

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0791

Modified
Overpayment, No Penalties

PROCEDURAL HISTORY: On February 16, 2023, 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 \$3,303 overpayment in combined state and federal unemployment insurance benefits that claimant was required to repay to the Department, a \$990.90 monetary penalty, and a 21-week penalty disqualification from future benefits (decision # 193560). On March 8, 2023, decision # 193560 became final without claimant having filed a request for hearing. On January 23, 2024, claimant filed a late request for hearing. On May 21, 2024, ALJ Chiller conducted a hearing, and on May 29, 2024 issued Order No. 24-UI-255264, dismissing claimant's request for hearing as late without good cause and leaving decision # 193560 undisturbed. On June 17, 2024, claimant filed an application for review with the Employment Appeals Board (EAB). On July 19, 2024, EAB issued EAB Decision 2024-EAB-0508, reversing Order No. 24-UI-255264, allowing claimant's late request for hearing, and remanding the matter for a hearing on the merits of decision # 193560.

On September 16, 2024, ALJ S. Lee conducted a hearing, and on October 25, 2024 issued Order No. 24-UI-270858, modifying decision # 193560 by concluding that claimant was overpaid \$1,359 in regular unemployment insurance (regular UI) benefits, \$300 in Federal Pandemic Unemployment Compensation (FPUC) benefits, and \$142 in Pandemic Emergency Unemployment Compensation (PEUC) benefits that claimant was required to repay to the Department, but that claimant did not willfully make a misrepresentation and fail to report a material fact to obtain benefits and was not subject to a monetary penalty or penalty disqualification. On November 6, 2024, claimant filed an application for review of Order No. 24-UI-270858 with EAB.

EAB considered the entire hearing record. EAB agrees with the portion of Order No. 24-UI-270858 concluding that claimant did not willfully make a misrepresentation and fail to report a material fact to obtain benefits and was not subject to a monetary penalty or penalty disqualification. Pursuant to ORS 657.275(2), that portion of Order No. 24-UI-270858 is **adopted**.

FINDINGS OF FACT: (1) Pings employed claimant at their restaurant for a period including May 31, 2020 through September 24, 2022. Claimant was paid an hourly wage plus a share of tips. The employer paid claimant on a biweekly basis, and at times calculated her share of the tips in the week following the shift in which it was earned.

(2) Claimant filed initial claims for unemployment insurance benefits on April 21, 2020 and June 22, 2022. The claims were determined to be monetarily valid with weekly benefit amounts (WBAs) of \$151 and \$171, respectively. Claimant thereafter claimed benefits for the weeks listed in the table below, reporting earnings on each claim as indicated. Claimant was paid the listed benefits for each week based on the reported earnings. In response to a later audit, the employer reported earnings for each week as indicated in the table, causing the Department to conclude that claimant had been overpaid. The weeks listed are the weeks at issue.

Week	Dates	Claimant Reported Earnings	Employer Reported Earnings	Regular UI Paid	PEUC Paid	FPUC Paid
23-20	5/31/20 to 6/6/20	\$109.85	\$106.26	\$151.00	\$0	\$600.00
24-20	6/7/20 to 6/13/20	\$0	\$106.26	\$151.00	\$0	\$600.00
36-20	8/30/20 to 9/5/20	\$141.00	\$81.34	\$0	\$142.00	\$0
13-21	3/28/21 to 4/3/21	\$78.00	\$163.64	\$0	\$151.00	\$300
27-22	7/3/22 to 7/9/22	\$0	\$164.35	\$171.00	\$0	\$0
29-22	7/17/22 to 7/23/22	\$95.00	\$152.40	\$171.00	\$0	\$0
30-22	7/24/22 to 7/30/22	\$94.00	\$155.25	\$171.00	\$0	\$0
31-22	7/31/22 to 8/6/22	\$105.00	\$210.12	\$171.00	\$0	\$0
32-22	8/7/22 to 8/13/22	\$114.00	\$227.67	\$171.00	\$0	\$0
33-22	8/14/22 to 8/20/22	\$125.00	\$232.01	\$171.00	\$0	\$0
34-22	8/21/22 to 8/27/22	\$128.00	\$271.25	\$171.00	\$0	\$0
35-22	8/28/22 to 9/3/22	\$140.00	\$247.80	\$171.00	\$0	\$0
36-22	9/4/22 to 9/10/22	\$130.00	\$271.84	\$171.00	\$0	\$0
37-22	9/11/22 to 9/17/22	\$133.00	\$254.79	\$171.00	\$0	\$0
38-22	9/18/22 to 9/24/22	\$131.00	\$240.83	\$132.00	\$0	\$0

(3) Claimant typically worked Saturdays and Sundays during the weeks at issue. The employer paid claimant on a biweekly basis, and sometimes increased claimant’s share of tips after claimant had already claimed the week of benefits during which she earned those tips. The employer also paid employees their vacation leave prior to the week that the leave was taken. As a result of these factors, and the fact that her workweeks (Saturday and Sunday) spanned two benefit weeks, claimant miscalculated and inadvertently misreported her earnings on her weekly claims. The earnings reported by the employer when audited, as indicated in the table above, accurately reflect claimant’s reportable earnings.¹

¹ Some apparent typographical errors in the employer’s reporting caused the earnings for weeks 23-20 and 24-20 to differ from what appeared on the schedule of adjustments that was part of decision # 193560. See Exhibit 1 at 9. Additionally, decision # 193435 was issued on March 2, 2023 to make minor amendments to the earnings for weeks 32-22 and 33-22.

(4) The Department paid claimant benefits for weeks 23-20, 24-20, 36-20, and 13-21 on or before May 7, 2021. Payments for the remaining weeks at issue were made on or after February 17, 2022.²

(5) On February 16, 2023, the Department issued decision # 193560, concluding that claimant had been overpaid benefits for some of the weeks at issue, and assessing an overpayment and penalties. It also alleged that claimant was overpaid because she willfully misreported earnings to obtain benefits.

(6) From July 1, 2019 through June 30, 2020, the applicable minimum wage was \$12.50. From July 1, 2020 through June 30, 2021, the applicable minimum wage was \$13.25. From July 1, 2022 through June 30, 2023, the applicable minimum wage was \$14.75.³

CONCLUSIONS AND REASONS: Claimant was overpaid \$1,359 in regular UI benefits that she is required to repay to the Department. Claimant was overpaid \$142 in PEUC benefits and \$300 in FPUC benefits, but is not liable to repay those benefits because the decisions allowing those benefits were amended to decisions denying benefits more than one year later.

Overpayment. An individual is not eligible to receive unemployment insurance benefits if they are not unemployed. ORS 657.155(1)(e) (“An *unemployed individual* shall be eligible to receive benefits with respect to any week”) (emphasis added). Per 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.

ORS 657.150(6) provides:

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.

² EAB has taken notice of these facts which are contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed facts will remain in the record.

³ EAB has taken notice of these facts which are generally cognizable facts. 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.

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 employer testified that they provided claimant’s wage information to the Department, allocated on a weekly basis, in accordance with their records. Transcript at 35. The Department accepted this information as accurate without modifying the allocation. Transcript at 9. Claimant testified that she did not dispute the wage information reported by the employer. Transcript at 22. Therefore, the facts have been found according to the wage information provided by the employer.

The record shows that claimant’s earnings exceeded her WBA for each of weeks 13-21 and 31-22 through 38-22. Pursuant to ORS 657.155(1)(e) and ORS 657.100(1), claimant was not “unemployed” during those weeks and was therefore not entitled to benefits. Accordingly, claimant was overpaid \$151 in PEUC benefits and \$300 in FPUC benefits for week 13-21 and \$1,329 in regular UI benefits for weeks 31-22 through 38-22.

For the remaining weeks at issue, claimant had earnings that did not exceed her WBA. Claimant’s WBA was therefore subject to reduction under ORS 657.150(6) in the amount of earnings that exceeded ten times the minimum wage, as indicated below:

Week	Earnings	Ten Times Minimum Wage⁴	Entitlement	Benefits Paid⁵	Overpayment
23-20	\$106.26	\$125.00	\$151.00	\$151.00	\$0
24-20	\$106.26	\$125.00	\$151.00	\$151.00	\$0
36-20	\$81.34	\$132.50	\$151.00	\$142.00	\$0 ⁶
27-22	\$164.35	\$147.50	\$154.00	\$171.00	\$17.00
29-22	\$152.40	\$147.50	\$166.00	\$171.00	\$5.00
30-22	\$155.25	\$147.50	\$163.00	\$171.00	\$8.00

⁴ Ten times the minimum wage was greater than one-third of claimant’s WBA in each of the weeks at issue and was therefore used to determine the reduction in benefits.

⁵ Claimant’s entitlement to FPUC benefits for these weeks was not affected by the revised earnings information and information on benefits relating to that program has been omitted. FPUC benefits were payable in applicable weeks when a claimant was entitled to at least \$1 in regular UI or PEUC benefits. *See* 15 U.S.C. § 9021(d)(4).

⁶ Claimant was underpaid \$9.00 in PEUC benefits for this week, but as explained in greater detail below, claimant is not liable to repay any overpaid PEUC benefits, and therefore no offset exists for that benefit type.

Claimant was therefore overpaid an additional \$30 in regular UI benefits for these weeks, for a total regular UI overpayment of \$1,359.

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 23-20, 24-20, 36-20, and 13-21 by paying each of these claims on or before May 7, 2021, and amended those decisions on February 16, 2023. Of these four weeks, the order under review concluded that claimant was overpaid benefits only for week 13-21. Order No. 24-UI-270858 at 2, 10. As previously explained, the record supports this conclusion. Further, the order under review implicitly 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 alleged willful misrepresentation. However, Order No. 24-UI-270858 concluded that the Department did not meet its

burden to show that claimant was overpaid due to willful misrepresentation to obtain benefits, and EAB adopts that conclusion.

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 23-20, 24-20, 36-20, and 13-21 occurred on or before May 7, 2021, more than one year before the February 16, 2023 administrative decision 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.

Though the Department alleged willful misrepresentation caused the overpayment, if reversed on appeal, 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 week 13-21, claimant is not liable for repayment of PEUC and FPUC benefits because EAB’s decision adopts the finding that there was no willful misrepresentation.

However, decision # 193560 amended the original decisions allowing benefits for weeks 27-22 and 29-22 through 38-22, made by paying claimant benefits on or after February 17, 2022, within one year of the original decisions. The Department therefore was authorized under ORS 657.267 to make those amendments. Claimant was overpaid \$1,359 for those weeks due to her underreporting of wages that did not amount to willful misrepresentation. Pursuant to ORS 657.310(1), claimant is liable for an overpayment of \$1,359 in regular UI benefits that she is subject to repay to the Department or have deducted from future benefits.

DECISION: Order No. 24-UI-255264 is modified as outlined above.

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

DATE of Service: December 9, 2024

NOTE: The Department may defer recovery or completely waive the overpaid amount if certain standards are met. If you apply but do not qualify for a waiver, other relief may be available, such as temporarily pausing collection efforts or limiting reductions of current benefits. It is important to apply for a waiver as soon as possible because waivers are not retroactive. For more information on requesting a waiver, go to <https://unemployment.oregon.gov/overpayments> or call 503-947-1995.

The Overpayment Waiver Application is available for download at <https://unemployment.oregon.gov/uploads/docs/Form129-EN.pdf> and can be submitted in any of these ways:

- **Frances Online:** Log in to your Frances Online account and use “Send a Message”

- **Use the Contact Us form online at: unemployment.oregon.gov/contact**
- **Email: UIOverpayments@employ.oregon.gov – Subject: “Waiver Request”**
- **Fax: 503-947-1811 – ATTN: BPC Waiver Requests**
- **U.S. Mail: BPC Overpayment Waivers, PO Box 14130, Salem, OR 97311**

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.surveygizmo.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 ito.

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
 Email: appealsboard@employ.oregon.gov
 Website: www.Oregon.gov/employ/pages/employment-appeals-board.aspx

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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.