

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1314

Affirmed
Benefits Are Payable

PROCEDURAL HISTORY: On August 5, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding unemployment insurance benefits are not payable for July 5 through July 11, 2015 (week 27-15) (decision # 92009). Claimant filed a timely request for hearing. On August 28, 2015, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for September 11, 2015. On September 11, 2015, ALJ R. Davis issued Hearing Decision 15-UI-44254, dismissing claimant's request for hearing for failure to appear. On September 23, 2015, claimant filed a timely request to reopen the hearing. On October 2, 2015, the OAH mailed notice of a hearing scheduled for October 19, 2015. On October 19, 2015, ALJ Murdock conducted a hearing, at which the employer failed to appear, and on October 21, 2015, issued Hearing Decision 15-UI-46262, allowing claimant's reopen request and concluding claimant did not receive vacation pay that is deductible from benefits payable for week 27-15. On November 5, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

On November 5, 2015, the employer submitted written argument to EAB. The argument states the employer does not request review of that portion of Hearing Decision 15-UI-46262 allowing claimant's request to reopen. We therefore did not address that issue in our decision.

The employer's argument contains new information for EAB to consider regarding whether benefits are payable to claimant for week 27-15. We construe the employer's argument as a request for EAB to consider its new information under OAR 471-041-0090(2) (October 29, 2006), which allows EAB to consider new information when the party offering the information establishes that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. The employer provided no explanation regarding why it failed to appear at the hearing. Therefore, we considered the entire record, but did not consider new information in the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) Claimant was employed by Roseburg Forest Products Co. On June 26, 2015, the employer paid claimant a lump sum of \$783.20 for all her vacation time for the calendar year

beginning on June 1, 2015. Exhibit 4. The employer did not allocate the vacation pay to a particular week or state that the purpose of the vacation pay was to compensate claimant for vacation due to layoff. Claimant received the lump sum payment in lieu of receiving vacation pay when she used vacation time.

(2) Claimant did not work from July 5, 2015 through July 11, 2015 (week 27-15), the week at issue, due to lack of work. She had no earnings during week 27-15.

(3) Claimant claimed unemployment benefits for week 27-15. The Department paid claimant benefits for that week.¹ Claimant's weekly benefit amount was \$549.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude claimant did not receive vacation pay that is deductible from unemployment benefits for week 27-15.

ORS 657.150(6) provides that an 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 the greater of ten times the minimum hourly wage or one-third the individual's weekly benefit amount. ORS 657.150(7) provides that vacation pay shall be considered as "earnings" in the determination of the amount of benefits payable with respect to the week in which the holiday or vacation falls. ORS 657.150(7) also provides, in relevant part, that, "if payment for the . . . vacation is paid more than 45 days prior to the . . . vacation or is delayed more than 45 days following the end of the week in which the . . . vacation falls, the provisions of [ORS 657.150(7) that reduce the weekly benefit amount] do not apply and previously reduced benefits shall be adjusted accordingly." For purposes of ORS 657.150(7), the term "vacation" means "a specific period of time, paid or unpaid, during which the individual is freed from work/job/employment duties and responsibilities and is free to use the time away from work for any purpose the individual chooses." OAR 471-030-0017(1)(h).

Where, as here, the Department initially paid a claimant benefits, it has the burden to establish that the claimant was not entitled to receive those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). Thus, the Department has the burden to show claimant had earnings that must be allocated to the week at issue to reduce her weekly benefit amount. The Department failed to meet that burden.

The uncontroverted evidence at hearing showed that claimant received vacation pay on June 26, 2015 for vacation time that she would use for the calendar year beginning on June 1, 2015. Claimant did not work during week 27-15 due to lack of work. Although the record shows claimant's time off during week 27-15 was "vacation" within the meaning of OAR 471-030-0017(h), because she was "freed from work /job/employment duties and responsibilities" during the week, the employer did not pay claimant for any vacation time during week 27-15, or show that any of the lump sum amount was intended to pay claimant for her time off during week 27-15. There is therefore no legal basis to determine the vacation pay constituted earnings for week 27-15. ORS 657.150(7) does not authorize the Department to allocate the vacation pay to a particular week or weeks without a factual basis for doing so. Neither the

¹ We take notice of this fact, which is contained in Employment Department records. Any party that objects to EAB doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of EAB mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

employer nor the Department appeared at hearing, and the record fails to show a basis to allocate any portion of claimant's vacation pay to the week at issue.

The Department failed to meet its burden to show that claimant had earnings during the week at issue that reduced her weekly benefit amount. We therefore conclude claimant's weekly benefit amount shall not be reduced pursuant to ORS 657.150(7).

DECISION: Hearing Decision 15-UI-46262 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: December 10, 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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