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

EMPLOYMENT APPEALS BOARD DECISION 2017-EAB-0181

Hearing Decision 17-UI-75418 Affirmed ~ Ineligible
Hearing Decision 17-UI-75423 Affirmed ~ Overpayment and Penalties

PROCEDURAL HISTORY: On September 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from July 24, 2016 to August 13, 2016 (decision # 132252). On October 12, 2016, the Department served notice of a second decision, based on decision # 132252, assessing a $663 overpayment, $132.60 monetary penalty and 5 penalty weeks (decision # 193552). On October 13, 2016, decision # 132252 became final without claimant having filed a request for hearing. On October 28, 2016, claimant filed a late request for hearing on decision # 132252 and a timely request for hearing on decision # 193552. On November 21, 2016, ALJ Seideman conducted two hearings, and on November 22, 2016 issued Hearing Decision 16-UI-71550, allowing claimant's late request for hearing on decision # 132252 and affirming the Department's decision that he was not available for work from July 24, 2016 to August 13, 2016, and Hearing Decision 16-UI-71551, affirming the assessment of an overpayment and penalties. On December 12, 2016, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB). On December 21, 2016, EAB issued EAB Decisions 2016-EAB-1389 and 2016-EAB-1390, reversing the hearing decisions and remanding these matters to OAH for additional proceedings. On January 17, 2017, ALJ Seideman conducted two hearings, and on January 25, 2017 issued Hearing Decision 17-UI-75418, re-affirming decision # 132252, and Hearing Decision 17-UI-75423, re-affirming decision # 193552. On February 14, 2017, claimant filed timely applications for review of both hearing decisions with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-75418 and 17-UI-75423. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0181 and 2017-EAB-0182).

No adversely affected party requested EAB review the portion of hearing Decision 17-UI-75418 in which the ALJ allowed claimant’s late request for hearing on decision # 132252. We therefore confined our review in that matter to the availability issue.

As a preliminary matter, the record in these matters was not clear as to the dates upon which claimant traveled to Michigan, began his drive from Michigan to Oregon, and arrived back in Oregon. In every instance, we reviewed the variety of dates found throughout the records and found facts in accordance with what we considered to be the best evidence based on our consideration of all the evidence.

FINDINGS OF FACT: (1) On November 24, 2015, claimant filed an initial claim for benefits. His weekly benefit amount was $232. The maximum weekly benefit amount in effect at the time was $567.

(2) Claimant's usual labor market included Portland, Beaverton, Aloha and Tigard. Claimant's usual job was as a cook; cooks in claimant's labor market usually worked all days and hours.

(3) Since approximately 2013 claimant maintained regular employment; his regular employer typically laid him off work beginning in early July and returned him to full time work in mid-August. On July 1, 2016, claimant's regular employer notified claimant that he was being laid off work. At the time of the layoff, claimant's regular employer did not have any additional work available for claimant.

(4) On approximately July 2, 2016, claimant began a trip to Michigan for personal reasons. At all relevant times, claimant considered Portland his permanent residence, had no intention to move his permanent residence to Michigan, and planned to return to Portland in time to resume working for his regular employer when the employer had work for him. To the extent claimant sought work in Michigan he was only willing to accept temporary employment because he planned to return to Oregon.

(5) Approximately one week after the beginning of claimant's layoff, on approximately July 12, 2016, his regular employer told him he was scheduled to return to work on August 11, 2016.[1]

(6) Beginning July 24, 2016 to August 13, 2016 (weeks 30-16 to 32-16), the weeks at issue, claimant filed weekly claims for unemployment benefits. During the week of July 24, 2016 to July 30, 2016 (30-16), claimant spent the entire week in Michigan. That week, claimant contacted his regular employer in Oregon to verify his scheduled return to work date. He might also have contacted two restaurants in Michigan, asked friends and family if they knew of any job openings in Michigan and probably looked online for work in Michigan.

(7) During the week of July 31, 2016 to August 6, 2016 (31-16), claimant spent the entire week in Michigan. That week, claimant contacted his regular employer in Oregon. He might also have contacted three businesses in Michigan and looked online for work in Michigan.

(8) On approximately August 7, 2016, claimant began driving from Michigan back to Portland, Oregon. The trip took him three or four days, and he arrived in Portland on August 9 or August 10. During the week of August 7, 2016 to August 13, 2016 (week 32-16), claimant contacted his regular employer in Oregon and worked 10 hours at a rate of $13.35 per hour. Claimant might also have contacted up to two employers in Michigan that week and looked for work in Michigan online before beginning his trip back to Oregon.

[1] January 17, 2017 hearing, Hearing Decision 17-UI-75418, Audio Recording at ~ 10:35.

(9) When claimant filed his weekly claim for benefits for each of the weeks at issue, the Department required claimant to respond to the question, "Were you away from your permanent residence for more than 3 days last week?" November 21, 2016 hearing, Hearing Decision 16-UI-71551, Audio Recording at ~ 5:00. Claimant responded, "No." *Id.* The Department required claimant to respond to the question, "Each day last week, were you willing to work and capable of accepting and reporting for full-time, part-time and temporary work?"[2] Claimant responded "Yes."[3] The Department also required claimant to report whether he had performed any work search activities during the week, and, if so, to list them. Claimant responded, "Yes" to the question, but did not list any work search activities. January 17, 2017 hearing, Hearing Decision 17-UI-75423, Audio Recording at ~ 7:30.

(10) Based on the answers claimant provided to the Department's weekly claim certification questions the Department determined that claimant was eligible to receive benefits for each of the weeks at issue. The Department paid claimant $232 for the weeks of July 24, 2016 through August 6, 2016 (weeks 30-16 and 31-16). Because claimant had returned to work for his regular employer during the week of August 7, 2016 through August 13, 2016 (week 32-16) and had earned wages that reduced his weekly benefit amount, the Department paid claimant $199 for that week.

CONCLUSIONS AND REASONS: Claimant was not eligible for benefits from July 24, 2016 to August 13, 2016 based on his availability for work and/or his work search activities during the weeks at issue. Claimant was overpaid in the amount of $663. Claimant willfully made a material misrepresentation to obtain benefits and is liable for a $132.60 monetary penalty and 5 penalty weeks.

Eligibility. ORS 657.155(1)(c) requires that an individual be available for work and actively seek work during each week claimed as a condition of being eligible for benefits. ORS 657.155(2) states that "[a]n individual who leaves the individual's normal labor market area for the major portion of any week is presumed to be unavailable for work within the meaning of this section" unless, in pertinent part, he "overcome[s]" the presumption by establishing that he "conducted a bona fide search for work and has been reasonably accessible to suitable work in the labor market area in which the individual spent the major portion of the week to which the presumption applies." OAR 471-030-0036(6)(a) states that the "normal labor market" is set by the Department and includes the "geographic area surrounding the individual's permanent residence within which employees in similar circumstances are generally willing to commute to seek and accept the same type of work at a comparable wage."

Claimant's permanent residence was in Portland, Oregon and the Department established his normal labor market to include the geographic area surrounding his permanent residence, including Portland, Beaverton, Aloha and Tigard. During the first two weeks at issue and most of the third, however, claimant was either in Michigan or traveling between Michigan and Portland. There can, therefore, be

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[2] We take notice of the weekly claim line questions pertaining to claimant's availability and work search activities, which are contained in Employment Department records. 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.

[3] We reasonably infer that claimant answered "yes" to this question because being available for work is a prerequisite to being eligible for benefits. *See* ORS 657.155(1)(c); OAR 471-030-0036(3)(a). Had claimant not responded in a qualifying manner by answering "yes," it is more likely than not that the Department would not have paid claimant benefits for any of the three weeks at issue without first investigating whether claimant was or was not eligible for benefits that week based upon his availability.

no reasonable factual dispute in this case that claimant was not physically present in his labor market area during the first two weeks at issue and during the majority of the third week. The question is whether claimant was nevertheless "available for work" while outside his labor market because he conducted a "bona fide" work search in and was "reasonably accessible" to the Michigan labor market."

The Department has not specifically defined the terms "bona fide search for work" or "reasonably accessible to suitable work" in the context of ORS 657.155(2). The Department has, however, generally defined the terms "available for work" and "actively seeking work" for purposes of ORS 657.155(1)(c) and we consider those definitions applicable here. *See e.g.* OAR 471-030-0036(3)(d)(A) (requiring that an individual be "actively seeking work" when not physically present in his usual labor market). OAR 471-030-0036(3) provides, in pertinent part, that for purposes of determining an individual's availability for work under, an individual must be "[w]illing to work full time, part time, and accept temporary work opportunities . . .;" "[c]apable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought . . .;" "[n]ot imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time;" and "[p]hysically present in the normal labor market area as defined by section (6) of this rule, every day of the week, unless [] [t]he individual is actively seeking work outside his or her normal labor market area; * * *."

OAR 471-030-0036(5)(a) provides, in pertinent part, that "an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity," which includes 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)(b) provides a limited exception to the actively seeking work requirement, but only for individuals who "had, as of the layoff date, been given a date to return to full-time work" if the date the individual is to return to work is within "four weeks or less" of that layoff date.

Claimant may not be excused from seeking work because of his layoff from his regular employment. The layoff exception only applies if the employer had, as of the layoff date, given claimant a date to return to work, and claimant did not have a return to work date until a week after his layoff occurred. Even if claimant had a return to work date at the time of the layoff, for the layoff exception to apply the period between the layoff date and claimant's return to work must also be "four weeks or less;" claimant's was well over four weeks later. For those reasons, claimant was not excused from seeking work during his layoff and he was required to actively seek work as a condition of receiving benefits.

Turning now to claimant's work search activities, we conclude that claimant did not conduct a "bona fide" or "active" work search in the Michigan labor market.[4] First, we find it unlikely that claimant sought work in Michigan during the weeks at issue, and, to any extent he had, we find it unlikely that claimant had a reliable recollection of which jobs he sought and during which week. While claimant claimed that he had sought work, and brought a list of the jobs he allegedly sought to the second hearing on that issue, claimant stated during one hearing that he had not kept a record of his August 2016 work searches and provided only vague information about his activities. November 21, 2016 hearing, Hearing Decision 16-UI-71550 at ~ 31:50. While he prepared a list of his alleged work search activities in

[4] For purposes of this case, we find it unnecessary to define the boundaries of the Michigan labor market since none of claimant's activities, whether considered individually or cumulatively, are sufficient to meet the "bona fide" "work search" or "reasonably accessible" standards.

advance of the January 17th hearing, that list had to have been sometime between the November and January hearings, meaning he made the list at least four and perhaps as much as six months after the events at issue, and after claimant had already demonstrated during the first hearing that he had a poor recall of the events at issue. Moreover, it is notable that claimant repeatedly told Department employees – and admitted repeatedly telling Department employees – that he had not sought any work in Michigan during the weeks at issue. Specifically, a Department employee asked claimant if he had sought work during the weeks at issue, and claimant replied, "No, I have a job." January 17, 2017 hearing, Hearing Decision, Audio Recording 17-UI-75423 at ~ 7:55. The Department employee explained to claimant that he was required to actively seek work as a condition of receiving benefits and asked again if he had conducted any work search activities, and he again responded, "No." January 17, 2017 hearing, Hearing Decision 17-UI-75418, Audio Recording at ~ 26:45; January 17, 2017 hearing, Hearing Decision 17-UI-75423, Audio Recording at ~ 8:30. We find it more likely than not that claimant did not actively seek work; to any extent he might have, however, we find that claimant's evidence about his work search was, likely, unreliable.

Second, even if we considered facts in the light most favorable to claimant, the outcome of this decision would remain the same. Claimant conducted, at most, four work search activities in Michigan during each of the three weeks at issue.[5] Because claimant's Michigan work-seeking activities did not satisfy the Department's requirement that individuals conduct five work search activities each week, regardless which labor market he was in, we conclude that he did not conduct an adequate "search for work" in the Michigan labor market. Moreover, we find that his work search efforts were not "bona fide" given that claimant planned to leave Michigan on August 7th. A "bona fide" effort is generally defined as one made "in or with good faith," "truly," "actually," or "with earnest intent."[6] Although there is nothing in the law or rules that requires an individual seeking work outside his labor market intend to relocate his permanent residence if he obtained work, the facts illustrate that by the time claimant contacted any potential Michigan employers, particularly during the last part of week 31-16 or in week 32-16, claimant had only a day or two at most before he planned to leave the state to return to his permanent residence. We cannot find that it is more likely than not that claimant earnestly intended to get a job in Michigan under the circumstances at any point, and particularly toward the end of his trip to Michigan. His work search activities, therefore, were not bona fide.

We also conclude that claimant was not reasonably accessible to work in the Michigan labor market. Claimant was not willing to accept an offer of permanent employment and was not capable of reporting for any suitable work opportunities; rather, he was only willing to accept temporary employment, and he was only willing to accept work from an employer and capable of reporting to work for that employer under the condition that they accepted that he was going to leave work after a short period of time. Claimant testified also that, although no one asked him, he would have disclosed to any potential employer interested in hiring him that he planned to leave work and return to Oregon shortly and would only be available to work in Michigan for a short time. January 17, 2017 hearing, Hearing Decision 17-

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[5] In reaching that conclusion, we disregarded claimant's weekly contact with his regular employer in Oregon, since that employer contact cannot be considered a Michigan labor market-based work search, and he was not "available" to his labor market in Oregon while on an extended trip to Michigan since he was not capable of reporting to any job in his Oregon labor market within a reasonable period of time had he been asked to do so.

[6] *See* http://thelawdictionary.org/bona-fide/; https://www.merriam-webster.com/dictionary/bona%20fide

UI-75418, Audio Recording at ~ 18:25. Considering that claimant did not seek work through any temporary employment or day-labor agencies that customarily hire employees for short periods of time we find it unlikely that any reasonable employer would have considered hiring and training claimant to work for such a short period of time. It is therefore more likely than not that the condition claimant placed on his willingness to get hired by or work for any employer imposed a condition that substantially reduced claimant's opportunities to return to work at the earliest possible time.

For those reasons, we conclude that claimant did not overcome the presumption that he was not available for work under ORS 657.155(2) while outside of his labor market. He was, therefore, not available for work, he did not actively seek work, and he was not eligible to receive unemployment insurance benefits during the weeks at issue, July 24, 2016 to August 13, 2016 (weeks 30-16 to 32-16).

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.*

Although claimant was not eligible to receive unemployment insurance benefits during the weeks at issue, the Department paid him $663. Claimant was, therefore, overpaid. The Department paid the benefits to claimant because he provided incorrect answers to the weekly claim line questions about being out of his labor market, being available for work and actively seeking work. Regardless of claimant's knowledge or intent in providing incorrect answers, because his answers caused the Department to overpay him for the weeks at issue, claimant is liable to repay the amount of the overpayment to the Department, or have it deducted from future benefits otherwise payable.

Misrepresentation. In addition to being liable to repay the overpayment, ORS 657.215 and ORS 657.310 provide that an individual who willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, may be subject to penalties.

Claimant's testimony was inconsistent, for example, at various points during the four hearings held in these matters he testified as follows: that he sought work; that he had reported his work seeking activities to the Department when claiming benefits; when informed that he had not done so claimed that he did not know he had to report the activities; that he made direct employer contacts in Michigan but did not know he had to make any direct employer contacts; that he did not have to seek work because he was laid off and only claiming three weeks of benefits; and that he knew he had to seek work but because he was in contact with his regular employer thought he only needed to do three work seeking activities instead of the usual five activities. In response to an inquiry about why, if he had sought work, he repeatedly told a Department employee that he had not sought work during the weeks at issue because he "had a job," claimant responded it was because he did not understand the question; that response is implausible given claimant's statement that he "had a job" was directly responsive to the employee's question, suggesting he did, in fact, understand the question. He also provided evasive responses to some questions, particularly during the November 21, 2016 hearing on Hearing Decision 16-UI-71551. For those reasons, we do not consider claimant's testimony about his reasons for claiming the way he did reliable evidence of his intent.

Generally speaking, claimant suggested at the hearings that he claimed the way he did because he was "confused" about how to answer the Department's weekly claim line questions. November 21, 2016 hearing, Hearing Decision 16-UI-71551, Audio Recording at ~ 10:35; January 17, 2017 hearing, Hearing Decision 17-UI-75423, Audio Recording at ~ 20:00. The reliable evidence suggests, however, that claimant intentionally misconstrued the questions and answered them as he did in order to obscure from the Department the fact that he was out of his labor market, his layoff was more than four weeks, and he was not seeking work. For example, the Department's weekly claim line question asked, "Were you away from your permanent residence for more than 3 days last week?" Claimant responded, "No." At the hearing, however, claimant acknowledged that his "permanent residence" was in "Portland, Oregon," and that Michigan was "away" from his permanent residence. November 21, 2016 hearing, Hearing Decision 16-UI-71551, Audio Recording at ~ 10:30. Claimant testified, "I would not have moved to Michigan," suggesting that he did not consider Michigan to be his permanent residence or the prospective location of his permanent residence. November 21, 2016 hearing, Hearing Decision 16-UI-71551, Audio Recording at ~ 13:36. By answering "No" to the Department's weekly claim question, claimant provided a false answer. With respect to claimant's claim that he was "confused" about how to answer that question, when asked on November 21st in what way he was confused over how to answer that question at the time he claimed benefits, claimant replied, "It's very hard to recall since it was so long ago" and that "It's totally clear to me now." *Id.* It is implausible that the question was confusing to claimant at any point in time. It is more likely than not that he intentionally provided a false response to the Department about being away from his permanent residence; the only logical reason an individual would have to make such a false statement to the Department would be to obtain benefits. Because claimant willfully made a false statement to the Department to obtain benefits, he is liable for misrepresentation penalties.[7]

Penalty weeks. The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052. Where, as here, the disqualification period is imposed because of disqualifying acts related to ORS 657.155, the length of the penalty is the greater of either the number of weeks in which the disqualifying act occurred, or the result reached by calculating the total amount of the overpayment divided by the maximum Oregon weekly benefit amount in effect at the time, rounding the result to the nearest two decimal places, multiplying the result by four, then rounding the result up to the nearest whole number. OAR 471-030-0052(1)(a) and (1)(c).

The number of weeks in which the disqualifying act occurred is 3. Claimant's overpayment was $633, divided by the maximum weekly benefit amount in effect at the time, $567, equals 1.11, multiplied by 4 equals 4.44, and rounded up to the nearest whole number equals 5. 5 is greater than 3; therefore, claimant's misrepresentation penalty disqualification period is 5 weeks.

Monetary penalty. An individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is also liable for a monetary penalty in an amount of at least 15, but

[7] Claimant also said at one of the hearings that didn't report any work searches because he didn't need to report work searches if he was claiming less than four weeks and "I was only claiming for 3 weeks." November 21, 2016 hearing, Hearing Decision 16-UI-71551 at ~ 12:00. Given that the Department's automated weekly claim system informed claimant at the time he started claiming the weeks at issue that he was not excused from seeking work, however, claimant's alleged belief that he did not have to seek work and claim that was confused about his obligation to seek work were not plausible. *See* November 21, 2016 hearing, Hearing Decision 16-UI-71550 at ~ 31:00.

not greater than 30, percent of the amount of the overpayment. ORS 657.310(2). The penalty percentage depends on the number of "occurrences" of misrepresentation occurred; an "occurrence" is counted "each time an individual willfully makes a false statement or representation." OAR 471-030-0052(7) (February 23, 2014). In this case, claimant claimed three weeks. In each of those weekly claims, claimant made at least one willful false statement, for example about being away from his permanent residence. Therefore, we conclude that claimant had three misrepresentation "occurrences."

OAR 471-030-0052(7)(a) provides that if an individual has three misrepresentation "occurrences" within five years of the occurrence for which a penalty is being assessed, the individual is assessed a monetary penalty equal to 20 percent of the total overpayment. 20 percent of $663 equals $132.60. Claimant's monetary penalty is, therefore, $132.60.

Conclusion. In sum, claimant was ineligible to receive unemployment insurance benefits during the weeks at issue, July 24, 2016 to August 13, 2016 (weeks 30-16 to 32-16). He was overpaid $663 in benefits for the weeks at issue and is liable to either repay the overpayment to the Department or have that amount deducted from future benefits otherwise payable. He is also liable for a $132.60 monetary penalty and 5 penalty weeks for making a willful misrepresentation to the Department to obtain benefits.

DECISION: Hearing Decisions 17-UI-75418 and 17-UI-75423 are affirmed.

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

DATE of Service: March 6, 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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