

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0817**

*Affirmed*  
*Benefits Are Not Payable*

**PROCEDURAL HISTORY:** On April 26, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant received vacation pay and was not unemployed when he claimed benefits from February 26, 2017 to April 22, 2017, and that benefits were not payable to him during those weeks (decision # 83816). Claimant filed a timely request for hearing. On June 1, 2017 and June 26, 2017, ALJ Meerdink conducted a hearing, and on June 27, 2017, issued Hearing Decision 17-UI-86669, concluding that claimant received a pension, retirement pay or similar periodic payment and was not unemployed from February 26, 2017 to April 22, 2017, and affirming the Department's decision that benefits were not payable to him. On July 10, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision. Even if we had, the outcome of this decision would remain the same for the reasons explained.

**EVIDENTIARY MATTER:** At the hearing, the ALJ stated that a union letter and steward cards claimant offered into the record were admitted into evidence, but did not orally assign exhibit numbers to them. Audio recording at ~ 2:35. In Hearing Decision 17-UI-86669, however, the ALJ wrote that "Exhibits 1 through 3 were admitted into the record," although the ALJ marked only the May 3, 2017 letter from Seafarers International Union as Exhibit 2, and copies of claimant's Entry Steward Registration Card and Steward Registration Card as Exhibit 3. Having reviewed the entire record and listened to the audio recording of the hearing, we conclude that the ALJ erred in stating that an "Exhibit 1" was admitted into evidence; only Exhibit 2 and Exhibit 3, as described and marked above, were marked and admitted into evidence, and we considered those documents when reaching this decision.

**FINDINGS OF FACT:** (1) On June 26, 2017, claimant filed an initial claim for unemployment insurance benefits. His weekly benefit amount was \$567. He filed weekly claims for benefits from February 26, 2017 to April 22, 2017, the weeks at issue.

(2) At all relevant times, claimant worked for Alaska Tanker Company, LLC, usually as a steward assistant and sometimes as a cook or assistant cook. Claimant worked for the employer on a contractual basis; each contract required that claimant work three 120-day tours of duty for the employer with a mandatory 60-day break between each tour. Claimant had worked for the employer for approximately 23 years.

(3) At all relevant times, claimant was a member of the Seafarers International Union (SIU). The employer was subject to a collective bargaining agreement with SIU. Pursuant to the collective bargaining agreement, the employer did not provide claimant with vacation pay or accrued vacation leave. Instead, the employer was required to make contributions on claimant's behalf to the Seafarers Vacation Plan.

(4) The Seafarers Vacation Plan was a multi-employer employee benefit plan funded by contributions from employers, including Alaska Tanker Company, LLC. The employer's contributions amounted to one day's worth of pay for every two days that claimant worked. The contributions were placed into a trust fund for the benefit of the vacation plan's participants, including claimant. Claimant did not have to be "on vacation" in order to be eligible for payment from the vacation plan. Rather, funds from the vacation plan were payable at any time he met the eligibility requirements, which included working "at least 60 days within a 15 month period for employers that contribute to the plan" and applying for funds "within 15 months of the date of discharge from the earliest vessel applied for." Exhibit 2.

(5) On an unknown date, likely prior to February 26, 2017, claimant applied to receive benefits under the Seafarers Vacation Plan. On February 26, 2017, claimant began a 60-day "vacation period" between his second and third 120-day tours of duty and scheduled to return to work for the employer on May 14, 2017. June 1, 2017 hearing, Transcript at 5. On March 9, 2017, SIU distributed a gross benefit of \$8,495 to claimant from the Seafarers Vacation Plan; claimant received a net amount of approximately \$3,365.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant cannot be considered "unemployed" between February 26, 2017 and April 22, 2017 because he received remuneration from employment that exceeded his weekly benefit amount.

As a preliminary matter, we disagree with the ALJ that claimant received no remuneration during the 60-day "vacation period" at issue because a third party paid claimant during that period of time, where, as here, the employer was solely responsible for contributing the money that funded his payments, he was under contract with the employer at the time, and both claimant's eligibility for funds through the vacation plan and the amounts distributed to him were based upon his hours of work with the employer.<sup>1</sup> Likewise, we disagree with the ALJ that claimant's receipt of benefits under the Seafarers Vacation Plan should be considered "pension, retirement or retired pay, annuity, or other similar period payment based on the previous work of the individual."<sup>2</sup> There is no evidence in this record suggesting that the Seafarers Vacation Plan either was or was akin to a pension, retirement or retired pay. Nor is claimant's

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<sup>1</sup> Hearing Decision 17-UI-86669 at 3.

<sup>2</sup> *Id.*

application for lump sum payments an annuity, or akin to an annuity, which is generally defined as “a fixed sum of money paid to someone each year, typically for the rest of their life,” or “a form of insurance or investment entitling the investor to a series of annual sums.”<sup>3</sup> The Seafarers Vacation Plan was not a fixed sum, investment or insurance, and it did not entitle claimant to an annual payment. However, we agree with the outcome of Hearing Decision 17-UI-86669 on the grounds set forth below.

Only “unemployed” individuals are eligible for benefits. *See accord* ORS 657.155(1). ORS 657.100(1) provides that an individual is “unemployed” if remuneration paid or payable to the individual is less than his weekly benefit amount. ORS 657.105(1) defines “wages” to include “all remuneration for employment.”<sup>4</sup>

OAR 471-030-0017 provides as follows:

(1) Definitions. For purposes of applying ORS 657.100 and 657.150, and as used in this rule:

(a) "Employment" means:

(A) Being in an employer-employee relationship during a period of time for which remuneration was paid or payable; or

(B) Providing a service or product for cash or cash value.

(b) "Earnings" means remuneration;

(c) Where an employer-employee relationship exists, "remuneration" means compensation resulting from the employer-employee relationship, including wages, salaries, incentive pay, sick pay, compensatory pay, bonuses, commissions, stand-by pay, and tips;

\* \* \*

(h) For purposes of ORS 657.150(7), the term "vacation" means a specific period of time, paid or unpaid, during which the individual is freed from work/job/employment duties and responsibilities and is free to use the time away from work for any purpose the individual chooses.

\* \* \*

In this case, claimant was in an employer-employee relationship when he was under contract with the employer during the 60-day mandatory “vacation period” between tours of duty during the weeks at

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<sup>3</sup> See <https://en.oxforddictionaries.com/definition/annuity>

<sup>4</sup> ORS 657.130 excludes payments from trusts or annuities that are exempt from tax under section 401(a) of the United States Code; the record shows that the Seafarers Vacation Plan was regulated by ERISA (*see* Exhibit 2), which is found at 29 USC 1001 *et seq* and is therefore not included in the trusts and annuities exemption codified in Employment Department law.

issue. He received remuneration resulting from his employer-employee relationship in the form of an employer-funded disbursement from SIU's Seafarers Vacation Plan while he was on a "vacation," which, as that term is defined by the Department, is a "specified period of time" during which he was freed from work responsibilities and free to use his time for whatever purpose he chose. Therefore, although claimant's receipt of money during the weeks at issue was not a payment of accrued vacation pay directly from the employer, the money he received was "vacation" pay for purposes of Employment Department law and for purposes of determining his eligibility to receive payment of unemployment insurance benefits during the weeks at issue.

Although claimant received only approximately \$3,365 in net payment from the SIU vacation plan on March 9<sup>th</sup>, the applicable definitions of wages and remuneration reference the "total" or "gross" amounts of remuneration or compensation received by claimant, and the gross amount paid to claimant was \$8,495. Because the \$8,495 was received during a 60-day vacation period, OAR 471-030-0017(3)(d) requires that, under the circumstances of this case, that claimant's remuneration be allocated equally over that period. The 60-day vacation period of February 26<sup>th</sup> through May 14<sup>th</sup> encompassed 11 weeks. \$8,495 divided by 11 equals \$772.27, an amount that exceeds claimant's \$567 weekly benefit amount. Because the weekly *pro rata* share of remuneration during the 60-day vacation period exceeded claimant's weekly benefit amount during each of the weeks at issue, claimant cannot be considered "unemployed," and unemployment insurance benefits are therefore not payable to him during the weeks at issue.

**DECISION:** Hearing Decision 17-UI-86669 is affirmed.

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

**DATE of Service:** August 3, 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](http://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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