

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1959

*Order No. 14-UI-29014 Affirmed, Late Request for Hearing Dismissed
Hearing Decision 14-UI-30699 Affirmed, Overpayment and Penalties*

PROCEDURAL HISTORY: On September 16, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from June 1 through July 5, 2014 (weeks 23-14 through 27-14) (decision # 73949). On October 6, 2014, decision # 73949 became final without an appeal having been filed. On October 14, 2014, the Department served notice of another administrative decision concluding that claimant was overpaid \$2,690 and liable for a \$672.50 monetary penalty and 20 penalty weeks (decision # 195279). On October 22, 2014, claimant filed separate requests for hearing regarding decisions # 73949 and 195279. On November 5, 2014, ALJ Kangas issued Order No. 14-UI-28238, dismissing claimant's request for hearing regarding decision # 73949 as untimely, subject to claimant's "right to renew" the request by submitting responses to the "Appellant Questionnaire" attached to the hearing decision within 14 days of the date the decision was mailed, or by November 5, 2014. On November 10, 2014, claimant mailed her response, and on November 19, 2014, ALJ Kangas issued Order No. 14-UI-29014, a final order of dismissal of claimant's October 22, 2014 request for hearing regarding decision # 73949. On December 16, 2014, ALJ Triana conducted a hearing on decision # 195279, and on December 19, 2014 issued Hearing Decision 14-UI-30699, affirming the Department's decision. On December 30, 2014, claimant filed an application for review of Hearing Decisions 14-UI-28238 and 14-UI-30699 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order No. 14-UI-29014 and Hearing Decision 14-UI-30699. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2014-EAB-1959 and 2014-EAB-1960).

FINDINGS OF FACT: (1) On March 8, 2008, claimant began her employment with Kola, Inc., where she worked as a project supervisor. In 2014, the employer periodically laid claimant off work due to lack of work.

(2) In March 2014, the employer laid claimant off work and on April 23, 2014, claimant filed an initial claim for unemployment insurance benefits. The Department determined claimant was monetarily

eligible for benefits based on the amount of her base year wages and that her weekly benefit amount was \$538, the maximum available at that time. On April 23, the Department mailed claimant a claimant handbook and separate Department publication, both of which explained that to be eligible for benefits, she had to actively seek work during each week claimed, which meant performing at least five work seeking-activities per week, at least two of which consisted of direct contact with an employer who might hire her.

(3) On May 18, 2014, the employer notified claimant that she was being laid off work, but would be called back to work on July 7, 2014.

(4) On May 21, 2014, a Department employee spoke to claimant by phone and specifically advised her regarding the type of work she was required to seek, her labor market area, the days and hours she had to be able and willing to work. The Department employee also told claimant that she was required to actively seek work during each week claimed by performing at least five work seeking-activities per week, at least two of which consisted of direct contact with an employer who might hire her. The employee advised her that if she failed to follow the described work search requirements, her benefits would be denied. Exhibit 1.

(5) Claimant claimed benefits for June 1 through July 5, 2014 (weeks 23-14 through 27-14), the weeks at issue. Claimant filed each of her weekly claims for benefits online. When filing her first claim for benefits for week 23-14 on June 11, 2014, claimant reported that she had last worked on May 18, 2014 and expected to return to work on July 7, 2014. Exhibit 1. When filing a weekly claim for benefits, claimant was asked regarding the week being claimed, "Did you actively look for work?" and was advised on the online screen,

Before answering this question, please be advised that we may request a copy of your work searches. Failure to provide it when requested will result in a denial of benefits for the weeks requested. And you will have to repay any benefits for the weeks denied.

Transcript at 12-13. For each of the weeks at issue to the question, "Did you actively look for work?", claimant responded, "yes", knowing that the most she had done was contact her own employer to check in and she had not actively sought work as required by the Department. Transcript at 13. For each of the weeks at issue, claimant also checked off a box that had the following language next to it:

I am on temporary layoff with my regular Employer. I am returning to full-time work within four weeks of when I was originally laid off. I remained in contact with my Employer last week.

Note: If you meet this requirement, you do not need to complete the work search activities above. False answers may result in overpaid benefits and/or additional penalties which you must pay back.

Transcript at 36-37. Claimant marked that box despite knowing that the employer laid her off work on May 18, 2014 and scheduled her to return to full-time work on July 7, 2014, more than four weeks after her lay off date.

(6) The Department investigated claimant's eligibility for benefits for each of the weeks at issue, concluded claimant had not actively sought work in any week and, on September 16, 2014, issued

decision # 73949, denying claimant benefits for the weeks claimed for that reason and advising that an appeal of the decision was required to be filed on or before October 6, 2014 to be timely. On September 16, 2014, the Department mailed decision # 73949 to claimant's address on file with the Department.

(7) On September 22, 2014, a fraud investigator with the Department mailed claimant a letter to claimant's address on file with the Department: 1667 W 5th St., Gresham OR 97080-6722. The letter informed claimant that claims for benefits were being investigated for willful misrepresentation and enclosed a questionnaire for her to complete and return within 10 days. The questionnaire advised, "An administrative decision has already been issued regarding your failure to seek work during the period June 1, 2014 to July 5, 2014." Exhibit 1. On September 26, 2014, claimant completed the questionnaire, which included her confirmation that the letter had been mailed to her "current mailing address", and mailed it back to the Department, which received it on September 29, 2014. Exhibit 1.

(8) On October 6, 2014, decision # 73949 became final without an appeal having been filed.

(9) On October 14, 2014, the Department's fraud investigator completed her investigation and issued decision # 195279 concluding claimant willfully misrepresented facts to obtain benefits for the weeks at issue and assessing an overpayment of benefits in the amount of \$2, 690 that claimant was required to repay, 20 penalty weeks and a \$672.50 monetary penalty. On October 14, 2014, the Department mailed decision # 195279 to: 1667 SW 5th St, Gresham OR 97080-6722.

10) On October 22, 2014, claimant filed separate requests for hearing regarding decisions # 73949 and 195279. Claimant did not file her request for hearing regarding decision # 73949 before the October 6, 2014 deadline because she did not "open" or "read" the decision until October 21, 2014. DR Exhibit 3.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant failed to show good cause for filing a late request for hearing regarding decision # 73949. Claimant was overpaid and must repay \$2,690 in regular benefits, is liable for a \$672.50 monetary penalty, and as an additional penalty, is disqualified from receiving future benefits for a period of 20 weeks.

Late Request for Hearing. A request for hearing must be filed within 20 days after notice of the administrative decision was mailed to the party. ORS 657.269(2); OAR 471-040-0005 (July 14, 2011). ORS 657.269(1)(a) provides that unless a party files a request for hearing in a timely manner, the decision is final. ORS 657.270(7)(a) provides that a late request for hearing may be dismissed when the requesting party fails to show good cause for the delay. "Good cause" exists when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control. OAR 471-040-0010(1) (February 10, 2012).

In the present case, claimant filed her request for hearing regarding decision # 73949 on October 22, 2014, 36 days after the decision was mailed because she reported she did not "open" or "read" the decision until October 21, 2014. On the same questionnaire claimant made those responses, claimant did not answer the question, "On what date....did you receive the administrative decision?" DR Exhibit 3. However, claimant received and responded to the Department's September 21 fraud investigation letter mailed to the same address on September 29. More likely than not, claimant received notice of decision #73949 in the regular course of the mail just a few days after it was mailed by the Department on September 16, 2014. It was well within claimant's reasonable control to "open" or "read" the

Department's decision soon after she received it. Accordingly, claimant failed to show good cause for filing a late hearing request regarding decision # 73949 and her hearing request is dismissed. Under ORS 657.269(1)(a), decision # 73949 is final as a matter of law.

Overpayment and Penalties. 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.* 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. 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).

Here, because the Department originally paid claimant benefits it subsequently concluded claimant was ineligible to receive, the Department had the burden to establish that claimant received benefits to which she was not entitled, and that she willfully made false statements or misrepresentations to obtain those benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

At hearing, claimant did not dispute the Department's evidence that when filing her claim for each of the weeks at issue, claimant responded "yes" to the question, "Did you actively look for work?" although she knew she had not sought any work during that week. Transcript at 17-19. Claimant explained that by checking the box that she was on "temporary layoff" and "returning to full-time work within four weeks of when [she] was originally laid off" she believed she did not need to fulfill the Department's work search requirements. Transcript at 17-19. Claimant reported to the Department, however, that she was laid off on May 18, 2014, and expected to return to work on July 7, 2014. We do not find plausible claimant's explanation that she did not understand that the four week period began when she was originally laid off. Transcript at 26-28. For five consecutive weeks, claimant checked a box on her weekly form to indicate that she was "returning to full-time work within four weeks of *when I was originally laid off.*"¹ Transcript at 36-37. (emphasis added). More likely than not, claimant knowingly and intentionally misrepresented the date on which she expected to return to work and her work search in order to obtain benefits.

The Department established that claimant received \$2,690 in regular benefits to which she was not entitled based upon her willful misrepresentations regarding her work search activities and lay off period during the weeks at issue. Exhibit 1. Consequently, claimant is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to her under ORS chapter 657. Viewing the record as a whole, she willfully misstated material facts to the Department to obtain benefits and also is liable for penalties under ORS 657.215.

¹ Claimant testified she had no difficulty reading. Transcript at 34.

The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052 (1)(c)(February 23, 2014). When the disqualification is imposed because the disqualifying acts relate to the provisions of ORS 657.155, the number of weeks of disqualification is determined by dividing the total overpayment by the maximum weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the individual's disqualifying act(s), rounding the result to two decimal places, multiplying by four, and rounding the result up to the nearest whole number. OAR 471-030-0052(1)(e). Claimant's total overpayment is \$2,690, divided by \$538 equals 5, multiplied by 4 equals 20, rounded up to the nearest whole number equals 20. Claimant's penalty disqualification period is 20 weeks. Claimant is also liable for a penalty in an amount equal to 25 percent of the amount of the overpayment based on the misrepresentations of material facts she made during each of five consecutive weeks. ORS 657.310(2).² 25% of claimant's overpayment of \$2,690 is \$672.50.

In summary, claimant is required to repay to the Department, by deduction from future benefits or otherwise, \$2,690.00. Claimant is also subject to a \$672.50 monetary penalty and 20 penalty weeks.

DECISION: Hearing Decisions 14-UI-29014 and 14-UI-30699 are affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: February 13, 2015

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 website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

² OAR 471-030-0052 (Misrepresentation Disqualification) provides in relevant part,

...(7) The department will review the number of occurrences of misrepresentation when applying the penalty as described in ORS 657.310(2). An occurrence shall be counted each time an individual willfully makes a false statement or representation, or willfully fails to report a material fact to obtain benefits. The department shall use the date the individual failed to report a material fact or willfully made a false statement as the date of the occurrence. For an individual subject to disqualification by administrative action under 657.215, the penalty will be:

...(c) For the fifth or sixth occurrence within 5 years of the occurrence for which a penalty is being assessed, 25 percent of the total amount of benefits the individual received but to which the individual was not entitled.

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