

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0063**

*Affirmed*  
*Ineligible*

**PROCEDURAL HISTORY:** On November 24, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not eligible for benefits for the period of November 1 through November 8, 2015 because she did not file an initial claim in accordance with Department rules (decision # 152501). Claimant filed a timely request for hearing. On January 5, 2016, ALJ Vincent conducted a hearing, and on January 11, 2016 issued Hearing Decision 16-UI-50800, affirming the Department's decision. On January 19, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** During the hearing, the ALJ identified and admitted one document into the record as Exhibit 1. The exhibit was not marked, but the ALJ described it in sufficient detail that EAB was able to identify it and marked it as a clerical matter. EAB reviewed Exhibit 1, claimant's written argument, and the entire hearing record when reaching this decision.

**FINDINGS OF FACT:** (1) On October 19, 2015, claimant spoke with a representative from the Department about filing a claim for unemployment insurance benefits in anticipation of a future layoff from her employer. Claimant understood from the representative's statements to her that the Department required her to wait until the week after her layoff to file an initial claim for benefits. Claimant noted on a piece of paper to "apply Sunday after the first week of layoff." Audio Record at 23:11 to 23:20. Claimant did not recall the representative's name, and the Department kept no record of claimant's call.

(2) On Tuesday, November 3, 2015, claimant was laid off from work.

(3) Claimant filed an initial claim for unemployment insurance benefits on Sunday, November 8, 2015 (the first day of week 45-15).

(4) On November 10, 2015, claimant claimed benefits for the period of November 1, 2015 through November 7, 2015 (week 44-15). The Department denied those benefits.

**CONCLUSIONS AND REASONS:** Claimant is not eligible for benefits or waiting week credit for week 44-15.

An “initial claim” is a new claim by a claimant to establish a benefit year or other eligibility period. OAR 471-030-0040(1)(b) (February 23, 2014). An initial claim must be filed prior to or during the first week or series of weeks for which benefits, waiting week credit, or noncompensable credit is claimed. OAR 471-030-0040(3). An initial claim is effective the Sunday of the calendar week in which it is filed. *Id.*

The Department has the burden to prove that claimant was not available for work with respect to weeks in which the Department initially paid benefits, and now seeks to retroactively deny them. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By extension of that principle, claimant has the burden of proof with respect to weeks the Department withheld benefits. The Department did not pay claimant benefits or give her waiting week credit for week 44-15. Therefore, claimant has the burden to prove that she filed her initial claim in accordance with Department rules.

It is undisputed that claimant did not file her initial claim until week 45-15, which was after week 44-15, the first week for which she sought to claim benefits. Thus, because claimant did not file her initial claim prior to or during the first week for which she claimed benefits or waiting week credit, claimant was not eligible for benefits for that week under OAR 471-030-0040 as a matter of law.

Claimant’s justification for having waited until week 45-15 to file her initial claim was the alleged representation made to her by a Department representative that she could not file an initial claim until the week following her layoff. Thus, claimant appears to contend that, based on her understanding of what the Department representative told her, the Department is estopped from denying her benefits or waiting week credit for week 44-15.

Estoppel against a governmental entity requires a finding that an agency or its representative knowingly made a false or misleading statement of an existing material fact, and an individual justifiably and detrimentally relied upon that false or misleading statement. *Employment Division v. Western Graphics Corp.*, 76 Or App 608, 710 P2d 788 (1985). Here, claimant’s testimony was credible and persuasive that she spoke to a Department representative on October 19, 2015 regarding a future claim, and that her understanding of the Department representative’s directions was that she needed to wait until the benefit week following her layoff to file an initial claim. Claimant also argued in her written argument that she did not intentionally disregard the Department’s rules, and should not be held accountable for a mistake in communication with the Department’s representative on October 19. We agree the record shows no reason to doubt claimant intended to follow the rules. However, the record does not establish by a preponderance of the evidence that the mistake in communication was attributable to the Department representative, rather than to claimant.

Claimant did not recall who she spoke to on October 19 and the Department witness at hearing was unable to locate of record of an October 19 conversation between claimant and the Department. Claimant asserted the Department representative told her she could not file an initial claim until the week following her layoff. However, the Department representative asserted that claimant may have misunderstood the Department representative because the Department does not instruct claimants that they may not file an initial claim while they are still working, and the information claimant described

was the same information the Department provides regarding filing a weekly claim for benefits, not an initial claim. Audio Record 30:51 to 31:29. Thus, although claimant established her own understanding of the representative's statements, her understanding alone does not establish by a preponderance of the evidence that the representative made false or misleading statements of material facts or knowingly mislead claimant. Absent such a showing, claimant failed to meet her burden of proof to establish that the Department should be estopped from denying her benefits or waiting week credit for week 44-15.

For the reasons explained, claimant is not entitled to benefits or waiting week credit for the period of November 1, 2015 through November 7, 2015 (week 44-15).

**DECISION:** Hearing Decision 16-UI-50800 is affirmed.

Susan Rossiter and J. S. Cromwell

**DATE of Service: February 9, 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](http://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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