

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1271

Modified
Eligible Weeks 2-16 to 11-16
No Overpayment

PROCEDURAL HISTORY: On August 18, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision (# 14017) concluding claimant did not actively seek work from January 10, 2016 to March 19, 2016 (weeks 2-16 through 11-16). On September 7, 2016, decision # 140417 became final without claimant having filed a timely request for hearing. On September 21, 2016, the Department served notice of an administrative decision, based on decision # 140417, concluding the Department overpaid claimant \$4,970 in unemployment insurance benefits he was liable to repay (decision # 113044). On September 28, 2016, claimant filed a late request for hearing on decision # 140417 and a timely request for hearing on decision # 113044.

On October 26, 2016, ALJ Murdock conducted two hearings, and on October 28, 2016 issued Hearing Decision 16-UI-70113, allowing claimant's late request for hearing on decision # 140417 and concluding claimant did not actively seek work from January 17, 2016 to January 23, 2016 (week 3-16) and January 31, 2016 to March 19, 2016 (weeks 5-16 through 11-16), but was otherwise eligible for benefits, and Hearing Decision 16-UI-70165, concluding that the Department overpaid claimant \$3,976 in benefits he was liable to repay. On November 10, 2016, claimant filed applications for review of both 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-70113 and 16-UI-70165. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-1270 and 2016-EAB-1271).

No adversely affected party requested review of the portion of Hearing Decision 16-UI-55385 in which the ALJ allowed claimant's late request for hearing. Nor has any adversely affected party requested review of the portion of Hearing Decision 16-UI-55385 in which the ALJ concluded claimant was eligible for benefits for weeks 2-16 (January 10, 2016 through January 16, 2016) and 4-16 (January 24, 2016 through January 30, 2016). Because those determinations are not in dispute, we therefore confine our review of Hearing Decision 16-UI-55385 to claimant's eligibility for benefits during the remaining weeks at issue, weeks 3-16 and 5-16 through 11-16.

FINDINGS OF FACT: (1) On December 27, 2015, claimant filed an initial claim for unemployment insurance benefits. His claim was valid with a weekly benefit amount of \$497. He filed weekly claims for the period including January 10, 2016 through March 19, 2016 (weeks 2-16 through 11-16). The Department paid claimant benefits for each of those weeks. Of those, weeks 3-16 and 5-16 through 11-16 remain at issue.

(2) At all relevant times, claimant worked for North Santiam Paving. Claimant's work was weather-dependent and he experienced layoffs of indefinite durations. North Santiam Paving returned claimant to work when they had work for him. Claimant customarily maintained frequent and repeated contact with North Santiam Paving during layoff periods to check on the availability of work and ensure that the employer was aware he was available to perform work if needed.

(3) Each time claimant filed a weekly claim for benefits during the weeks at issue he reported to the Department that he had performed five work seeking activities. During week 3-16, claimant's work seeking activities included contacting North Santiam Paving and Green & White, checking internet job ads, using the Department's WorkSource website, and one other activity. During week 5-16, claimant's work seeking activities included contacting North Santiam Paving and Green & White, using iMatch to seek work, checking internet job ads, and contacting Oregon State Bridge Building. During week 6-16, claimant's work seeking activities included contacting North Santiam Paving, Cornfed, Silas Trucking, Oregon State Bridge Building, and DCC Construction. During week 7-16, claimant's work seeking activities included contacting North Santiam Paving, Cornfed, Oregon State Bridge Building and Siegmund, and one other activity. During week 8-16, claimant's work seeking activities included contacting North Santiam Paving, Rich Franklin Corp. and Silas Trucking, and two other activities. During week 9-16, claimant's work seeking activities included contacting North Santiam Paving, Silas Trucking, Cornfed and River Bend, and checking internet job ads. During week 10-16, claimant's work seeking activities included contacting North Santiam Paving, Rich Franklin Trucking, checking internet job ads, working six hours for North Santiam Paving, and one other activity. During week 11-16, claimant's work seeking activities included contacting North Santiam Paving, Cornfed and Rich Franklin Trucking, checking internet job ads, and one other activity.

(4) Claimant made weekly contact with North Santiam Paving because that was his regular employer, and claimant understood that it was important to repeatedly contact that employer if he wanted to return to work or be assigned to any work opportunities that arose during his layoff. Claimant made repeated contact with other employers after they instructed him to "call us back later on" to inquire about getting hired. Transcript at 26, 33. In addition to the listed activities, claimant applied for other job openings he found when checking internet job ads.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that, in addition to weeks 2-16 and 4-16, claimant actively sought work during weeks 3-16 and 5-16 through 11-16. Consequently, we also conclude that claimant was not overpaid benefits for any of the weeks at issue.

As a preliminary matter, the Department, having initially paid benefits to claimant based on his weekly claims, has the burden to prove claimant was not eligible for the benefits he has received. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). With respect to claimant's specific work seeking activities, the Department's witness testified initially as follows:

[D]uring the period at issue he mostly issued on his work search he just listed his regular Employer North Santiam Paving and that was it. Occasionally he would list another Employer, but he indicated that he had called, but that was it in terms of his work search. * * * Some of the weeks he only listed his regular Employer North Santiam Paving as his direct Employer contacts. Some other weeks he called around to other Employers but never submitted any applications or resumes.

Transcript at 17-18. When the ALJ asked the witness which weeks claimant reported having contacted employers other than North Santiam Paving, the witness replied,

Let me look that up . . . So I – I’ll go to one – each one individually really – very quickly. So Week 2, ’16 he reported his regular Employer and he reported that he called River – an Employer named River Bend. Week 3, ’16 he only listed his regular Employer as Employer contacts. Week 4, ’16 he reported his regular Employer and he reported that he called Cornfed Construction.

Just a moment. Week 5, ’16 he reported his regular Employer and then he reported that he called Green and White. Week 6 – 6, ’16 he reported his regular Employer and then he reported that he called Cornfed Construction again, which is a duplicate. Week 7, ’16 he reported his regular Employer and he reported that he called Cornfed Construction again which is another duplicate; not a separate Employer. Week 8, ’16 he only reported his regular Employer.

Week 9, ’16 he reported his regular Employer and he reported that he called Silas (phonetic) Trucking. But keep – keep in mind he - he basically admitted that he didn’t put in any applications. He just was calling around which is not enough to be considered an active work search. Week 10, ’16 he just reported his regular Employer. Week 11, ’16 he just reported his regular Employer.

Transcript at 20-21. The witness then described claimant’s other work search activities during those weeks as “basically a duplicate of his Employer contacts. Calling Cornfed, search Craig - - Craigslist for potential jobs, but didn’t – it doesn’t look like he followed through with anything. Let’s see. I’m looking at the – but basically again just duplicate – Craigslist, Cornfed, River Bend, which is just a duplicate of what he – he’d been putting in before. That’s about it.” Transcript at 21.

Claimant testified, however, that during each week he claimed benefits he reported five separate work seeking activities to the Department and alleged that the Department’s witness had omitted a significant portion of his work search activities during the ALJ’s examination. Transcript at 23. Claimant stated, “There’s five different contacts that I made every week whether it was looking through the State of Oregon going on their website or taking the job referrals that they sent to me and contacting the Employers.” Transcript at 23. He also testified that he provided the Department with the phone number of each employer with which he made direct contact during the weeks he claimed because “[y]ou have to list the phone number of who it is that you’re – that you’re contacting.” Transcript at 27.

The ALJ re-examined the Department's witness to "have her go through each – each line detail for me" from claimant's work search reports to the Department. Transcript at 29. In response, the witness then indicated that, in addition to the work seeking activities she had listed earlier in her testimony, claimant had done additional direct contacts and work seeking activities. Whereas she had previously testified that claimant "listed only his regular Employer" as a contact during week 3, for example, she then testified that he had done online searches of two separate sites and made direct contact with a second employer. During week 5, while she previously indicated that he contacted only his employer and Green and White, she later testified that he had actually contacted Oregon State Bridge Building and done online searches of two separate sites. The Department's witness initially reported that claimant only contacted "his regular employer" and "called Cornfed Construction again, which is a duplicate," but when directed by the ALJ to "go through each – each line detail for me" she disclosed that claimant had also made contact with three additional employers that week. The Department's witness provided similar additional details for each of the remaining weeks at issue, revealing that claimant made direct contacts and did other work search activities during each of the weeks at issue that she had not previously disclosed, but, at the same time, still failing to disclose all five of the work seeking activities claimant had reported during many of the weeks.

In sum, although indicating that she had "look[ed] [] up" claimant's work search reports and was ostensibly reading them during her initial testimony, thereby suggesting claimant had conducted only one or two work search activities in any given week, the Department's witness was not actually forthcoming with all the relevant information during her initial testimony. Her later testimony, provided only when directed, yielded highly relevant and material but incomplete information that could have a significant effect on the ALJ's and EAB's determination of claimant's eligibility for benefits. Notably, even in the face of claimant's testimony that the Department's witness had failed to disclose all of his work search activities and being asked by the ALJ to "go through each – each line detail for me," the witness still failed to disclose all five of claimant's reported work search activities during all of the weeks at issue. For those reasons, we must conclude that the Department's witness did not supply reliable evidence about claimant's actual work search activities during the weeks at issue, and, consequently, where the evidence offered by the parties were in conflict we found facts in accordance with claimant's credible evidence and the reasonable inferences we drew therefrom.

Actively Seeking Work. To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c). The Department defines "actively seeking work" as "doing what an ordinary and reasonable person would do to return to work at the earliest opportunity," specifically, conducting "at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual." OAR 471-030-0036(5)(a). The Department further defines "work seeking activities" to include things like registering for job placement services with the Employment Department, attending job placement meetings sponsored by the Employment Department, participating in a job club or networking group dedicated to job placement, updating a resume, reviewing the newspaper or job placement web sites without responding to a posted job opening, and making direct contact with an employer." OAR 471-030-0036(5)(a)(A). The Department defines "direct contact" as "making contact with an employer in person, by phone, mail, or electronically to inquire about a job opening or applying for job openings in the manner required by the hiring employer." OAR 471-030-0036(5)(a)(B).

The ALJ generally faulted claimant's work search for two reasons, first, because he made repeated contacts with some employers, and second, because he made weekly contacts with his regular employer. Reasoning that claimant's direct contacts with employers had to be with "new and different employers" each week, the ALJ concluded that claimant's repeated contact with North Santiam and other employers did not satisfy the Department's requirement that claimant make two direct contacts in any given week. Hearing Decision 16-UI-70113 at 5. We disagree.

There is no provision in Oregon law or the Department's administrative rules requiring that every direct contact must be with a new and/or different employer. *See generally* ORS chapter 657, OAR chapter 471. Nor is there any such requirement in the Department's Claimant Handbook, which, while not an exhaustive how-to manual for claimants claiming benefits, is intended to help "explain[] what you need to know while claiming" unemployment.¹ Rather, the requirement is that any work seeking activities, including direct contacts, must be what an ordinary and reasonable person would do to return to work at the earliest opportunity. The Department's handbook recognizes that various employers might have different requirements, and instructs claimants making direct contact with employers to "contact the employer in the way they require."²

Claimant made multiple contacts with the same employers during the weeks at issue because, in one instance, he was directed to attend three separate meetings and participate in its hiring process. Transcript at 21. In other instances, he was instructed to "call us back later on" or "give us a call in another couple of months, you know. And that's what everybody does . . ." Transcript at 26, 33. As a matter of common sense, an individual working in a "tight" industry with limited off-season employment options, as claimant testified he was, would make repeated direct contacts with the same employers "in the way they require" as part of a work search aimed to return him to work in that industry "at the earliest opportunity." *See* Transcript at 25-26. Likewise, claimant made weekly contacts with his regular employer because he was expected to do so, and because that was the way to receive opportunities to return to work while on layoff "at the earliest opportunity." Specifically, claimant testified that, during his layoff period, "sometimes there was work" with his regular employer, and if he contacted them he "stayed front on their mind so when [][the employer] needed somebody I was available" "and I got to work that week or I got to work a couple of days." Transcript at 25. In the absence of evidence that the Department specifically instructed claimant that his repeated contacts with employers or his regular employer did not count toward his five required work seeking activities or his two direct contacts, we conclude that this record shows that claimant's repeated contacts with employers and his regular employer were "direct contacts" for purposes of meeting the Department's requirement that he actively seek work.

¹ We take notice of this fact, which is generally cognizable and contained in Employment Department records. *See* http://www.oregon.gov/EMPLOY/Unemployment/Claimant_Handbook/Pages/default.aspx. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our 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.

² We take notice of this fact, which is generally cognizable and contained in Employment Department records. *See* http://www.oregon.gov/EMPLOY/Unemployment/Claimant_Handbook/Pages/Section-3-Maintaining-Eligibility.aspx. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our 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.

The record shows that claimant conducted five work seeking activities, including at least two direct contacts, during weeks 2-16, 4-16, 5-16, 6-16 and 9-16. Therefore, for the reasons explained herein and, with respect to weeks 2-16 and 4-16, explained in Hearing Decision 16-UI-70133, the record establishes that claimant actively sought work during each of those five weeks and was not ineligible for benefits as a result. The Department's evidence suggested that claimant made fewer than five contacts during each of the other weeks, specifically, that in week 3-16, claimant made one direct contact and conducted three other activities; in week 7-16, claimant made three direct contacts and conducted one other activity; in week 8-16, claimant made two direct contacts and conducted one other activity; in week 10-16, claimant made two direct contacts and conducted two other activities; and in week 11-16, claimant made two direct contacts and conducted two other activities. The Department's evidence of claimant's work search activities was, however, unreliable for the reasons previously explained. Claimant credibly testified that in each of the weeks at issue he reported five work seeking activities, including the phone numbers of employers he contacted for work, because "you have to fill in all five of those blanks . . . or you can't even submit your – your form." Transcript at 23. Claimant described his employer contacts and pursuit of job referrals, including applications for work that he submitted in addition to the employer contacts he listed when reporting his work seeking activities to the Department. Transcript at 34-35, 36. Claimant's testimony suggests that although the Department's witness did not read them into the record, he did in fact conduct at least five work seeking activities during each of the weeks at issue, including weeks 3-16, 7-16 to 8-16, and 10-16 to 11-16. We find it reasonable on this record to infer that his activities during each of those weeks were, more likely than not, substantially similar to his work seeking activities in the other weeks, and therefore probably included at least two direct contacts and a sufficient number of additional work seeking activities to total five per week. We therefore conclude that it is more likely than not that claimant actively sought work as required during each of the weeks at issue and is eligible for benefits on the basis of his active work search.

Overpayment. 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.

The Department paid benefits to claimant for weeks 2-16 through 11-16 based in part on his reports that he was actively seeking work during each of those weeks, but alleged claimant was overpaid based on its conclusion that he had not actively sought work. The ALJ disagreed that claimant was overpaid in weeks 2-16 and 4-16 based on her decision that he had actually sought work during those two weeks, but otherwise agreed that claimant had been overpaid. *See* Hearing Decision 16-UI-70165 at 2-3. We agree with the ALJ's decision as to weeks 2-16 and 4-16, but otherwise disagree. As noted above, we conclude that claimant actively sought work during all the weeks at issue, including weeks 3-16 and 5-16 through 11-16. Accordingly, he was not overpaid during any of the weeks at issue, and is not liable to repay any of the benefits he received based on his reports that he actively sought work.

DECISION: Hearing Decisions 16-UI-70113 and 16-UI-70165 are modified, as outlined above.

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

DATE of Service: December 6, 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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