

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0141

Hearing Decision 17-UI-75801 Affirmed
Hearing Decision 17-UI-75643 Modified

PROCEDURAL HISTORY: On December 23, 2016, the Oregon Employment Department (the Department) served notice of two administrative decisions, the first concluding claimant did not actively seek work during the period of November 6, 2016 through December 10, 2016 (decision # 114922) and the second concluding claimant was not available for work during the period of December 7, 2016 through December 12, 2016 (decision # 121754). Claimant filed timely requests for hearing on both administrative hearings, but on December 30, 2016 withdrew the hearing request on decision # 121754. On December 30, 2016, the Department also served notice of an administrative decision assessing an overpayment of \$1770, a monetary penalty of \$354 and 12 penalty weeks based on decisions #114922 and #121754. Claimant filed a timely request for hearing on the overpayment decision. On January 24, 2017, ALJ Murdock conducted a hearing at 9:30 a.m. on decision #114922 and at 10:00 a.m. on the overpayment decision. On January 25, 2017, the ALJ issued Hearing Decision 17-UI-75399, affirming decision # 114922 and on January 27, 2017 issued Hearing Decision 17-UI-75643, affirming the overpayment decision. On January 31, 2017, the ALJ issued Hearing Decision 17-UI-75801, correcting an error in the Order section of Hearing Decision 17-UI-75399, but not otherwise changing the substance of that decision. On February 4, 2017, claimant filed applications for review on 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 17-UI-75801 and 17-UI-75643. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0141 and 2017-EAB-0142).

FINDINGS OF FACT: (1) Sometime before November 6, 2016, claimant filed an initial claim for unemployment insurance benefits. That claim was determined valid. Claimant claimed and was paid \$1,770 in benefits for the weeks of November 6, 2016 through December 10, 2016 (weeks 45-16 through 49-16), the weeks at issue.

(2) During the weeks at issue, claimant knew she was required to perform five work seeking activities during each week that she claimed benefits to remain eligible to receive benefits. Claimant was also aware she would be ineligible to receive benefits if she was away from her permanent residence for more than three days during any week for which she claimed benefits.

(3) On November 9, 2016 (in week 45-16), claimant received and accepted an offer of work. The starting date for that offered work was December 12, 2016 (in week 50-15). On November 10, 2016, claimant and that employer signed an employment agreement. Since claimant had secured what was a suitable job, she thought it would be pointless to seek other work in the interim until that job began on December 12, 2016. Claimant reviewed materials on the Department's website, but found no information addressing work seeking requirements if an individual had located suitable work that was to begin at a later date or stating that such an individual was exempt from further work seeking activities. On or about November 14, 2016, claimant called the unemployment insurance phone line to inquire about work seeking requirements since she had located a job. Claimant was placed on hold for a lengthy period of time and hung up without speaking to a Department representative.

(4) Beginning for week 45-16 and continuing through week 49-16, claimant did not seek any work. Claimant filed weekly claim reports for those weeks in which listed the name of the employer for whom she was going to begin work on December 12, 2016 in each of the five spaces available on the claim form to report her work search activities. Claimant also keystroked into the form that she had a job that was to begin on December 12, 2016 with the employer she was listing and, as a result, was uncertain about how to report her work search activities. Audio of 9:30 a.m. Hearing at ~8:50. Sometime around November 30, 2016, claimant again called the unemployment insurance phone line to inquire about her work seeking requirements in light of the job she had accepted but not yet started. Once more, claimant was placed on hold for a long period of time and hung before she was able to speak with a representative. After making this call, claimant called her local WorkSource Center on two occasions to ask what work seeking requirements, if any, were applicable to her situation and left two voicemail messages. Audio of 10:00 a.m. Hearing at ~13:59. Claimant's calls were not returned.

(5) From Wednesday, December 7, 2016 through Saturday, December 10, 2016 (in week 49-16), claimant was not staying at her residence in Portland, Oregon, but went to the Caribbean for a short vacation. While in the Caribbean, claimant remotely completed certain pre-employment training required by her new employer. On the weekly claim report she filed for week 49-15, claimant certified she was not away from her permanent residence for more than three days in that week. Claimant did so because she interpreted the claim report question to mean three business days away from her residence rather than any three days in a week. Audio of 10:00 a.m. Hearing at ~20:46. Claimant filed the claim report for week 49-16 from her location in the Caribbean.

CONCLUSIONS AND REASONS: Claimant did not actively seek work during the weeks of November 6, 2016 through December 10, 2015. Claimant was overpaid \$1,770 in benefits that she must repay or have deducted from any future benefits otherwise payable to her, but is not subject to the assessment of a monetary penalty or penalty weeks.

Actively Seeking Work. 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). 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.*

Claimant did not dispute that she did not perform five work seeking activities during each of the weeks at issue. Although claimant might have thought she did not need to engage in the usual work seeking requirements set out at OAR 471-030-0036(5)(a) during the period between when she accepted a suitable job and when that job started, and that doing so would have been pointless since she did not intend to accept another job, no statute or regulation exempts an individual in claimant's circumstances from those general requirements. There is also no statute or regulation that authorizes EAB to exempt individuals from those work search requirements, even if they show good cause for doing so. Since no exceptions are applicable to claimant's situation, and claimant did not actively seek work during the weeks at issue within the meaning of OAR 471-030-0036(5)(a), she is not eligible to receive benefits during the weeks at issue.

Overpayment and Penalties. ORS 657.155(1)(c) provides that an individual is eligible to receive benefits in a week only if, among other things, the individual is available for work and actively seeks work during that week. OAR 657.155(2) provides that an individual who leaves the individual's labor market for the major portion of any week is presumed to have been unavailable for work in that week and, therefore, is presumed to have been ineligible to receive benefits. ORS 657.310(1) provides that if an individual received benefits to which the individual was not entitled because the individual, *regardless of the individual's knowledge or intent*, made or cause to be made a false statement or misrepresentation of a material fact is liable to repay the amount of overpaid benefits or to have that amount deducted from any future benefits otherwise payable to the individual.

Regardless of claimant's intentions and her attempts to qualify her statements on the weekly claim reports she submitted during the weeks at issue, she certified that she actively sought work for each of those weeks and would not have been paid benefits for those weeks if she had not made this representation. Even if claimant was unable to locate Department materials that provided guidance about the work seeking requirements applicable to her situation, even if she thought it would not serve any purpose for her to seek work when she had already accepted a job offer and even if she did not intend to make a misrepresentation to the Department about her work seeking activities during the weeks at issue, the fact remains that she received \$1,770 in benefits to which she was not entitled based upon listing five work seeking activities in each of the weekly claims reports she filed. Under the terms of ORS 657.310(1), claimant is therefore liable to repay the \$1,770 in benefits to the Department or to have that amount deducted from any future benefits otherwise payable to her.

ORS 657.215 and ORS 657.310(2), read together, provide that an individual who has willfully made a false statement or misrepresentation, or willfully failed to report a material fact in order to obtain benefits is subject to the assessment of a monetary penalty and a disqualification from future benefits otherwise payable to the individual. In Hearing Decision 17-UI-75643, the ALJ determined that claimant was subject to the assessment of a monetary penalty in amount of \$354 and 12 penalty weeks based both on her false representations that she actively sought work during the weeks at issue and her false representation that she was not away from her permanent residence for more than three days during

week 49-16. The ALJ concluded that both types of penalties were properly assessed since both misrepresentations were willful. Hearing Decision 17-UI-75643 at 4-5. We disagree.

In connection with claimant's certifications that she actively sought work during weeks 45-16 through 49-16, claimant's testimony that she could locate no Department materials that provided guidance on her work seeking responsibilities in the interim between when she had accepted a suitable job offer and when the offered job was to begin was unrebutted. Claimant's position that she did not think it would serve any purpose for her to seek additional work in that interim period was understandable since she intended to and did start that job on December 12, 2016. Claimant's further testimony that she unsuccessfully attempted on several occasions to reach Department representatives to clarify her work seeking responsibilities during the weeks at issue was also not challenged. It appears that claimant did what she did in terms of setting out her work seeking activities on the weekly claims report she filed because of a lack of direction from the Department and her belief that what she was doing to prepare for her new job might properly be considered work seeking activities. Notably, rather than obscuring that her work seeking activities during the weeks at issue were limited to contacts with her new employer, claimant further disclosed this fact each week on the weekly claims report she submitted to enable the Department to "correct" her if it determined the work searches she listed were inadequate. Audio of 9:30 a.m. Hearing at ~8:50. On this record, given claimant's apparent transparency about what she was doing and why, it does not appear that she was attempting to deceive the Department about her work seeking activities. Absent evidence establishing a knowing and willful attempt to mislead the Department, the ALJ erred in assessing penalties based on the manner in which claimant reported her work seeking activities during the weeks at issue.

In connection with claimant's absence from her permanent residence and the labor market for over three days in week 49-16, claimant incorrectly interpreted the claims report question inquiring into absences for that week to mean being gone for more than three business days in a week, rather than any three days in that week. Audio of 10:00 a.m. Hearing at ~20:46. However, the construction that claimant placed on that question was not implausible and her testimony at hearing about how she interpreted the question appeared sincere. As well, claimant's point was well taken and persuasive that if she had intended to deceive the Department she would have acted far less obviously than filing her claim report for week 49-16 from outside the United States, which the Department could detect, but would have waited to do so until she was back at her home. On this record, it does not appear that claimant willfully attempted to deceive the Department to obtain benefits to which she was not entitled by certifying that she was not absent from her residence for more than three days during week 49-16.

In summary, claimant did not actively search for work during the weeks at issue. For those weeks, claimant was overpaid \$1,770 in benefits which she is liable to repay or to have deducted from any future benefits otherwise payable to her. However, the ALJ erred and claimant is not liable for an assessment of a monetary penalty or penalty weeks.

DECISION: Hearing Decision 17-UI-75801 is affirmed.
Hearing Decision 17-UI-75643 is modified.

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

DATE of Service: March 7, 2017

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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