

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1314-R

Hearing Decision 15-UI-46262 Reversed On Reconsideration
Week 27-15 Benefits Are Not 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 December 10, 2015, EAB issued Appeals Board Decision 2015-EAB-1314, affirming Hearing Decision 15-UI-46262. On December 23, 2015, the Department filed a request for reconsideration. This decision is issued pursuant to our authority under ORS 657.290(3).

CONCLUSIONS AND REASONS: The Department's request for reconsideration is allowed. On reconsideration, Hearing Decision 15-UI-46262 is reversed, and we conclude benefits are not payable to claimant for the week of July 5, 2015 through July 11, 2015 (week 27-15).

OAR 471-040-0145 provides that any party may request reconsideration to correct an error of material fact or law. At issue in this matter is whether claimant received vacation pay that should reduce or eliminate her weekly benefit payment for the week of July 5, 2015 through July 11, 2015 (week 27-15). In Appeals Board Decision 2015-EAB-1314, we concluded that claimant's benefits were not subject to reduction. We reasoned that claimant was off work during the week at issue due to a layoff, not a vacation, and there was no basis upon which to conclude that claimant's receipt of lump sum vacation pay was connected to her time off during the week at issue. Our conclusion was based on an erroneous interpretation of OAR 471-030-0017(h), defining "vacation."

It is immaterial whether claimant was off work because the employer lacked work for her to perform or because she had opted to take the time off as a holiday. OAR 471-030-0017(h) provides that "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, and does not distinguish between volitional time off work and mandatory time off work. Claimant's time off work from July 5, 2015 through July 11, 2015 therefore satisfies the definition of "vacation."

ORS 657.150(7) requires that vacation payments, such as the \$783.20 payment claimant received prospectively for the period of June 2015 through June 2015, that are received within 45 days before or after the week in which the vacation falls be considered earnings.¹ Claimant received the vacation payout on June 26, 2015, and the vacation period occurred within 45 days of that date, commencing July 5, 2015. Her vacation payout must, therefore, be considered earnings.

ORS 657.150(6) requires that an individual with earnings in any week must have her weekly benefit amount reduced by an appropriate amount. Where, as here, the earnings (or vacation pay) for the week at issue were \$783.20, which exceeded claimant's weekly benefit amount of \$549, no benefits are payable. Therefore, no benefits are payable to claimant for the week of July 5, 2015 through July 11, 2015 (week 27-15).

DECISION: On reconsideration, Hearing Decision 15-UI-46262 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 5, 2016

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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¹ We conclude that the payout was for prospective vacation time based on claimant's testimony that if she wanted to take vacation after getting the lump sum payout, she would either have to work overtime or take time off without pay. Audio recording at 16:14.