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BYE: 201650

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

588
AAA 005.00
MC 010.05

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1273

Affirmed
(Confirmada)
Ineligible – Weeks 27-16 through 32-16
(No Eeligible – Semanas 27-16 a 32-16)
Overpayment Assessed
(Se Impuso Sobre pago)

PROCEDURAL HISTORY: On August 31, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from July 3, 2016 through August 13, 2016 (decision # 85421). On October 5, 2016, the Department served notice of an administrative decision assessing a \$1620 overpayment based on decision # 85421 after claimant failed to appeal that decision in a timely manner (decision # 114813).

On October 7, 2016, claimant filed telephone requests for hearing on decisions # 85421 and # 114813 with the Office of Administrative Hearings (OAH). On November 1, 2016, ALJ S. Lee conducted two interpreted hearings, one on decision # 85421 and one on decision # 114813. On November 4, 2016, ALJ S. Lee issued Hearing Decision 16-UI-70626, concluding claimant's late hearing request was based on an excusable mistake and affirming decision # 85421, and Hearing Decision 16-UI-70626, affirming decision # 114813.

On November 9, 2016, claimant filed applications for review of Hearing Decisions 16-UI-70626 and 16-UI-70627 with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-70626 and 16-UI-70627. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-1274 and 2016-EAB-1273, respectively).

No adversely affected party requested review of that portion of Hearing Decision 16-UI-70626 concluding claimant's late request for hearing was based on an excusable mistake. We therefore confined our decision in that case to the issue of claimant's work search.

FINDINGS OF FACT: (1) Claimant filed an initial claim for unemployment benefits on December 23, 2015. She claimed and received benefits for the weeks including July 3 through August 13, 2016 (weeks 27-16 through 32-16). These are the weeks at issue.

(2) Claimant's regular employment prior to the weeks at issue was as a cashier for Inter-Pacific Management (IPM). On July 1, 2016, IPM laid claimant off without giving her a return to work date.

(3) Claimant was experienced at filing claims for benefits having had twelve prior claims. Moreover, the Department notified claimant of the work seeking requirements for benefit eligibility, including that she actively seek work by performing at least five work search activities each week with two of those being direct contacts with potential employers. Those notifications occurred when claimant filed her claim on December 23, 2015 and again on March 31 and June 30, 2016, when the Department mailed to claimant at her address of record a Department publication (UI Pub 195), which specifically set forth those work search requirements. Claimant received the mailings.

(4) When claimant filed each of her weekly benefit claims for the weeks at issue, claimant only reported two work search activities – direct contacts with potential employers, although she also contacted IPM about returning to work and reviewed job ads in the local newspaper each week. To complete the claim filing process, claimant was required to certify that she actively sought work during each week claimed. Based on claimant's certifications, the Department paid, and claimant received, \$270 in benefits for each of the weeks at issue.

(5) Subsequently, a Department audit of claimant's weekly claims revealed that she had not performed the required number of weekly work search requirements for benefit eligibility and decisions # 85421 and # 114813 were eventually issued.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant did not actively seek work and was ineligible for benefits for each of the weeks at issue. Accordingly, claimant was overpaid \$1620 in regular benefits and must repay the Department that amount or have it deducted from future benefits otherwise payable.

Where, as here, the Department paid a claimant benefits for weeks claimed, and then subsequently denied that he or she was eligible for those benefits, the Department has the burden to establish by a preponderance of evidence that the claimant was not entitled to the benefits paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Active Work Search. To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). To actively seek work, an individual must do what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a) (February 23, 2014). OAR 471-030-0036(5)(a) states that the minimum requirements for an individual to be considered to be "actively seeking work" are the performance of 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.

Here, the Department alleged that claimant failed to actively seek work during each of the weeks including July 3 through August 13, 2016 (weeks 27-16 through 32-16) because she failed to perform at

least five work seeking activities each week. The Department met its burden. After admitting that when she filed her claims the online claim system requested that she report five work seeking activities for the week claimed, claimant asserted that she reported only the two direct contacts because she “wasn’t understanding clearly.” Transcript at 15. However, when asked what other work seeking activities she performed during each of those weeks other than those she reported, she responded that she contacted her boss at IPM to determine if she could return to work and “would always check on the newspaper.” *Id.* Accordingly, claimant performed a total of only four work seeking activities each week. Because claimant performed only four work seeking activities each week rather than the required five, under OAR 471-030-0036(5)(a), claimant did not actively seek work and was ineligible for benefits for the weeks at issue.

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. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual’s knowledge or intent. *Id.*

Based upon claimant’s weekly certifications to the Department that she was actively seeking work during each of the six benefit weeks from July 3 through August 13, 2016, claimant received \$1,620 (\$270 x 6) in regular benefits to which she was not entitled. With regard to claimant’s benefit claims for each of those weeks, the Department established that she did not actively seek work even though that may have been due to her misunderstanding of the rules. Claimant’s certifications to the Department that she was actively seeking work during those weeks were, therefore, false. Regardless of claimant’s knowledge or intent in making those false reports to the Department, she is liable under ORS 657.310(1) to either repay \$1,620 in regular benefits or have that amount deducted from any future benefits otherwise payable to her under ORS chapter 657.

In sum, claimant is ineligible for benefits for each of the weeks including July 3 through August 13, 2016 (weeks 27-16 through 32-16). In addition, claimant was overpaid and must reimburse the Department \$1,620 in regular benefits either directly or through deduction from future benefits payable to her.

DECISION: Hearing Decisions 16-UI-70626 and 16-UI-70627 are affirmed. *Decisiones de las Audiencias 16-UI-70626, 16-UI-70627 quedan confirmadas.*

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

DATE of Service: December 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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.