

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0733

Hearing Decision 17-UI-85403 Affirmed – Late Request for Hearing Dismissed
Hearing Decision 17-UI-85434 Affirmed – Overpayment Assessed

PROCEDURAL HISTORY: On January 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the weeks of November 20, 2016 through January 7, 2017 (decision # 102648). On February 21, 2017, decision # 102648 became final without a request for hearing having been filed. On March 15, 2017, the Department issued an administrative decision assessing an overpayment of \$1,722 for the weeks of November 27, 2016 through January 7, 2017, based on decision # 102648 (decision # 160018). On April 4, 2017, the Department received a letter which was construed as an untimely request for hearing on decision # 102648 and a timely request for hearing on decision # 160018. On June 9, 2017, ALJ Shoemake conducted a hearing at 9:30 a.m. on claimant's untimely request for hearing on decision # 102648, and conducted another hearing at 10:45 a.m. on decision # 160018. On June 9, 2017, the ALJ issued Hearing Decision 17-UI-85403, dismissing claimant's request for hearing on decision # 102648 and concluding that decision # 102648 would remain undisturbed. On June 12, 2017, the ALJ issued Hearing Decision 17-UI-85434, affirming decision # 160018, which stated that claimant was overpaid \$1,722 in benefits for the weeks of November 27, 2016 through January 7, 2017. On June 16, 2017, claimant filed applications for review of both administrative 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-85403 and 17-UI-85434. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0732 and 2017-EAB-0733).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) On November 11, 2016, claimant filed an initial claim for benefits. Claimant's claim was determined valid with a weekly benefit amount of \$287. When claimant filed this claim he represented to the Department that he was on a temporary layoff, but provided no return to work date.

(2) Claimant claimed and was paid benefits for the weeks of November 27, 2016 through January 7, 2017 (weeks 48-16 through 01-17), the weeks at issue. Claimant was paid \$1,722 in total benefits for these weeks. During the weeks at issue when he made his weekly claim reports, claimant certified he was on a temporary layoff and did not report any work seeking activities.

(3) On and after January 30, 2017, the date decision # 102648 was issued and mailed to claimant, claimant's address of record with the Department was his mother's address, an address at which claimant did not reside. The Department mailed decision # 102648 to claimant at his mother's address. The decision was not returned to the Department as undeliverable. Claimant checked the mail he received at his mother's house "as often as I can" to determine if he had received any mail at her address that required his attention, but sometimes mail addressed to him waited at her residence "until I c[ould] get to it." Audio at ~11:37. Shortly after March 15, 2017, a second administrative decision, assessing an overpayment of \$1,722 and addressed to claimant at his mother's address, was delivered to his mother's residence. On March 28, 2017, claimant wrote a letter to the Department that was referenced "Re: Hearing Request," which set out detailed facts challenging the conclusion of administrative decision # 102648 that he did not actively seek work during the weeks at issue. The letter stated claimant had been laid off for four weeks and that when he filed his unemployment claim he was informed that he did not need to search for work if he had a return to work date. The letter was received by the Office of Administrative Hearings (OAH) on April 4, 2017. The letter was processed as a request for hearing on both decision #102648 and the overpayment decision.

CONCLUSIONS AND REASONS: Claimant's request for hearing on decision # 102648 is dismissed. Claimant was overpaid \$1,722 in benefits to which he was not entitled and is liable to repay the amount of those benefits to the Department or to have the amount deducted from any future benefits otherwise payable to him.

The Untimely Hearing Request. ORS 657.269 provides that an administrative decision becomes final and benefits shall be paid or denied in accordance with it unless a request for hearing on the administrative decision is filed within 20 days after the date the decision was mailed to the party's last known address. ORS 657.875 provides, among other things, that the 20 day period in which a party must file a request for hearing may be extended upon a showing of good cause for a reasonable time under the circumstances of the particular case. OAR 471-040-0010(1) (February 10, 2012) states that "good cause" exists when an action, delay or failure to act arises from an applicant's excusable mistake or from factors beyond the applicant's reasonable control. "Good cause" does not include failing to understand the implications of a decision or notice when it is received. OAR 471-040-0010(1)(b)(B). A "reasonable time" to extend a filing period is seven days after the circumstances that prevented a timely filing ceased to exist. OAR 471-040-0010(3). Documents sent through the U.S. Postal Service by regular mail are presumed to have been received by the addressee, subject to evidence to the contrary. *See generally* OAR 137-003-0520(10) (January 31, 2012); ORS 40.135(1)(q).

A hearing, claimant contended that administrative decision #102648 was never delivered to his mother's house as the explanation for his failure to timely request a hearing on that decision. However, claimant presented no evidence that any other article of mail had ever failed to be delivered to his mother's residence, whether that mail was addressed to her or to him, or that there were any other problems with the reliability of mail deliveries to his mother's address. As well, claimant agreed that the overpayment decision, also addressed to him at his mother's residence in mid-March 2017, was properly delivered to

her residence as were at least two “bills” from the Department sent during approximately this same period. Audio of 9:45 a.m. Hearing at ~11:45, ~12:30, ~13:20, ~14:27, ~14:48. Claimant’s bare assertion that decision # 102648 was not delivered to or received at his mother’s address, without more, is insufficient to overcome the presumption that it was delivered and received.

In addition, it appears from the facts surrounding claimant’s March 28, 2017 letter to the Department that claimant had knowledge of decision # 102648 that could only have come from having read it or speaking to the Department about it, both of which claimant denied having done before March 28, 2017. Audio at ~14:48, ~15:31, ~16:15. Significantly, the March 28, 2017 letter appeared specifically tailored to rebut the factual findings in and conclusions of decision # 102648. The content of that letter indicates that claimant had access to decision # 102648 when drafting it, most likely because it was received at his mother’s address shortly after it was issued on January 30, 2017. It also appears, most likely, that claimant requested a hearing on decision # 102648 only after he received the March 15, 2017 overpayment decision, which specifically referenced that the overpayment was “due to the Administrative Decision(s) mailed January 30, 2017,” and understood the implications of decision # 102648 as a result. Because it is more likely than not that claimant received decision # 102648, and because he failed to present evidence showing it was more likely than not that an excusable mistake or factor beyond his reasonable control prevented him from timely filing the request for hearing, claimant has not shown good cause to extend the filing period. Claimant’s untimely request for hearing on decision # 102648 is therefore dismissed, and decision # 102648 remains undisturbed.

The Overpayment. ORS 657.155(1)(c) provides that an individual is not eligible to receive benefits in any week in which the individual did not actively seek work. ORS 657.310(1) provides that an individual who receives benefits to which the individual was not entitled because the individual, *regardless of the individual’s knowledge or intent*, made or caused to be made a false statement or misrepresentation of a material fact or failed to disclose a material fact, is liable to repay the amount of the benefits to which the individual was not entitled or to have the amount of those benefits deducted from any future benefits otherwise payable to the individual.

During the weeks at issue, claimant was paid \$1,722 in benefits because, among other things, he certified to the Department that he actively sought work during each of those weeks. However decision # 102648 found that claimant did not actively seek work during the weeks at issue, that decision became final and binding on February 21, 2017, claimant’s late request for hearing has been dismissed, and, as a consequence, the record establishes that claimant was overpaid \$1,722 as a matter of law. Because claimant was paid \$1,722 in benefits to which he was not entitled, and that overpayment was due to incorrect information he provided to the Department about actively seeking work, claimant is liable to repay those benefits to the Department or to have them deducted from any future benefits otherwise payable to him. Claimant is required to repay those funds even if he was not aware that he was providing incorrect information to the Department during the weeks at issue, and even if he did not intend to receive benefits to which he was not entitled.

DECISION: Hearing Decisions 17-UI-85403 and 17-UI-85434 are affirmed.

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

DATE of Service: July 21, 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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