

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0573**

*Affirmed*  
(*Afirmada*)

*Late Request for Hearing Allowed*  
(*Peticion tardia de audiencia permitida*)

*Ineligible Weeks 50-16 through 52-16 and 01-17 through 03-17*  
(*Inelegible semanas 50-16 al 52-16 y 01-17 al 03-17*)

*Overpayment Assessed*  
(*Se impuso sobre pago*)

**PROCEDURAL HISTORY:** On February 27, 2017, the Oregon Employment Department (the Department) served notice of administrative decision # 113234, which concluded that claimant failed to actively search for work from December 11 through December 31, 2016 (weeks 50-16 through 52-16), and administrative decision # 114749, which concluded that claimant failed to actively seek work from January 1 through 21, 2017 (weeks 01-17 through 03-17). Both decisions became final on March 20, 2017 without requests for hearing having been filed. On March 31, 2017, the Department served notice of administrative decision # 85928, which concluded that claimant was overpaid benefits in the amount of \$1,464 for weeks 50-16 through 52-16, and administrative decision # 85623, which concluded that claimant was overpaid benefits in the amount of \$1,034 for weeks 01-17 through -3-17. On April 4, 2017 claimant filed untimely hearing requests on decisions # 113234 and #114749, and timely hearing requests on decisions # 85298 and # 85623. On May 1, 2017, ALJ Shoemake conducted hearings, and on May 2, 2017, issued Hearing Decision 17-UI-82345, which allowed claimant's late request for hearing on decision # 113234 and affirmed that decision, and Hearing Decision 17-UI-82360, which allowed claimant's late request for hearing on decision # 114749 and affirmed that decision. On May 3, 2017, ALJ Shoemake issued Hearing Decision 17-UI-82380, which affirmed decision # 85928, and Hearing Decision 17-UI-82379, which affirmed decision # 85623. On May 9, 2017, claimant filed applications for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-82345, 17-UI-82360, 17-UI-82380 and 17-UI-82379. For case-tracking purposes, this decision is being issued in quadruplicate (EAB Decisions 2017-EAB-0572, 2017-EAB-0573, 2017-EAB-0574 and 2017-EAB-0575).

Based on a *de novo* review of the entire record in these cases, and pursuant to ORS 657.275(2), the ALJ's findings and analysis in Hearing Decisions 17-UI-82345 and 17-UI-82360 with respect to the conclusions allowing claimant's late requests for hearings on decisions # 113234 and #114749 are **adopted**.

**FINDINGS OF FACT:** (1) On January 8, 2016, claimant filed an initial claim for unemployment insurance benefits. A weekly benefit amount of \$488 was established.

(2) On December 9, 2017, claimant's employer, GS Concrete, told claimant that there was no available work for him. The employer did not give claimant a date when he could expect to return to full time work for the employer.

(3) When claimant restarted his claim for unemployment insurance benefits on December 16, 2016, he reported that he last day worked for the employer on December 9 and that he had a return to work date of January 10, 2017. Claimant claimed benefits for weeks 50-16 through 52-16 (December 11 through 31, 2016), and was paid benefits in the amount of \$1,464 for these weeks.

(4) On January 9, 2017, claimant filed a new initial claim for unemployment benefits. A weekly benefit amount of \$517 per week was established. He claimed benefits for weeks 01-17 through 03-17 (January 1 through 21, 2017). Week 01-17 was credited to claimant as a waiting week, and he was paid benefits in the amount of \$1,034 for weeks 02-17 and 03-17.

(5) During weeks 50-16 through 52-16 and 01-17 through 03-17, the weeks at issue, claimant performed no work search activities other than checking with the employer to see if it had any work available for him. When claimant filed claims for each of the weeks at issue, he certified that he was actively searching for work.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude that claimant failed to actively search for work during the weeks at issue. Claimant was paid \$2,498 in benefits to which he is not entitled and he is liable to repay that amount to the Department or have it deducted from any future benefits otherwise payable to him.

**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). 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 limited exceptions 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.* An individual who is on a temporary layoff for four weeks or less with the individual's regular employer and had, as of the layoff date, been given a date to return to work, is considered to have actively sought work by remaining in contact with and being capable of accepting and reporting for any suitable work with that employer for a period of up to four calendar weeks following the end of the week in which the layoff occurred. OAR 471-030-0036(5)(b)(A). Where, as here, the Department has paid benefits, the Department has the burden to establish that benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

During the weeks at issue, claimant was laid off from work for his regular employer. Because the employer gave him no date by which he was expected to return to work, however, he did not qualify for the temporary layoff exception to the work search requirements. Claimant therefore must have conducted at least five work seeking activities per week during the works at issue to be eligible for benefits for those weeks. Other than checking regularly with his employer to see if work was available, claimant performed no work seeking activities. The Department therefore met its burden to show that claimant did not conduct an active work search during the weeks at issue, and claimant is ineligible to receive benefits for 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. 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 certifications to the Department that he actively sought work during the weeks at issue, the Department paid him benefits in the amount of for \$2,498. At hearing, however, the Department established that claimant was not entitled to receive these benefits because he was required to comply with the work search requirements of OAR 471-030-003(5) and failed to do so. Claimant's representations regarding his work search activities therefore were false. Regardless of claimant's knowledge or intent in making that false statement to the Department, he is liable under ORS 657.310(1) either to repay the \$2,498 in benefits to the Department or have that amount deducted from any future benefits otherwise payable to him under chapter 657.

**DECISION:** Hearing Decisions 17-UI-82345, 17-UI-82360, 17-UI-82380 and 17-UI-82379 are affirmed. *Decisiones de la Audiencia 17-UI-82345, 17-UI-82360, 17-UI-82380 y 17-UI-82379 quedan confirmadas.*

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

**DATE of Service: June 1, 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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*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](http://courts.oregon.gov). En este sitio web, hay información disponible en español.*

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