

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0751

Modified
Overpayment, No Penalties

PROCEDURAL HISTORY: On February 13, 2024, 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 \$2,008 overpayment that claimant was required to repay, a \$602.40 monetary penalty, and an 11-week penalty disqualification from future benefits (decision # 200551). Claimant filed a timely request for hearing. On October 7, 2024, ALJ Chiller conducted a hearing at which the employer failed to appear, and on October 18, 2024, issued Order No. 24-UI-269999, affirming decision # 200551. On October 25, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) On November 10, 2021, claimant filed an initial claim for benefits. The Department determined that the claim was monetarily valid with a weekly benefit amount (WBA) of \$274 and benefit year expiration date of the week ending October 29, 2022. On November 7, 2022, claimant filed another initial claim for benefits effective the week beginning October 30, 2022 (week 44-22). The Department determined that the claim was monetarily valid with a WBA of \$292.

(2) Claimant claimed benefits for the weeks from August 21 through December 3, 2022 (weeks 34-22 through 48-22) and December 11, 2022, through May 6, 2023 (weeks 50-22 through 18-23). Claimant did not claim benefits for the week of December 4 through 10, 2022 (week 49-22).¹

¹ 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

(3) From at least August 2022 through May 2023, Broyles Revocable Family Trust employed claimant as a bookkeeper. Claimant performed most of his work during the first week of each month and performed a negligible amount of work during the other weeks of the month, though payment of wages was contingent on completion of any work assigned for the month. Claimant was paid a monthly salary of at least \$2,200.

(4) Because claimant was paid on a monthly basis but typically only worked one week each month, claimant decided he would either not claim benefits for the week in which he performed most of his work, or would claim benefits for the week but report having earned wages in excess of his weekly benefit amount. For weeks in which he did not work or performed a negligible amount of work, claimant decided he would report \$91 in wages, which he learned from the Department would not affect his weekly benefit.

(5) In November 2022, claimant reported \$1,154.16 in earnings for the week of October 30 through November 5, 2022 (week 44-22). In December 2022, claimant did not claim benefits for the week of December 4 through 10, 2022 (week 49-22) to account for that month's wages. However, for September and October 2022, and January through April 2023, the Department's records showed that claimant claimed benefits every week of the month and did not report having earned wages in excess of \$91 during any week.

(6) For the weeks from August 21 through October 29, 2022 (weeks 34-22 through 43-22), the Department paid claimant \$274 each week. For the weeks from November 6 through December 3, 2022, and December 11, 2022, through May 6, 2023 (weeks 45-22 through 48-22 and 50-22 through 18-23), the Department paid claimant \$292 per week. The Department did not pay claimant benefits for the week of October 30 through November 5, 2022 (week 44-22). Each payment of benefits for weeks before and including the week of January 29 through February 4, 2023 (week 05-23) were made on or before February 6, 2023. The payments for the week of February 26 through March 4, 2023 (week 09-23) and April 2 through 8, 2023 (week 14-23) were made on March 6, 2023, and April 10, 2023, respectively.²

(7) On February 13, 2024, the Department issued decision # 200551, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, that claimant was not entitled to receive benefits for the weeks from August 28 through September 3, 2022 (week 35-22), September 25 through October 1, 2022 (week 39-22), October 30 through November 5, 2022 (week 44-22), November 6 through 12, 2022 (week 45-22), January 1 through 7, 2023 (week 01-23), January 29 through February 4, 2023 (week 05-23), February 26 through March 4, 2023 (week 09-23), and April 2 through 8, 2023 (week 14-23), and assessing an overpayment and penalties. These are the weeks at issue.

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 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 did not willfully make a misrepresentation and fail to report a material fact to obtain benefits. Claimant was overpaid benefits for weeks 35-22, 39-22, 45-22, 01-23, 05-23, 09-23, and 14-23, totaling \$2,008. However, the Department was not authorized to amend the original decisions allowing payment of benefits for weeks 35-22, 39-22, 45-22, 01-23, and 05-23 because they were paid more than a year before decision # 200551 was issued, and claimant does not have to repay the overpaid benefits for those weeks. Claimant must repay the overpayments for weeks 09-23 and 14-23, totaling \$584.

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

OAR 471-030-0017 (December 14, 2022) provides, in relevant part:

(4) Allocating Remuneration: For purposes of ORS 657.100 and 657.150(6) remuneration or an applicable prorate share thereof shall be allocated as follows:

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

* * *

Claimant testified that he earned at least \$2,200 in wages per month from at least August 2022 through May 2023. Transcript at 18. Claimant further testified that it was his intention to either not claim benefits, or claim benefits but report wages in excess of his weekly benefit amount, for the one week each month in which he performed all or nearly all of the month's work. Transcript at 21, 24. The Department's records showed that for the months in which the weeks at issue occurred, claimant claimed benefits for every week of each month and reported only \$91 in wages each week. The order under review concluded, "It appears that claimant may have mistakenly failed to follow his own practice of reporting his [entire monthly] salary or not filing a claim" for one benefit week per month, and "accidentally providing false information for the one week for which he intended to provide accurate information does not make his misrepresentation any less willful." Order No. 24-UI-269999 at 5-6. The record does not support that the Department met its burden to show that claimant willfully misrepresented his wages to obtain benefits.

The Department asserted that claimant's monthly salary was reportable as remuneration during the first benefit week of each month claimed pursuant to OAR 471-030-0017(4)(a). Transcript at 6. It can reasonably be inferred from claimant's testimony that he also viewed his wages as reportable in this manner while claiming benefits. Claimant contended that for one week of each month worked he either reported earnings in excess of his WBA or skipped claiming benefits. Transcript at 21. For November and December 2022, the claim records are consistent with claimant having accounted for his wages in this manner. However, the Department's representative testified that records show claims filed for every week of each month in September and October 2022 and January through April 2023 with claimant-reported earnings of \$91 each week. Transcript at 42-44. Additionally, the record contains what appear to be copies of claimant's weekly continuing claims each showing \$91 in earnings reported, but the

week to which each claim form pertains is not identified. *See* Exhibit 2 at 5-68. The evidence as to whether claimant willfully misreported his earnings to obtain benefits during the weeks at issue is no more than equally balanced. The Department therefore has not met its burden of showing by a preponderance of the evidence that claimant is subject to a penalty disqualification or monetary penalty under ORS 657.215 and 657.310(2).

Overpayment based on underreported remuneration. 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.*

ORS 657.155(1) (emphasis added) provides, in relevant part, “An *unemployed* individual shall be eligible to receive benefits with respect to any week. . . .” ORS 657.100(1) provides, “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.”

Claimant earned at least \$2,200 in wages from working mostly or exclusively during the weeks at issue that were the first week of their respective month. Though paid on a monthly basis and with the contingency of completing any assigned work throughout the entire month, the Department and claimant agreed that the wages were allocable under OAR 471-030-0017(4)(a) to only the first week of each month, as previously discussed. The record does not show that this method of allocation is incompatible with the provisions of ORS 657.100(1) or OAR 471-030-0017. Therefore, \$2,200 in wages were allocable to the first week of each month at issue, weeks 35-22, 39-22, 01-23, 05-23, 09-23, and 14-23. Because that amount exceeded claimant’s WBA of \$274 for weeks 35-22 and 39-22, and \$292 for weeks 01-23, 05-23, 09-23, and 14-23, claimant was not “unemployed” during those weeks and was not entitled to receive benefits. Claimant therefore was overpaid a total of \$1,716 for these weeks.

Overpayment for week 45-22. ORS 657.315(1)(a) provides, in relevant part, that an individual who has been overpaid benefits because of an error not caused by the individual’s false statement, misrepresentation of a material fact or failure to disclose a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding the individual is not eligible for the benefits, is liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final.

ORS 657.155(1)(d) provides, in relevant part, “An unemployed individual shall be eligible to receive benefits with respect to any week only if. . . [t]he individual has been unemployed for a waiting period of one week[.]”

On November 7, 2022, claimant filed an initial claim for unemployment insurance benefits effective October 30, 2022 (week 44-22). Claimant claimed benefits for week 44-22 and reported earnings that exceeded his WBA. The Department therefore did not pay benefits or issue waiting week credit for that

week because claimant was not “unemployed.” Claimant claimed benefits for the week of November 6 through 12, 2022 (week 45-22). Instead of issuing waiting week credit for the week, the Department erroneously paid claimant \$292 in benefits to which he was not entitled. Claimant was overpaid \$292 for week 45-22.

Authority to amend decisions allowing payment. 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.

(emphases added.)

The Department made its original decisions under ORS 657.267(1) to allow payment of benefits for weeks 35-22, 39-22, 45-22, 01-23 and 05-23 by paying each of these claims on or before February 6, 2023, and amended those decisions to a denial of payment on February 13, 2024. The order under review concluded that claimant was overpaid benefits for those weeks. Order No. 24-UI-269999 at 2, 5.³ As previously explained, the record supports this conclusion. Further, the order under review implicitly

³ Order No. 24-UI-269999 did not discuss the overpayment for week 45-22, but the conclusion that claimant was overpaid a total of \$2,008 suggests that the order intended to conclude that claimant was also overpaid for that week.

concluded that the Department had authority to amend the original decisions allowing payment of those benefits to a decision denying benefits more than one year later because it was a case of willful misrepresentation, except with respect to week 45-22. *See* Order No. 24-UI-269999 at 5. As previously discussed, the Department did not meet its burden to show that the overpayment was the result of willful misrepresentation to obtain benefits.

Pursuant to ORS 657.267(4), except in “cases of alleged willful misrepresentation or fraud,” the Department had one year to amend the original decisions allowing benefits. Here, the payment of benefits for weeks 35-22, 39-22, 45-22, 01-23 and 05-23 occurred on or before February 6, 2023, more than one year before decision # 200551 was issued. Therefore, the Department’s authority to make that amendment and, in turn, claimant’s liability to repay the resulting overpayment, is dependent on whether the “willful misrepresentation or fraud” exception to the one-year limitation applies.

It can reasonably be inferred that the purpose of ORS 657.267(4) is to preclude the assessment of overpayments caused by claimant or Department error when the Department fails to discover the error or assess the overpayment within a year after the benefits are paid. It can further be inferred that the exception to this one-year limitation was intended to apply only when the overpayment was caused not by error but through willful misrepresentation to obtain benefits. The statute therefore authorizes the Department to assess an overpayment more than a year after it occurred when willful misrepresentation is also alleged. If the determination of willful misrepresentation to obtain benefits is reversed on appeal, however, the *allegation* ceases to exist, and the exception to the one-year limitation no longer applies. In such situations, the Department lacks authority to assess an overpayment, despite the overpayment having been assessed with an allegation of willful misrepresentation. Accordingly, with respect to the overpayment of benefits for weeks 35-22, 39-22, 45-22, 01-23 and 05-23, claimant is not liable for repayment because EAB’s decision reverses the finding of willful misrepresentation.

However, decision # 200551 amended the original decisions allowing benefits for weeks 09-23 and 14-23, made by paying claimant benefits on March 6, 2023, and April 10, 2023, respectively, within one year of the original decisions. The Department therefore was authorized under ORS 657.267 to make those amendments. Claimant was overpaid \$292 in benefits for each of those weeks due to his underreporting of wages that did not amount to willful misrepresentation. Pursuant to ORS 657.310(1), claimant is liable for an overpayment of \$584 that he is subject to repay to the Department or have deducted from future benefits.

DECISION: Order No. 24-UI-269999 is modified, as outlined above.

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

DATE of Service: November 22, 2024

NOTE: The Department may defer recovery or completely waive the overpaid amount if certain standards are met. To make a request for Waiver of Overpayment Recovery, call 503-947-1995 or email OED_Overpayment_unit@employ.oregon.gov . You must submit waiver applications that correspond to the program for which you were overpaid benefits. **If you were overpaid benefits under both state and federal benefits programs, you will need to file two separate waiver**

applications. To access a State UI Overpayment Waiver application go online to <https://unemployment.oregon.gov/waivers> and click the link for “State UI Overpayment Waiver”. To access a Federal Program Overpayment Waiver application go online to <https://unemployment.oregon.gov/waivers> and click the link for “Federal Program Overpayment Waiver”.

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 stated above.** See ORS 657.282. For forms and information, visit <https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx> and choose the appropriate form under “File a Petition for Judicial Review.” You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymzmo.com/s3/5552642/EAB-Customer-Service-Survey>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.



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 desisyong.

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 محكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

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

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