

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1306

Reversed ~ Revocada
Eligible, No Overpayment ~ Eeligible, No Sobre pago

PROCEDURAL HISTORY: On September 7, 2016, the Oregon Employment Department (the Department) served notice of administrative decision # 131239, in which the Department concluded claimant was not available for work from July 3, 2016 to July 30, 2016 (weeks 27-16 through 30-16). On September 27, 2016, decision # 131239 became final without claimant having filed a timely request for hearing. On October 11, 2016, the Department served notice of administrative decision # 133322, in which the Department concluded it had overpaid claimant \$1,194 based on decision # 131239. On October 17, 2016, claimant filed a late request for hearing on decision # 131239 and a timely request for hearing on decision # 133322. On November 14, 2016, ALJ Vincent conducted a hearing, and on November 16, 2016 issued Hearing Decision 16-UI-71218, allowing claimant's late request for hearing on and affirming decision # 131239, and Hearing Decision 16-UI-71230, affirming decision # 133322. On November 18, 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-71218 and 16-UI-71230. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-1306 and 2016-EAB-1307).

EVIDENTIARY MATTERS: In Hearing Decision 16-UI-71218, the ALJ concluded that "good cause has been shown to extend the filing period," and, consequently, that claimant's late request for hearing on decision # 131239 was allowed and the ALJ had jurisdiction to address the work search issue. *See* Hearing Decision 16-UI-71218 at 2, 3. The ALJ had no evidentiary basis for that conclusion. He did not take evidence from any party or develop any record about the circumstances under which claimant filed the late request for hearing. Because no adversely affected party has disputed the ALJ's decision to allow claimant's late request, however, we have confined our review of Hearing Decision 16-UI-71218 to whether claimant actively sought work during the weeks at issue described below.

In Hearing Decision 16-UI-71218, the ALJ also wrote that he admitted Exhibit 1 into that record. *See* Hearing Decision 16-UI-71218 at 1. However, the record transmitted to EAB by the Office of Administrative Hearings (OAH) did not include any marked documents. On review of the audio

recording, we found that the ALJ described the documents that comprised Exhibit 1 with sufficient detail to identify the unmarked documents. Audio recording at ~ 17:10. We have therefore marked those documents as Exhibit 1 and we considered them when reaching our decision in this matter.

FINDINGS OF FACT: (1) On July 7, 2016, claimant filed an initial claim for unemployment insurance benefits. She filed weekly claims for benefits for weeks including July 3, 2016 to July 30, 2016 (weeks 27-16 to 30-16), the weeks at issue.

(2) During week 27-16, claimant sought work by contacting two employers for jobs, conducting three online work searches, and going to the Department's WorkSource center. The Department gave claimant waiting week credit for that week based on her report that she had actively sought work.

(3) During week 28-16, claimant sought work by applying for four jobs with three employers, going to Oregon Human Development Corporation (OHDC) for help looking for work, and going to Goodwill Job Connect. The Department paid claimant \$317 in benefits for that week based on her report that she had actively sought work.

(4) During week 29-16, claimant sought work by applying for jobs with two employers, going to OHDC, Goodwill Job Connect and a WorkSource center, and looking online. The Department paid claimant \$243 for that week based on her report that she actively sought work.

(5) During week 30-16, claimant applied for jobs with three employers, went to OHDC, went to Goodwill Job Connect, and went to a WorkSource center. The Department paid claimant \$317 in benefits for that week based on her report that she had actively sought work.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant actively sought work during weeks 27-16 through 30-16, and was not overpaid benefits for those weeks.

Actively Seeking Work. To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c). For purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing 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). With few exceptions, none of which apply here, individuals are "required to conduct 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." *Id.* "Direct contact" means "making contact with an employer . . . 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). Having paid claimant benefits (or credited her for a waiting week) in each of the weeks at issue, the Department has the burden to prove that claimant did not actively seek work and was overpaid. *See accord Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In Hearing Decision 16-UI-71218, the ALJ summarily concluded, despite finding facts to the contrary, that "[d]uring no week of the period at issue did the claimant perform at least five work search activities and at least two with actively hiring employers."¹ We disagree.

¹ The ALJ also wrote, "During week 28-16 and 30-16 the claimant seeks to have her English languages [*sic*] classes credited. These classes cannot be credited as work seeking activities as the classes were calculated to improve on the claimant's job

With respect to weeks 27-16 and 28-16, the record developed at the hearing fails to support the ALJ's conclusion that claimant did not actively seek work. During week 27-16, claimant made two direct contacts with employers and, by conducting three online searches and going to the WorkSource center, performed four other work seeking activities. During 28-16, claimant made direct contacts with employers by applying for four jobs and sought help looking for work from two other organizations. Notably, the Department's witness testified, with respect to weeks 27-16 and 28-16, "I have to apologize. Reviewing the first two weeks of this claim, it appears that [claimant] did have sufficient work searches for Weeks 27 and 28." Transcript at 4. Given that the record shows claimant did more than five work seeking activities each of those weeks, including at least two direct contacts per week, and the Department conceded the issue with respect to those weeks, we conclude that claimant actively sought work during weeks 27-16 and 28-16.

With respect to weeks 29-16 and 30-16, the record also fails to support the ALJ's conclusion that claimant did not actively seek work. During week 29-16, claimant made two direct contacts with employers and sought help seeking work with two other organizations. She also contacted a WorkSource center, and claimant's daughter likely helped her look for work online, as she had throughout the weeks at issue. During week 30-16, claimant applied for three jobs, contacted two organizations for help seeking work, and went to a WorkSource center. Because claimant's activities during each of those weeks included at least five work seeking activities, at least two of which were direct contacts, we conclude that claimant actively sought work during weeks 29-16 and 30-16.

Claimant actively sought work during weeks 27-16 through 30-16, and was, therefore, eligible for benefits during all four of those weeks.

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.

Because the Department and the ALJ concluded that claimant was ineligible for benefits based on her work seeking activities during weeks 27-16 through 30-16, they also concluded that the benefits she received based on her claims for those four weeks, totaling \$1,194, were paid in error.² We have concluded, however, that claimant did actively seek work during the four weeks at issue and was

skills, and were not calculated to obtain immediate employment." Hearing Decision 16-UI-71218 at 3. We need not resolve whether claimant's language classes were work seeking activities for purposes of OAR 471-030-0036(5) because claimant testified that in addition to attending classes at OHDC she "went looking for work there." See Transcript at 6. Because the unrefuted evidence is that claimant's contact with OHDC was at least in part to seek work, we conclude that her contacts with that organization were work seeking activities, irrespective that she also took language classes.

² The Department assessed a \$1,194 overpayment based on payments to claimant for weeks 27-16 through 30-16 even though she was only paid \$877 in benefits during those four weeks. That is because the Department determined based on decision # 131239 that claimant was not entitled to waiting week credit for week 27-16. If claimant was not entitled to waiting week credit in week 27-16, her waiting week would be pushed out to the next week in which she was eligible for benefits, which, according to decision # 133322, was week 34-16. However, the Department had already paid claimant \$317 in benefits for week 34-16; assigning waiting week credit to that week meant claimant was overpaid for that week, adding the \$317 in benefits claimant had received for week 34-16 to claimant's overpayment, making the total amount \$877 + \$317, for a total of \$1,194.

therefore entitled to the benefits she was received. Therefore, claimant was not overpaid benefits, and she is not liable to repay them to the Department.

DECISION: Hearing Decisions 16-UI-71218 and 16-UI-71230 are set aside, as outlined above.
Decisiones de Audiencias 16-UI-71218 y 16-UI-71230 son revocadas, como se indicó anteriormente.

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

DATE of Service: December 12, 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.