

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1321

Modified
Request For Hearing Timely Filed
No Overpayment or Penalties Assessed

PROCEDURAL HISTORY: On February 11, 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 a \$960 overpayment that claimant was required to repay to the Department, a \$192 monetary penalty, and a six-week penalty disqualification from future benefits (decision #194230). On March 3, 2022, decision # 194230 became final without claimant having filed a request for hearing. On March 18, 2022, claimant filed a late request for hearing on decision # 194230. On May 16, 2022, the Department served notice of an administrative decision which superseded decision # 194230,¹ concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing a \$4,960 overpayment that claimant was required to repay to the Department, a \$992 monetary penalty, and a 31-week penalty disqualification from future benefits.

On November 7, 2023, ALJ Lucas conducted a hearing at which the employer failed to appear, and on November 15, 2023 issued Order No. 23-UI-241229, allowing claimant's request for hearing as timely as applied to the May 16, 2022 administrative decision, and modifying that decision by concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and was liable for an overpayment of \$1,280 in regular unemployment insurance (regular UI) benefits and \$1,200 in Federal Pandemic Unemployment Compensation (FPUC) benefits, a \$372 monetary penalty, and a 16-week penalty disqualification from future benefits. On December 4, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's request for hearing is **adopted**. The remainder of this

¹ The May 16, 2022 administrative decision stated that it "cancels [decision # 194230]," but also found that a February 25, 2022 administrative decision had been issued which itself amended decision # 194230. Exhibit 4 at 3. The February 25, 2022 administrative decision was not included in the record, and is presumed to have also been canceled and replaced by the May 16, 2022 administrative decision.

decision addresses claimant's remuneration during the weeks at issue, the assessed overpayment, and whether claimant willfully made a misrepresentation to obtain benefits.

FINDINGS OF FACT: (1) On April 16, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant had a monetarily valid regular UI claim with a weekly benefit amount of \$640.

(2) Claimant claimed benefits for the weeks of April 12, 2020 through April 25, 2020 (weeks 16-20 and 17-20) and May 24, 2020 through June 6, 2020 (weeks 22-20 through 23-20). These are the weeks at issue. For each of the weeks at issue, the Department paid claimant \$640 in regular UI benefits (totaling \$2,560) and \$600 in FPUC benefits (totaling \$2,400). When claimant filed his weekly claim for week 16-20, he reported that he had earned \$182 in wages and worked seven hours that week. Claimant did not report any hours or earnings for any of the other weeks at issue.

(3) Zion Metal Works employed claimant as a welder from January 8, 2010 through August 20, 2020, when the employer discharged him. Claimant was off from work on a leave related to his child's health issues for approximately two months, and returned on June 22, 2020. During the weeks at issue, claimant's rate of pay was \$26 per hour.

(4) On May 10, 2020 and August 23, 2020, the Department selected claimant for a "basic review" which "goes over how to properly report hours and earnings" and asked claimant "a series of questions on how to... correctly file their benefits each week." Transcript at 24–25. The review process provided claimant with the correct answers "even if they answer the questions wrong[.]" Transcript at 25.

(5) In December 2021, the Department conducted a Benefit Earnings Audit to "confirm correct payment of benefits" to claimant. Exhibit 4 at 6. As part of this audit, the Department mailed a form to the employer requesting information about claimant's employment which, in relevant part, included a table in which the employer was to report claimant's hours worked, gross wages, and other compensation for the weeks at issue and several other weeks through October 2020. Exhibit 4 at 6–7. The employer's handwritten response indicated that claimant had performed work, and received wages, during the weeks at issue.

(6) On the basis of the employer's response to the Benefits Earnings Audit, the Department determined that claimant was not eligible for benefits for the weeks at issue because he had earned more than his weekly benefit amount for each of those weeks.

CONCLUSIONS AND REASONS: Claimant was not overpaid benefits that he was required to repay to the Department, did not willfully make a misrepresentation to obtain benefits, and is not liable for a monetary penalty or a penalty disqualification from future benefits.

Remuneration. 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.”

Under *former* OAR 471-030-0017(3) (effective January 11, 2018 through December 13, 2022), for purposes of ORS 657.100 and 657.150(6) remuneration or an applicable pro-rata share thereof shall be allocated as follows:

(a) In the case of services, allocated to the week in which the service was performed;

* * *

(d) If the dates of sale or service are not clearly established, allocation shall be made upon a reasonable estimate provided by the claimant. If the individual cannot or will not provide a reasonable estimate, the remuneration shall be allocated equally over the period during which services were rendered or products were sold.

The Department determined that claimant was overpaid for the weeks at issue because, on the basis of the employer's response to the December 2021 Benefit Earnings Audit, it found that claimant had earned more than his weekly benefit amount for each of the weeks at issue and therefore was not “unemployed” during those weeks. The order under review modified this determination, concluding that while claimant did not have any earnings or hours during weeks 22-20 and 23-20, he had earned more than his weekly benefit amount during weeks 16-20 and 17-20, and therefore was not “unemployed” during those two weeks. Order No. 23-UI-241229 at 8. The record does not support the conclusion that claimant earned more than his weekly benefit amount for weeks 16-20 or 17-20.²

Claimant reported on his weekly claim for week 16-20 that he earned \$182 in wages and worked seven hours during that week and reported no hours or earnings for the remaining three weeks at issue. The employer's report on the audit response for these weeks differs, but it is not possible to discern from their response alone how many hours claimant actually worked, or how much he earned, for any of these weeks. For instance, the employer entered what first appears to be a numeral one in both the “Hours Worked” and “Gross Wages” boxes for several weeks, including weeks 16-20 and 22-20. Exhibit 4 at 6. However, given that the employer also listed claimant's rate of pay as \$26 per hour, it is unlikely that the employer intended those marks to indicate that claimant worked a single hour, for one dollar, for any of those weeks. Instead, it is more likely that the employer intended those marks to convey a different meaning.

For week 17-20, the employer reported that claimant worked 70.25 hours and earned gross wages of \$1,829.75. In light of this, and the fact that the employer indicated that claimant was paid on a bi-weekly basis, it is possible that the employer intended to convey that the wages and hours they reported for week 17-20 were meant to apply to a pay period encompassing both weeks 16-20 and 17-20. If that were true, it would, without a reasonable estimate from claimant explaining how much he worked or earned during each of those two weeks, be permissible to allocate the 70.25 hours and \$1,829.75 in wages

² Nothing in the record, including the employer's audit response, suggested that claimant performed work or earned wages during weeks 22-20 or 23-20, the conclusion in the order under review that claimant had no hours or earnings during those two weeks is supported by the record, and is not examined in further detail here.

equally across those two weeks. This would result in gross wages of approximately \$914.88 for each of weeks 16-20 and 17-20, which would exceed claimant's weekly benefit amount.

However, the employer did not explain this report on their audit response, and assuming as much without further corroborating evidence is speculative in light of the contrasting evidence provided by claimant at hearing. First, even if the \$1,829.75 sum is meant to represent claimant's earnings across a single bi-weekly pay period, the record contains no information about *when that pay period ran*. It is possible, for instance, that the pay period actually spanned week 15-20 (which is not at issue in this matter) and week 16-20, and that claimant was merely *paid* for that period during week 17-20. If that were the case, those wages would properly have been allocated over weeks 15-20 and 16-20, as wages must be reported for the week in which they were earned, not paid. Because the employer did not offer clarifying information and failed to appear at the hearing, the accuracy of this information is not a reliable basis for an accounting of claimant's earnings during the weeks at issue.

By contrast, claimant's original report of his hours and earnings for the weeks at issue remains the account best supported by the record. At hearing, claimant testified that he "barely even worked during" week 16-20, and further stated that he was on leave for "two whole months," returning on June 22, 2020. Transcript at 31. While claimant seemed to have difficulty recalling the specifics of his work hours and earned wages during the weeks at issue—nearly four years after the fact—these details lend credence to his original report for week 16-20. If claimant returned to work June 22, 2020 after his leave, it stands to reason that he would have likely worked through mid-April 2020 before taking leave. Thus, claimant's original report that he worked seven hours, and earned \$182 in wages, for week 16-20, is credible.

In light of the above, the record shows that claimant's original reports of his hours and wages for the weeks at issue were, more likely than not, accurate, and claimant did not earn in excess of his weekly benefit amount during those weeks.

Overpayment and willful misrepresentation. ORS 657.310(1)(a) provides that an individual who receives 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 makes a false statement or misrepresentation, or willfully fails to report a material fact to obtain benefits may be disqualified for benefits for a period not to exceed 52 weeks. ORS 657.215. Where the Department has paid benefits, it has the burden to prove benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

As explained above, the order under review determined that claimant was overpaid benefits for weeks 16-20 and 17-20 because it found that claimant earned more than his weekly benefit amount. Because the record does not show by a preponderance of the evidence that claimant actually earned more than his weekly benefit for those weeks (or any of the weeks at issue), the Department has not met its burden to show that claimant was overpaid for those weeks. Claimant is therefore not liable for an overpayment of

benefits. Neither is claimant liable for a monetary penalty, as monetary penalties are assessed under ORS 657.310(2)(a) as a percentage of the overpayment amount, which in this case is zero.

Further, irrespective of the fact that claimant was not overpaid benefits, the record does not show that claimant made a willful misrepresentation in order to obtain benefits, and therefore is not liable for a penalty disqualification from future benefits (“penalty weeks”). First, the record does not show that claimant made a misrepresentation of fact, as his account of his hours and earnings for the weeks at issue are found to be, more likely than not, accurate. Second, even if the record showed that claimant had misreported facts in relation to his earnings for the weeks at issue, the Department did not meet their burden to show that his having done so would amount to willful misrepresentation. The order under review concluded that because claimant “underwent a ‘knowledge test’ that informed claimant about reporting claimant’s earnings,” claimant’s alleged misreporting of his earnings constituted willful misrepresentation. Order No. 23-UI-241229 at 16. The record does not support this conclusion. Claimant took both of the “knowledge tests” (i.e., “basic reviews”)³ *after* he claimed benefits for weeks 16-20 and 17-20. At hearing, the Department’s witness testified that an individual taking the review is provided with the correct answers even if they answered the questions incorrectly. Transcript at 25. Thus, the record only shows that claimant was given information on how to report his hours and earnings after the weeks at issue were reported and not that he understood the information at the time he reported. As such, the record does not show that if claimant reported information incorrectly he did so due to a willful misrepresentation.

For the above reasons, claimant was not overpaid benefits for the weeks at issue, is not liable for an overpayment he is required to repay to the Department, did not willfully make a misrepresentation of fact to obtain benefits, and is not liable for a monetary penalty or penalty weeks.

DECISION: Order No. 23-UI-241229 is modified, as outlined above.

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

DATE of Service: January 18, 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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³ Transcript at 24.



Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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