

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0296

Hearing Decision 14-UI-20832 – Late Application for Review Dismissed
Hearing Decision 15-UI-34115 – Late Request for Hearing Dismissed
Hearing Decision 15-UI-34123 – Overpayment & Penalty Affirmed

PROCEDURAL HISTORY: On May 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not eligible for benefits under the SUD/TUI program (decision # 113408). On June 3, 2014, the Department served notice of an administrative decision concluding claimant voluntarily left her job with Birtola Garmyn without good cause (decision # 133213).

On June 4, 2014, claimant filed a timely request for hearing on decision # 113408. On June 23, 2014, decision # 133213 became final without a timely request for hearing having been filed.

The Office of Administrative Hearings (OAH) scheduled a hearing on decision # 113408 for June 19, 2014, and postponed the hearing to July 3, 2014 at claimant's request. On July 3, 2014, ALJ Shoemake conducted a hearing, at which claimant failed to appear, and issued Hearing Decision 14-UI-20832, dismissing claimant's request for hearing. On July 23, 2014, Hearing Decision 14-UI-20832 became final without claimant having filed an application for review or requested reopening.

On July 24, 2014, the Department served notice of an administrative decision concluding claimant was overpaid benefits in the amount of \$1,015 based on decision # 113408 (decision # 93309). On August 13, 2014, decision # 93309 became final without a request for hearing having been filed. On January 12, 2015, the Department issued notice of a decision canceling decision # 93309 (decision # 93439).¹

¹ Claimant implied at the hearing and in her argument that she believed the Department's canceled all of the administrative decisions that adversely affected her and her claim for benefits in a letter decision the Department issued to her on January 12, 2015. However, the Department's January 12, 2015 decision stated, in pertinent part, "On July 24, 2014, an administrative decision was issued which found you were overpaid in the amount of \$1,015.00. * * * [T]he administrative decision issued on July 24, 2014, is hereby cancelled." Exhibit 1, decision # 93439. By its plain terms, the Department canceled only the July 24, 2014 decision that assessed a \$1,015 overpayment. The decision did not state or imply that the Department had also canceled decisions # 113408 and 133213.

On January 12, 2015, the Department issued notice of an administrative decision concluding claimant was overpaid \$7,884, and assessing a \$2,365.20 monetary penalty and 52 penalty weeks (hereinafter referred to as “the overpayment decision”). On January 26, 2015, claimant filed a timely request for hearing on the overpayment decision and a late request for hearing on decision # 133213.

On February 20, 2015, ALJ R. Davis conducted two hearings, one on claimant’s late request for hearing on decision # 133213 and the other on the overpayment decision. On February 25, 2015, the ALJ issued Hearing Decision 15-UI-34115, concluding claimant did not show good cause for filing a late request for hearing on decision #133213, and Hearing Decision 15-UI-34123, concluding claimant was overpaid \$7,739 and assessing a 52 week penalty but no monetary penalty. On March 17, 2015, claimant filed a late application for review of Hearing Decision 14-UI-20832 and timely applications for review of Hearing Decisions 15-UI-34123 and 15-UI-34115.²

No adversely affected party filed an application for review of the portions of Hearing Decision 15-UI-34123 the ALJ decided in claimant’s favor, specifically, the ALJ’s conclusions that the applicable versions of ORS 657.310 and OAR 471-030-0052 were those in effect in 2008, and that claimant was not liable for a monetary penalty based on her misrepresentations, nor did any adversely affected party appeal the ALJ’s determination that claimant was not overpaid based on her receipt of vacation pay during the week ending July 14, 2012. Therefore, we did not consider those issues when reaching this decision, and instead confined our review to the matters adverse to the party requesting review.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-20832, 15-UI-34115 and 15-UI-34123. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2015-EAB-0294, 2015-EAB-0295 and 2015-EAB-0296).

EAB considered claimant’s argument to the extent it was relevant and based on the record.

FINDINGS OF FACT: (1) On January 17, 2008, claimant filed an initial claim for benefits. Her weekly benefit amount was \$408, and the maximum weekly benefit amount in effect at the time was \$482.

(2) On July 16, 2010, claimant filed another initial claim for benefits. Her weekly benefit amount was \$133.

(3) In February 2011, claimant worked for a business called Birtola Garmyn. Claimant voluntarily left that employment after working approximately four hours. Claimant did not report her work separation to the Department, and certified to the Department that she had not left a job or been discharged from work during the weeks claimed surrounding her voluntary leaving. Claimant was ineligible to receive

² Claimant’s filing on Hearing Decision 14-UI-20832 could be construed as a request to reopen and forwarded to OAH for processing. We have not done so in this case for two reasons. First, OAH had custody of claimant’s request, did not identify the request as a request to reopen, and forwarded the request to EAB for processing as an application for review. Second, the “reasonable time” standard applied by OAH for requests to reopen and EAB for late applications for review are identical, making the outcome of a reopen proceeding at OAH the same as the outcome at EAB, making it unnecessary and inefficient to subject claimant to additional proceedings.

benefits based upon her work separation until she earned four times her weekly benefit amount from work in subject employment.

(4) During weeks 7-11 and 8-11, the Department paid claimant \$409 per week. During week 9-11, the Department paid claimant \$320. During weeks 10-11 through 47-11, the Department paid claimant \$133 per week because she had not reported her work separation from Birtola Garmyn.

(5) Between November 27, 2011 and December 24, 2011, and in July of 2012, claimant worked for a business called Sierra Pacific Mortgage. Her earnings each week exceeded \$133. Claimant did not report her work or earnings to the Department, and certified to the Department each week claimed during those periods that she had not worked and did not have earnings.

(6) During weeks 48-11 through 51-11 and week 28-12, the Department paid claimant \$133 in unemployment insurance benefits each week. Claimant's earnings from Sierra Mortgage exceeded her benefit amount, and she was not eligible for benefits.

(7) On July 5, 2012, claimant filed a third initial claim for benefits. Her weekly benefit amount was \$145.

(8) In 2014, the Department approved claimant to participate in a specific training program, whereby claimant would receive weekly benefits while attending approved training in lieu of seeking work. At some point prior to February 16, 2014, claimant left the training program the Department had approved but continued to claim training program benefits and certify her attendance in the approved program. Claimant knew she had left the approved training program to transfer to a different program the Department had not approved, but did not report that to the Department before claiming those weeks of benefits. From February 16, 2014 through April 19, 2014, claimant received training program benefits in the amount of \$145 per week while she was not attending approved training, and ineligible to receive them.

(9) From April 29, 2014 through June 13, 2014, claimant was hospitalized or in a rehabilitation center recovering from a serious illness. Claimant did not change her address of record with the Department during that time.

(10) On June 3, 2014, the Department mailed decision # 133231 to claimant's address of record. On June 4, 2014, claimant filed a request for hearing on decision # 113408 using a form the Department had mailed to her during the time she was hospitalized. At the time she filed the June 4th hearing request, she was not aware that the June 3, 2014 decision existed. Between June 4, 2014 and June 19, 2014, claimant contacted the Office of Administrative Hearings (OAH) to postpone the hearing on decision # 113408; OAH allowed claimant's request and postponed the hearing from June 19, 2014 to July 3, 2014. On June 23, 2014, decision # 133231 became final without a request for hearing having been filed. At that time, claimant was still unaware that the decision had been issued.

(11) On July 3, 2014, claimant failed to attend the rescheduled hearing concerning decision # 113408, after which her request for hearing was dismissed, and the decision became final.

(12) On January 16, 2015, claimant signed and dated a request for hearing form upon which she expressed disagreement with decision # 133213 and the overpayment decision. For unknown reasons, claimant did not file her request by fax until 10 days later, on January 26, 2015.

CONCLUSIONS AND REASONS: Claimant's application for review of Hearing Decision 14-UI-20832 was late, not filed within a reasonable time, and must be dismissed. Claimant's late request for hearing on decision # 133213 was not filed within a reasonable time, and must be dismissed. Claimant was overpaid unemployment benefits, must repay the overpayment, and is liable for penalty weeks.

Hearing Decision 14-UI-20832 – Late Application for Review. ORS 657.270(7)(b) provides, “[a] dismissal by the administrative law judge . . . is final unless the party whose request for hearing has been dismissed files, within 20 days after the dismissal notice was mailed to the party’s last-known address, an application for review as provided under this chapter.” The 20-day deadline may be extended upon a showing of good cause. ORS 657.875. An individual may establish “good cause” by proving that she was prevented from making a timely filing by a factor or circumstance beyond her reasonable control, and if she files the late application for review within a “reasonable time,” which is 7 days after the circumstances that prevented a timely filing ceased to exist. OAR 471-041-0070(2).

Hearing Decision 14-UI-20832 became final on July 23, 2014. Claimant did not file an application for review of that matter until March 17, 2015, a delay of almost eight months. Although claimant did not specify the exact reason she filed her application of Hearing Decision 14-UI-20832 almost eight months late, we infer from her argument that she was confused about the Department’s processes and the number of administrative decisions she had received, while recovering from a significant illness that had caused her to undergo almost two months of hospitalization and rehabilitation. Although claimant’s confusion was understandable under the circumstances, it did not constitute good cause for the late filing for two reasons.

First, despite claimant’s illness and hospitalization, claimant was able to attend to her personal business and respond to other materials the Department mailed her during the period of time she was hospitalized and in rehabilitation, as shown by her June 4, 2014 filing of a request for hearing of decision # 113408 in this case, and her subsequent mid-June 2014 contact with OAH to reschedule the hearing in this matter. Given that claimant was capable of attending to personal business and communicating about her unemployment insurance claim around the time period in question, we cannot conclude that continuing to do so about the same case was beyond claimant’s reasonable control. Second, because claimant did not specify the exact reason for her eight-month delay in filing, or specify when the circumstances that prevented a timely filing ceased, claimant has not shown that she filed her March 17, 2015 application for review within a “reasonable time,” meaning within 7 days, of when those circumstances ceased. Nor can we infer from the record that she filed within a reasonable time, considering that she was or should have been aware of a pending hearing matter in mid-July 2014, had ongoing communication with the Department and OAH in January and February 2015, but did not file her application for review until mid-March 2015.

Because claimant did not establish good cause for her late filing, or establish that her late filing occurred within a “reasonable time,” claimant’s late application for review of Hearing Decision 14-UI-20832 must be dismissed.

Hearing Decision 15-UI-38543 – Late Request for Hearing. ORS 657.269 provides that an individual in receipt of an adverse administrative decision must request a hearing on that decision within 20 days of the date it was mailed, or the decision will become final. ORS 657.875 provides that the deadline may be extended if the party requesting the extension establishes good cause for the late filing, and makes the late filing within a “reasonable time,” which is defined as 7 days after the circumstances that prevented a timely filing ceased to exist.

In Hearing Decision 15-UI-38543, the ALJ concluded that claimant’s late request for hearing must be dismissed because it was not filed within the 7-day “reasonable time” period, reasoning that claimant signed the late request for hearing on January 16, 2015 but did not file it for 10 days. We agree with the ALJ’s findings and analysis.

EAB reviewed the entire hearing record related to Hearing Decision 15-UI-38543. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review (Hearing Decision 15-UI-38543) is **adopted**.

Hearing Decision 15-UI-34123 – Overpayment and Penalty. 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.*

During weeks 7-11 through 47-11, claimant was disqualified from receiving benefits because she voluntarily left work with Birtola Garmyn without good cause.³ During each of those weeks, however, the Department paid claimant \$409, \$320 or \$133 per week based on her false reports to the Department that she had not quit a job. Facts concerning claimant’s work separation were material to whether she was disqualified from receiving benefits because of a work separation.

Only “unemployed” individuals are eligible to receive unemployment insurance benefits. *See accord* ORS 657.155(1). An individual who earns more than her weekly benefit amount is not considered “unemployed,” and is not eligible to receive any benefits. ORS 657.100. During weeks 48-11 through 51-11 and week 28-12, claimant’s earnings from work exceeded her weekly benefit amount. Claimant was not “unemployed” during those weeks, was not eligible to receive benefits, and, therefore, the benefits she received for those weeks were overpaid. The overpayment occurred because claimant affirmatively reported to the Department that she had not worked and had no earnings during each of those weeks, which were false statements that were material to her eligibility to receive benefits based on her status as an unemployed person.

During weeks 8-14 through 14-14, claimant was not eligible to receive training program benefits because she had left the training program the Department had approved. During each of those weeks, however, the Department paid claimant \$145 because she continued to certify to the Department that she was attending the approved training. Facts concerning whether or not claimant was actually attending

³ Decision # 133213, concluding that claimant voluntarily quit work without good cause, became final on June 23, 2014, and claimant’s late request for hearing on that decision has been denied in Hearing Decision 15-UI-34115, which is, as noted herein, adopted by the EAB.

the training program the Department had approved for her to attend were material to the Department's assessment of her ongoing eligibility to receive training program benefits.

Because claimant received unemployment insurance benefits she was not entitled to receive, and received them because of her own false statements, misrepresentations to the Department or failures to disclose material facts to the Department, claimant is liable to repay the benefits she received because of her false statements, totaling \$7,739, regardless of her knowledge or intent at the time she made the false statements.⁴

However, the record also shows that claimant's false statements were willfully made. She affirmatively certified to the Department while making her claims for benefits for the weeks at issue that she had not quit a job, that she had not had any work or earnings, and that she was attending approved training. Each time she made one of those affirmative statements, she was willfully making a false report that she knew not to be true. For example, claimant knew she had briefly worked for Birtola Garmyn and no longer worked there, but did not report any type of work separation to the Department. During five of the weeks she claimed, claimant knew she worked, and in sufficient quantity to have earnings that exceeded her weekly benefits amount, but nevertheless reported to the Department, when asked to do so while making weekly claims and as a condition of completing her weekly claims, that she had not worked and had no earnings. Finally, claimant reported to the Department that she was continuing to attend approved training despite the fact that she had knowingly left that training program to enter a different one. In each of those instances, claimant affirmatively made false statements to the Department when she had knowledge that her statements were false. We infer that she did so for the purpose of obtaining benefits she might not have received had she not made the false statements in question; claimant knowingly and intentionally made false statements when filing her claims for benefits, and had claimant not been aware that making those false statements could affect her receipt of benefits, there would have been no reason for her to make them.

The penalty for making a willful disqualification is calculated by dividing the total overpayment amount by the maximum weekly benefit amount in effect during the first effective week of the initial claim, rounding off to the nearest two decimal places, multiplying the result by four, then rounding the total up to the nearest whole number. OAR 471-030-0052(1)(a). When the disqualification is imposed because the disqualifying acts relate to a work separation (among other things) and a failure to accurately report work and or earnings, four additional weeks are added to the total reached under that calculation. OAR 471-030-0052(1)(d).

Claimant's total overpayment was \$7,739, divided by \$482, which was the maximum weekly benefit amount in effect during the first week of claimant's first initial claim at issue, is 16.05, multiplied by 4 equals 64.2, rounded up equals 65, plus four additional weeks equals 69 weeks. However, the maximum penalty that may be applied in any misrepresentation case is 52 weeks, so claimant's penalty must be reduced to 52 weeks.

In sum, claimant did not show good cause for filing a late application for review of Hearing Decision 14-UI-20832, and did not establish good cause for filing a late request for hearing on decision # 133213.

⁴ Claimant's overpayment total includes \$409 each week for weeks 7-11 and 8-11, \$320 for week 9-11, \$133 each week for weeks 10-11 through 51-11 and 28-12, and \$145 each week for weeks 8-14 through 14-14.

Because decisions # 113408 and # 133213, concluding claimant was disqualified from benefits because of a work separation and ineligible for training program benefits, are final, we must conclude that claimant was overpaid \$7,739. She is also liable for 52 penalty weeks for misrepresenting material facts to obtain benefits.

DECISION: Claimant's application for review of Hearing Decision 14-UI-20832 is dismissed, and the decision therefore remains undisturbed. Hearing Decisions 15-UI-34115 and 15-UI-34123 are affirmed.

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

DATE of Service: April 8, 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 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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