

EO: 990
BYE: 201149

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

005
VQ 005.00
MC 010.05
MC 000.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0513

Hearing Decision 16-UI-57166 Reversed
Late Request for Hearing on Decision # 75629 Allowed

~

Hearing Decision 16-UI-57174 Affirmed
Late Request for Hearing on Overpayment Decision Denied

PROCEDURAL HISTORY: On June 5, 2012, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left employment with JB Hunt Transportation on November 21, 2011 (decision # 75629). On June 6, 2012, the Department served notice of an administrative decision assessing a \$4,814 overpayment, \$722.10 monetary penalty and 43 penalty weeks (hereinafter, "the overpayment decision"). On June 25, 2012, decision # 75629 became final without claimant having filed a request for hearing. On June 26, 2012, the overpayment decision became final without claimant having filed a request for hearing. On February 19, 2016, claimant filed late requests for hearing on decision # 75629 and the overpayment decision. On February 24, 2016, ALJ Kangas issued Hearing Decision 16-UI-53729, dismissing claimant's request for hearing on decision # 75629, and Hearing Decision 16-UI-52685, dismissing claimant's request for hearing on the overpayment decision, both subject to claimant's right to renew her requests by providing a response to an appellant questionnaire by March 9, 2016. Claimant mailed her responses to the questionnaires in an envelope postmarked March 7, 2016. On March 24, 2016, the Office of Administrative Hearings mailed notice of two hearings scheduled for April 8, 2016. On April 8, 2016, ALJ Wipperman conducted the hearings, and on April 13, 2016, issued Hearing Decision 16-UI-57166, dismissing claimant's late request for hearing on decision # 75629, and Hearing Decision 16-UI-57174, dismissing claimant's late request for hearing on the overpayment decision. On May 2, 2016, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-57166 and 16-UI-57174. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0513 and 2016-EAB-0514).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Effective December 12, 2010, claimant filed an initial claim for benefits. Claimant claimed benefits for the weeks of December 12, 2010 through April 7, 2012 (weeks 50-10 through 14-12). He filed his last weekly claim with the Department on April 10, 2012.

(2) Eight weeks after claimant last claimed benefits, on June 5 and June 6, the Department mailed the decisions at issue to claimant's last known address of record. Around that time, however, claimant's landlord had locked claimant out of his home, denied him access to his mail and began eviction proceedings. As a result, claimant did not receive decision # 75629 or the overpayment decision.

(3) Sometime between June 2012 and November 2013, the Department began issuing billing statements to claimant, and began garnishing claimant's wages to collect the overpayment and monetary penalty. In November 2013, claimant contacted the Department to request a reduction in the amount of the garnishment. Claimant did not ask, and the Department employee did not explain, the basis of the overpayment, and the Department did not inform claimant of decision # 75629.

(4) Although claimant was aware by at least November 2013 that he had been overpaid benefits by the Department, he did not know the cause of the overpayment. None of the billing statements or other information claimant received mentioned decision # 75629 or claimant's November 2011 work separation from JB Hunt Transportation. Claimant concluded based on his previous experience claiming benefits that the Department had overpaid him because of a miscalculation or error. He was not aware of decision # 75629.

(5) On September 24, 2014, the Department called claimant to verify his mailing address. Claimant requested during that call that the Department change his overpayment repayment plan, but did not ask about the cause of the overpayment. The Department did not inform claimant of decision # 75629 at that time.

(6) The Department intercepted the tax refund claimant anticipated receiving in early 2016. On February 19, 2016, claimant called the Department to inquire. During that call, a Department employee informed claimant for the first time that his overpayment was based in part on decision # 75629 and that claimant had the right to request a hearing on that decision. Claimant immediately filed a telephone request for hearing on decision # 75629 and the overpayment decision.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant showed good cause for filing a late request for hearing on decision # 75629 and filed his request for hearing within a reasonable time. Although claimant also showed good cause for filing a late request for hearing on the overpayment decision, he did not file his request for hearing on the overpayment decision within a reasonable time, and, therefore, we agree with the ALJ that claimant's late request for hearing on the overpayment decision must be dismissed.

ORS 657.269 provides that parties have 20 days to request a hearing on an administrative decision issued by the Department. ORS 657.875 allows that time period to be extended a "reasonable time," upon a showing of "good cause." OAR 471-040-0010(1) (February 10, 2012) defines "good cause" to include factors beyond an applicant's reasonable control.

Although the Department mailed both of the administrative decisions at issue in this case (decision # 75629 and the overpayment decision) to claimant at his last known address of record, claimant did not receive them because he had been locked out of his house during eviction proceedings and his former landlord withheld his mail. Although claimant failed to receive the decisions because he did not notify the Department of an updated address, he was not claiming benefits at the time, had not claimed benefits for approximately eight weeks, and, as a result had no reason to know or suspect that the Department might send him mail about a work separation that had occurred approximately seven months earlier, and, therefore, no reason to notify the Department that he no longer resided at that address. Nor, for the same reason, did claimant know or have reason to suspect that the Department might assess an overpayment based in part on that separation. Given that claimant did not know or have reason to know that the Department might be in contact with him eight weeks after he stopped claiming benefits, much less know of the existence of the administrative decisions at issue in this case, filing a timely request for hearing was beyond claimant's reasonable control. He therefore had "good cause" to extend the filing deadlines in both instances.

However, the filing deadlines may only be extended a "reasonable time." OAR 471-040-0010(3) defines a "reasonable time" as "seven days after the circumstances that prevented a timely filing ceased to exist." With regard to both decision # 75629 and the overpayment decision, the circumstance that prevented a timely filing was claimant's lack of knowledge that the decisions existed. With regard to the overpayment decision, that circumstance ceased to exist when he received billing statements and a garnishment notice from the Department. Those events occurred sometime prior to claimant's November 2013 call to the Department during which he implicitly acknowledged the existence of the overpayment decision by requesting that the Department reduce the amount of the garnishment that was based on it. In order to meet the "reasonable time" requirement, claimant would have had to request a hearing on the overpayment had seven days from the date of that call, but instead he waited more than two years, until February 19, 2016, to do so. Because claimant did not request a hearing on the overpayment decision within the seven-day "reasonable time" period, his late request for hearing on that decision must be dismissed, and he is not entitled to a hearing on the overpayment decision.

With regard to decision # 75629, however, claimant met the "reasonable time" requirement. Although the ALJ reasoned that claimant "should have been aware [by November 2013] that a decision by the Department had created his overpayment," the ALJ did not cite to evidence in the record to support that supposition.¹ Claimant provide uncontested testimony during the hearing that he knew of and had experienced other reasons that an overpayment might exist, including miscalculations and errors in claiming benefits or calculating the weekly benefit amount payable that had nothing to do with the existence of an administrative decision disqualifying him from benefits because of a work separation. On this record, there was no point between that decision's issuance on June 5, 2012 and November 19, 2016 at which claimant had actual or constructive knowledge that a decision about his November 2011 work separation from JB Hunt Transportation decision existed, much less that such a decision was a basis of the Department's conclusion that he was overpaid.² On this record, the first date upon which

¹ See Hearing Decision 16-UI-57166 at 3.

² Evidence in the record contradicts the ALJ's conclusion that claimant had to have known about decision # 75629 because it was the basis of the overpayment decision and supports claimant's position that he did not know or have reason to know the decision existed just because there was an overpayment. Specifically, although claimant's overpayment in this case was based both on decision # 75629 *and* the Department's conclusion that he had misreported his earnings, the Department did

claimant gained knowledge that decision # 75629 existed was February 19, 2016, and he requested a hearing immediately. Because claimant showed good cause to extend the period for requesting a hearing on decision # 75629 a reasonable time, his late request for hearing on that decision is allowed. Claimant is entitled to have a hearing on the merits of decision # 75629.

DECISION: Hearing Decision 16-UI-57166 is set aside, as outlined above. Claimant is entitled to a hearing on the merits of decision # 75629. Hearing Decision 16-UI-57175 is affirmed.³

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: May 19, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

not issue a separate notice about the misreported earnings, thus creating an overpayment and forming the basis of an overpayment decision without any other "decision by the Department [that] . . . created his overpayment" having been issued.

³ Claimant's overpayment from weeks 47-11 through 14-12 was based on the disqualifying work separation adjudicated in decision # 75629. If decision # 75629 is overturned in any subsequent hearing proceedings, the amount of the overpayment and any penalties based upon the overpayment amount might be subject to reduction or modification.