

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0011**

*Reversed*  
*Overpayment Not Assessed*

**PROCEDURAL HISTORY:** On March 30, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant had earnings that exceeded her weekly benefit amount for the week of August 2 through 8, 2020 (week 32-20), and that claimant therefore was overpaid \$451 in combined federal benefits that she was required to repay. Claimant filed a timely request for hearing. On November 27, 2023, ALJ Nyberg conducted a hearing at which the employer failed to appear, and on December 5, 2023, issued Order No. 23-UI-242635, affirming the March 30, 2021, overpayment decision. On December 21, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) On April 11, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant's weekly benefit amount was \$151.

(2) Claimant claimed benefits for the week of August 2 through 8, 2020 (week 32-20). This is the sole week at issue. The Department paid claimant \$151 in Pandemic Emergency Unemployment Compensation (PEUC) benefits and \$300 in Lost Wages Assistance (LWA) benefits for the week at issue.<sup>1</sup>

(3) Claimant did not perform work for the employer during the week at issue, and therefore did not report that she worked any hours or earned any wages during that week. The employer paid claimant on a monthly basis.

(4) On or around March 18, 2021, a Department representative spoke to a payroll representative for the employer, regarding claimant's earnings for August 2020. On March 24, 2021, a comment was entered into claimant's claim, stating:

---

<sup>1</sup> The order under review found that the Department paid claimant \$300 in *Federal Pandemic Unemployment Compensation* (FPUC) benefits for the week at issue, apparently informed by the Department's testimony at hearing. Order No. 23-UI-242635 at 2; Audio Record at 10:45. However, FPUC benefits were not available during the week at issue, whereas LWA benefits were. See <https://unemployment.oregon.gov/pandemic>. It therefore is reasonable to infer that the extra \$300 in federal benefits that claimant received for the week at issue were LWA benefits.

MOD HRS AND EARNINGS IN WKS 33-35/20 PER WAGE INFO PROVIDED BY EVA IN PAYROLL AT TIME 4 PAYROLL LLC; HANDLED PAYROLL FOR ARCANE CELLARS & WHEATLAND WINERY[.]<sup>2</sup>

(5) On April 5, 2021, the employer mailed a letter to the Department, which stated in relevant part:

On the September 5, 2020 payroll, I paid all my workers their Oregon Health retained benefit hours at their current rate of pay @ \$15/hr. I realized that our business was failing and that would be closing shortly and wanted our employees to get their full stored up earned benefits while we still had funds sufficient to pay them. We were not asked to do this but we felt it was the right thing to do as they had earned over their employment years and it was theirs.

During August 2020 [claimant] worked the following hours:

August 20<sup>th</sup> - 3 hours

August 24<sup>th</sup> = 4 hours

August 30<sup>th</sup> - 2 hours

[Claimant] was paid for the 9 hours PLUS whatever amount [claimant] was owed for her retained Oregon Health Benefits earned over many years as described above.

Exhibit 2 at 1.

**CONCLUSIONS AND REASONS:** Claimant had no remuneration for the week at issue, and therefore was not overpaid benefits for that week.

**Remuneration.** ORS 657.100(1) states: “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.”

ORS 657.150(6) states: An eligible unemployed individual who has employment in any week shall have the individual’s weekly benefit amount reduced by the amount of earnings paid or payable that exceeds whichever is the greater of the following amounts:

- (a) Ten times the minimum hourly wage established by the laws of this state; or
- (b) One-third of the individual’s weekly benefit amount.

---

<sup>2</sup> EAB has taken notice of this fact, which is 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.

*Former* OAR 471-030-0017 (effective January 11, 2018 through December 13, 2022) stated, in relevant part:

(1) Definitions. For purposes of applying ORS 657.100 and 657.150, and as used in this rule:

(a) “Employment” means:

(A) Being in an employer-employee relationship during a period of time for which remuneration was paid or payable; or

(B) Providing a service or product for cash or cash value.

(b) “Earnings” means remuneration;

(c) Where an employer-employee relationship exists, “remuneration” means compensation resulting from the employer-employee relationship, including wages, salaries, incentive pay, sick pay, compensatory pay, bonuses, commissions, stand-by pay, and tips;

\* \* \*

(3) Allocating Remuneration: 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 order under review concluded that claimant had earnings which exceeded her weekly benefit amount for the week at issue because of the existence of a “now-final administrative decision that found that the claimant earned \$205.31 during the week at issue, which exceeded her weekly benefit amount and rendered her ineligible for benefits.” Order No. 23-UI-242635 at 4. This conclusion was seemingly based on an exchange between the ALJ and the Department witness at hearing, in which the ALJ asked, “Do you know if the underlying decision was appealed?” to which the Department’s witness responded, “No.” Audio Record at 13:19 to 13:42. The ALJ then asked the witness if, to the latter’s knowledge, the “underlying decision” had become final; the witness answered, “Correct.” Audio Record at 13:43 to 13:58.

Prior to this exchange, the Department’s witness made no mention of any administrative decision underlying the March 30, 2021, overpayment decision, and the documentary record contains no

indication that such a decision exists. Furthermore, a review of Department records shows no mention of any such decision. As such, the “underlying decision” appears to be a fiction created by a miscommunication during the hearing, and does not exist. Thus, the conclusion that claimant earned more than her weekly benefit amount during the week at issue stems from the administrative decision at issue in this appeal, and is not binding as a matter of law. Instead, this issue must be considered based on a *de novo* review of the record evidence.

The evidence in the record does not support the conclusion that claimant had any remuneration which reduced her weekly benefit amount during the week at issue. Claimant reported on her weekly claim for the week at issue that she did not work that week, and reiterated that assertion in her testimony. Audio Record at 19:55. Additionally, the employer indicated in their April 5, 2021, letter that “During August 2020,” claimant worked a total of nine hours over the course of three days: August 20, 24, and 30. Exhibit 2 at 1. The wording of the letter strongly implies that claimant *only* worked during those three days in August 2020, none of which fall within the week at issue. Furthermore, the comment in claimant’s claim from March 24, 2021, indicates only that claimant’s earnings for weeks 33-20 through 35-20 were modified on the basis of information provided by the employer’s payroll.

It is not clear what evidence, if any, the Department used to determine that claimant earned remuneration in the amount of \$205.31 for the week at issue. The order under review found, “The claimant was paid monthly by an employer, who paid her for the month of August 2020. The Department treats monthly pay as being prorated across the weeks in the month. The claimant’s prorated weekly earnings for the week at issue, as reported by the employer and interpreted by the Department were \$205.31.” Order No. 23-UI-242635 at 2. This finding misstates the applicable authority. Under *Former* OAR 471-030-0017(3), 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.

Applying the provisions of the above rule, it would arguably be appropriate to apportion all of claimant’s August 2020 wages equally across each of the weeks in August 2020 if claimant performed services for the employer during *all* of those weeks, the specifics of when claimant worked during those weeks could not be ascertained or reasonably estimated by claimant, and, importantly, the total amount of remuneration for the month *can* be ascertained. E.g., if claimant worked varying (but unrecorded) hours for each of the five weeks in a single month, and was paid a total of \$3,000 for that month’s work, the Department would be permitted to allocate \$600 in wages to each of those five weeks.

Here, however, the record clearly establishes that claimant *did not work* during the week at issue. Furthermore, other than the nine hours that claimant worked on August 20, 24, and 30, 2020, for which she was apparently paid \$15 per hour, the record does not contain any indication of how much claimant was paid for the month of August 2020. Although the employer’s April 5, 2021 letter was mailed after the issuance of the March 30, 2021 overpayment decision (and thus could not be the basis for the overpayment assessed in that decision), it is reasonable to infer that the information that the employer’s payroll representative provided to the Department earlier in March 2021 was used as the basis for the apportionment of remuneration to the week at issue. The sum the employer’s payroll representative conveyed to the Department may be the same as the “Oregon Health retained benefit hours” referenced in the employer’s April 5, 2021, letter. However, even assuming that this sum represented remuneration

which was reportable under OAR 471-030-0017(c)—and it is not clear that it was—it is simply not possible to apportion this remuneration to any weeks claimed if the sum itself is unknown. Because the record is silent as to how much claimant was paid for August 2020, the Department has not met their burden to show that the apportionment of \$205.31 to the week at issue was correct, or that claimant had earnings which reduced her weekly benefit amount during the week at issue.<sup>3</sup>

**Overpayment.** 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. 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 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 overpayment. ORS 657.310(2).

The order under review concluded that claimant was overpaid benefits for the weeks at issue because “an administrative decision still in effect held that the claimant earned over her weekly benefit amount” for that week. Order No. 23-UI-242635. As explained above, the record does not show either that such an administrative decision exists or that an independent basis exists for concluding that claimant earned remuneration which reduced her weekly benefit amount during the week at issue. Therefore, the Department has not met its burden to show that claimant was not entitled to receive benefits for the weeks at issue, and as a result, claimant was not overpaid benefits that she is required to repay to the Department.

**DECISION:** Order No. 23-UI-242635 is set aside, as outlined above.

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

**DATE of Service:** January 24, 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](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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

---

<sup>3</sup> *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the Department has paid benefits it has the burden to prove benefits should not have been paid; by logical extension of that principle, where benefits have not been paid claimant has the burden to prove that the Department should have paid 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.

**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)

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.