of benefits for weeks 12-20 through 25-20 with decisions assessing an overpayment for those weeks.

Claimant is not liable to repay the \$8,892 regular UI overpayment associated with the regular UI benefits he received for weeks 12-20 through 25-20. Claimant is also not liable to repay the \$7,200 FPUC overpayment associated with the FPUC benefits he received for weeks 14-20 through 25-20.

Order No. 23-UI-241318 – Remuneration and Regular UI and FPUC Overpayments for Weeks 26-20 through 35-20. As to the weeks the Department had authority to amend its allowing decisions, weeks 26-20 through 35-20, an individual is only eligible to receive unemployment insurance benefits if they are “unemployed” within the meaning of ORS Chapter 657. ORS 657.155(1) (“An unemployed individual shall be eligible to receive benefits with respect to any week . . .”). Under 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.”

Here, claimant’s weekly earnings from Computer Aided Technology exceeded his weekly benefit amount each week for weeks 26-20 through 35-20. Claimant therefore did not constitute an “unemployed individual” per ORS 657.100(1) for any of those weeks and, accordingly, was not eligible to receive benefits for those weeks under ORS 657.155(1).

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.* In addition, an individual who has been overpaid benefits under ORS 657.215 because the individual made a willful misrepresentation to obtain benefits is liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2)(a). Moreover, 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.

Claimant made the omissions relating to his Computer Aided Technology earnings because of a misunderstanding, and not willfully to obtain benefits. At hearing, claimant testified that he "was misinformed by [Shari's restaurant] and OED representatives" at the time he filed his initial claim. Transcript at 19-20. Claimant further testified that during the "initial setup" of his claim in March 2020, Department representatives told him that he "was eligible to apply for benefits based on the emergency circumstances." Transcript at 23. Claimant stated that when answering the questions on his weekly claim forms, he did so "contingent on one [e]mployer, Shari's," because that was the employer from which claimant "lost [his] employment." Transcript at 21. Claimant further stated that during the weeks at issue, he "spoke to many OED representatives" who gave him "inconsistent and conflicting information that was difficult to verify and follow up on." Transcript at 23-24. Claimant stated he "reconfirmed each time with OED representatives about [his] situation and "was told repeatedly that due to the unusual circumstances, [he] should be okay." Transcript at 24.

The record therefore shows that claimant failed to report his earnings from Computer Aided Technology because of an error, and not willfully to obtain benefits. Claimant therefore was overpaid \$5,410 in regular UI benefits for weeks 26-20 through 35-20 and is liable under 657.310(1)(c) to repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to claimant during the five-year period following the date decision # 85622 becomes final.

With respect to claimant's overpayment of FPUC benefits for weeks 26-20 through 30-20, under the provisions of the CARES Act, 15 U.S.C. § 9023, claimant also received \$3,000 in FPUC benefits to which he was not entitled because he was not eligible for benefits under state law as explained above. *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."). Claimant therefore is liable for the overpayment of \$3,000 in FPUC benefits he received for weeks 26-20 through 30-20. 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 claimant 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." U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 15-20 (April 4, 2020) (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. Accordingly, because the provision of state law governing claimant’s regular UI 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 decision # 85622 becomes final.

Order No. 23-UI-241317 – Regular UI Overpayment Waiver. Under ORS 657.317(2)(a), the Department “may waive recovery of all or any part of overpaid benefits subject to repayment or deduction under ORS 657.310(1) or 657.315(1)” if the Department finds “that recovery of the benefits would be against equity and good conscience.” Per ORS 657.317(2)(b), the Department may not waive recovery of overpaid benefits that are subject to the penalty imposed under ORS 657.310(2). ORS 657.310(2) provides for the assessment of monetary penalties when an overpayment results from an individual having willfully made a misrepresentation to obtain benefits pursuant to ORS 657.215.

The effect of these statutes is that waiver is not available for fraud-type overpayments, *i.e.*, overpayments in which an individual willfully makes a misrepresentation to obtain benefits per ORS 657.310(2) and ORS 657.215. However, overpayments that are due to claimant “fault” in the sense that they are governed by ORS 657.310(1) but are non-fraud (*i.e.*, are subject to recovery under ORS 657.310(1)) and overpayments that are not due to claimant fault (*i.e.*, are subject to recovery under ORS 657.315) may be waived so long as recovery of the benefits would be against equity and good conscience.²

Order No. 23-UI-241317 found that claimant was overpaid \$14,302 in regular UI benefits for the weeks at issue. Order No. 23-UI-241317 at 2. However, in concluding that waiver of the \$14,302 regular UI overpayment should not be granted, the order failed to apply ORS 657.317, instead citing the standard that applies for waiver of recovery of FPUC overpayments. Order No. 23-UI-241317 at 4. The order then denied a regular UI waiver, concluding that claimant was at fault in not reporting his Computer Aided Technology earnings and stating that waiver may only be granted if the overpayment occurred without fault on the part of claimant. Order No. 23-UI-241317 at 5. The order under review erred in not applying the proper standard and development of the record is required to determine whether claimant’s regular UI overpayment should be granted.

The focus of a regular UI overpayment waiver analysis is not on whether the claimant was without fault. Rather, one first looks to whether the overpayment is governed by ORS 657.310(1) or ORS 657.315(1). If the overpayment is subject to recovery under either of those provisions, regular UI overpayment waiver is available, so long as recovery of the benefits would be against equity and good conscience. Here, claimant’s \$5,410 regular UI overpayment relating to weeks 26-20 through 35-20 is subject to recovery under ORS 657.310(1) and therefore may be waived so long as recovery of the benefits would be against equity and good conscience.

² This arrangement was established with the passage of SB 172 in 2021. *See* 2021 Regular Session, SB 172 Enrolled available at <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/SB172>. SB 172 was enacted on June 23, 2021 and applied retroactively. *See* <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/SB172/Enrolled> (“The amendments to ORS 657.310, 657.315 and 657.317 by sections 1 to 3 of this 2021 Act apply to benefits determined to have been overpaid before, on or after the effective date of this 2021 Act.”). Prior to enactment of SB 172, ORS 657.317(2) authorized waiver only in situations where the overpayment was not due to claimant fault.

Recovering overpaid regular UI benefits is against equity and good conscience if: (1) the person requesting a waiver has “no means to repay the benefits,” and (2) “has total allowable household expenses that equal or exceed 90% of the total household income less unemployment benefits.” OAR 471-030-0053(3) (effective June 23, 2021). Remand is required to develop the record as to what claimant’s total household income is and what his total allowable household expenses are, so as to enable a determination to be made of whether claimant’s allowable household expenses equal or exceed 90% of his household income.

On remand, the ALJ should ask questions to determine what claimant’s monthly total household income is. The ALJ should also inquire whether claimant had the following monthly expenses and the amount of those expenses, if applicable:

- Rent/House payment
- Utilities
- Television/internet
- Food
- Vehicle or public transportation expenses
- Telephone expenses
- Trash expenses
- Credit card payments
- Student loan payments
- Personal loan payments
- Medical debt payments
- Tax debt payments
- Medical expenses
- Dental expenses
- Vision care expenses
- Expenses for personal care products and services, such as haircuts
- Clothing expenses
- Housekeeping and household supplies and expenses
- Expenses relating to any spouse, partner, dependent relative, or child living in claimant’s household

If, on remand, the record shows that claimant’s allowable household expenses equal or exceed 90% of his household income, and that claimant otherwise has no means to repay, waiver of claimant’s \$5,410 regular UI overpayment relating to weeks 26-20 through 35-20 should be granted.

Order No. 23-UI-241317 – FPUC Overpayment Waiver. Waiver of FPUC overpayments are governed by the provisions of Section 2104(f)(2)(A)-(B) of the CARES Act, 15 U.S.C. § 9023(f), which requires, for waiver to be granted, that the overpayment of FPUC benefits be: (1) without fault on the part of the claimant, and (2) that repayment be contrary to equity and good conscience.

Order No. 23-UI-241317 found that claimant was overpaid \$10,200 in FPUC benefits for the weeks at issue. Order No. 23-UI-241317 at 2. The order then concluded that waiver of the FPUC overpayment

should not be granted because claimant was at fault in not reporting his Computer Aided Technology earnings. Order No. 23-UI-241317 at 5. The record as developed does not support this conclusion.

As to the first element of the FPUC overpayment waiver analysis, federal guidance provides that, in general, “an individual is considered to be without fault when the individual provided all information correctly as requested by the state, but the state failed to take appropriate action with that information or took delayed action when determining eligibility.” Unemployment Insurance Program Letter 20-21, Change 1 (UIPL 20-21 Change 1) at 9 (February 7, 2022). However, “a state may also find that an individual is without fault ***if the individual provided incorrect information due to conflicting, changing, or confusing information or instructions from the state***; the individual was unable to reach the state despite their best efforts to inquire or clarify what information the individual needed to provide; or other similar difficulties (*e.g.*, education, literacy, and/or language barriers) in understanding what information the state needed from the individual[.]” UIPL 20-21 Change 1, at 10 (emphasis added).

At hearing, claimant offered evidence suggesting that he may have failed to provide his earnings from Computer Aided Technology on his weekly claim forms because of conflicting or changing information from Department representatives. Specifically, claimant testified that during the “initial setup” of his claim in March 2020, Department representatives told him that he “was eligible to apply for benefits based on the emergency circumstances.” Transcript at 23. Claimant further stated that during the weeks at issue, he “spoke to many OED representatives” who gave him “inconsistent and conflicting information that was difficult to verify and follow up on.” Transcript at 23-24. Claimant also testified that he “reconfirmed each time with OED representatives about [his] situation” and “was told repeatedly that due to the unusual circumstances, [he] should be okay.” Transcript at 24. If the record on remand shows that claimant failed to provide his Computer Aided Technology earnings due to conflicting, changing, or confusing information or instructions from Department representatives, it would be appropriate to find that claimant’s \$3,000 FPUC overpayment relating to weeks 26-20 through 30-20 was without fault on the part of claimant.

On remand, the ALJ should ask questions to develop what specifically Department representatives told claimant and when they did so, and whether Department representatives ever gave claimant conflicting or confusing information about whether to provide his earnings information from Computer Aided Technology on his weekly claim forms. The ALJ should inquire whether the Department has any record of claimant contacting them and, if so, what information the records contain about the date and substance of the conversations, or if there is any record stating that claimant told the Department he had more than one job or sought advice about his situation from Department representatives. The ALJ should inquire of the parties whether claimant relied on any written material about what earnings claimants with multiple jobs should report, or how that situation otherwise affects one’s answers to the questions that appear on the weekly claim forms.

With respect to the “contrary to equity and good conscience” element of the FPUC overpayment waiver analysis, federal guidance provides that states may defer to state law in defining what it means for repayment to be contrary to equity and good conscience, or may use the federal standard. UIPL 20-21 Change 1, at 10. The federal standard provides that recovery is “contrary to equity and good conscience” when one of at least three circumstances are present. Those circumstances are: (1) recovery would cause financial hardship to the person from whom it is sought; (2) the recipient of the overpayment can show (regardless of their financial situation) that due to the notice that such payment would be made or

because of the incorrect payment, either they have relinquished a valuable right or changed positions for the worse; or (3) recovery would be unconscionable under the circumstances. UIPL 20-21 Change 1, at 10-13. The guidance elaborates that recovery would cause financial hardship where “review of the individual’s income to debts (including copies of pay records and bills) reflects the hardship caused by having to repay an overpayment because the individual needs much of their current income and liquid assets (including the CARES Act benefits received) to meet ordinary and necessary living expenses and liabilities.” UIPL 20-21 Change 1, at 11.

On remand, the ALJ should ask the Department’s witness whether the Department uses the state law standard (*i.e.*, allowable household expenses equal or exceed 90% of household income) to define what it means for repayment of an FPUC overpayment to be contrary to equity and good conscience, or if the Department uses the federal standard. If the former, the ALJ should ask questions to develop whether claimant’s allowable household expenses equal or exceed 90% of his household income. If the latter, the ALJ should ask questions to develop whether recovery of the \$3,000 FPUC overpayment relating to weeks 26-20 through 30-20 would (1) cause claimant financial hardship; (2) whether receipt of the benefits caused claimant to relinquish a valuable right or change positions for the worse; or (3) recovery of the overpayment would be unconscionable under the circumstances. If, on remand, the record shows that the \$3,000 FPUC overpayment was without fault on the part of claimant in that he provided incorrect information due to conflicting, changing, or confusing information or instructions from the state, and if repayment would be contrary to equity and good conscience, waiver of the \$3,000 FPUC overpayment relating to weeks 26-20 through 30-20 should be granted.

Finally, the administrative decision at issue in Order No. 23-UI-241317, decision # 154106, denied waiver of six distinct overpayment amounts: \$14,302; \$10,200; \$3,300; \$7,776; \$673; and \$300. The \$14,302 and \$10,200 figures respectively related to the regular UI and FPUC overpayments that stem from weeks 12-20 through 35-20, which, by operation of ORS 657.267(4), this consolidated decision reduces to \$5,410 and \$3,000, respectively. As for the remaining figures—\$3,300; \$7,776; \$673; and \$300—it is not clear which specific type of unemployment insurance program each overpayment amount relates to. At hearing, the Department’s witness testified generally that the \$3,300; \$7,776; \$673; and \$300 figures all relate to benefits paid under federal unemployment insurance programs and stem from an overpayment administrative decision separate from decision # 85622, that was issued later, on December 20, 2021. Transcript at 13, 14.

On remand, the ALJ should ask questions to identify which specific unemployment insurance program each of the \$3,300; \$7,776; \$673; and \$300 overpayment figures relate to. Specifically, the ALJ should ask whether they stem from a state program, such as regular UI or extended benefits, or if they stem from a federal program, such as FPUC, Pandemic Emergency Unemployment Compensation, Lost Wages Assistance, or Pandemic Unemployment Assistance. Once the program type for each overpayment amount is verified on remand, the ALJ should ask questions to apply the appropriate overpayment waiver analysis depending upon whether the overpayment amount stems from a state program or a federal program.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because

further development of the record is necessary for a determination of whether claimant is entitled to waiver of his \$5,410 regular UI overpayment and his \$3,000 FPUC overpayment relating to weeks 26-20 through 35-20, as well as whether he is entitled to waiver of the \$3,300; \$7,776; \$673; and \$300 overpayments, Order No. 23-UI-241317 is reversed, and this matter is remanded.

In summary, Order No. 23-UI-241318 is modified. Claimant is not liable for overpayments relating to weeks 12-20 through 25-20 because ORS 657.267(4) prohibited the Department from amending its initial decisions to allow payment of benefits for those weeks to decisions for those weeks assessing an overpayment that claimant must repay. For weeks 26-20 through 35-20, claimant received \$5,410 in regular UI benefits and \$3,000 in FPUC benefits to which he was not entitled. Claimant is liable to repay the \$5,410 in regular UI benefits or have it deducted from any future benefits otherwise payable to claimant during the five-year period following the date decision # 85622 becomes final. Claimant is also liable for the overpayment of \$3,000 in FPUC benefits to be recovered in accordance with the same procedures as apply to recovery of claimant's regular UI overpayment.

Order No. 23-UI-241317 is set aside, and the matter remanded for further proceedings to determine whether claimant is entitled to waiver of his \$5,410 regular UI overpayment and \$3,000 FPUC overpayment relating to weeks 26-20 through 35-20, as well as whether he is entitled to waiver of the \$3,300; \$7,776; \$673; and \$300 overpayments.

DECISION: Order No. 23-UI-241318 is modified, as outlined above. Order No. 23-UI-241317 is set aside, and the matter remanded for further proceedings consistent with this order.

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

DATE of Service: January 19, 2024

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Orders No. 23-UI-241318 or 23-UI-241317 or return either of these matters to EAB. Only a timely application for review of the subsequent order will cause the matter 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 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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