

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0978

Affirmed
Ineligible Weeks 09-17 through 11-17
Overpayment Assessed

PROCEDURAL HISTORY: On April 3, 2016, the Oregon Employment Department (the Department) served notice of administrative decision # 101809, concluding claimant did not actively seek work from February 26, 2017 through March 18, 2017. On May 15, 2017, the Department served notice of administrative decision # 113808, assessing a \$1,770 overpayment based on decision # 101809 after claimant failed to appeal decision # 101809 in a timely manner.

On May 22, 2017, claimant filed requests for hearing by fax on decisions # 101809 and # 113808 with the Office of Administrative Hearings (OAH). On August 10, 2017, ALJ Meerdink conducted a hearing on decision # 101809, concluded claimant's late hearing request was based on his failure to ever receive the decision based on factors beyond his reasonable control, conducted a hearing on the merits, and on August 11, 2017, issued Hearing Decision 17-UI-90150, affirming decision # 101809. On August 10, 2017, ALJ Meerdink conducted a separate hearing on decision # 113808, and on August 11, 2017, issued Hearing Decision 17-UI-90151, affirming that Department decision.

On August 15, 2017, claimant filed applications for review of Hearing Decisions 17-UI-90150 and 17-UI-90151 with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-90150 and 17-UI-90151. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0977 and 2017-EAB-0978, respectively).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to allowing claimant's late request for hearing on decision # 101809 are **adopted**. The remainder of this decision addresses whether claimant did not actively sought work from February 26, 2017 through March 18, 2017, and therefore was ineligible, and overpaid benefits, for those weeks.

FINDINGS OF FACT: (1) Claimant filed an initial claim for unemployment benefits on January 3, 2017. He claimed and received benefits for the weeks including February 26 through March 18, 2017 (weeks 09-17 through 11-17). These are the weeks at issue.

(2) Claimant's regular employment was as a tree cutter for TRM Cutting, Inc. (TRM). On or about February 26, 2017, TRM laid claimant off due to inclement weather which interfered with its tree falling operation without giving claimant a return to work date because his return was weather dependent.

(3) Claimant was experienced at filing claims for benefits having had twelve prior claims. Moreover, the Department notified claimant of the work seeking requirements for benefit eligibility, including that he actively seek work by performing at least five work search activities each week with two of those being direct contacts with potential employers, when he filed his claim on December 23, 2015 and again on March 31 and June 30, 2016, when the Department mailed to claimant at his address of record a Department publication (UI Pub 195), which specifically set forth those work search requirements. Claimant received the mailings.

(4) When claimant filed each of his weekly benefit claims for the weeks at issue, he reported that he was on a temporary layoff and only reported two work search activities – direct contacts with TRM and one potential employer. To complete the claim filing process, claimant was required to certify that he had actively sought work during each week claimed. Based on claimant's certifications that he had, the Department paid, and claimant received, \$590 in benefits for each of the weeks at issue.

(5) Subsequently, a Department audit of claimant's weekly claims revealed that he had not performed the weekly work search requirements for benefit eligibility, and decisions # 101809 and # 113808 were eventually issued.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant did not actively seek work and was ineligible for benefits for each of the weeks at issue. Accordingly, claimant was overpaid \$1770 in regular benefits and must repay the Department that amount or have it deducted from future benefits otherwise payable.

Where, as here, the Department paid a claimant benefits for weeks claimed, and then subsequently denied that he was eligible to receive those benefits, the Department has the burden to establish by a preponderance of evidence that the claimant was not entitled to the benefits paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). The Department met its burden.

Active 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) (February 23, 2014).

Among the other requirements, to qualify for the exception to the actively seeking work requirement that applies to individuals temporarily laid off from their regular employment, claimant must have been given a “date” to return to work. Claimant’s return to work was strictly weather dependent, and because he was not given a “date” to return to work, the exception to the actively seeking work requirements set forth in OAR 471-030-0036(5)(a) did not apply to claimant’s layoff.

Because the circumstances of claimant’s layoff did not qualify him for the exception to the actively seeking work requirements set forth in OAR 471-030-0036(5)(a), he was required to perform five work seeking activities each week as a condition of being eligible to receive unemployment insurance benefits. During the three weeks at issue, claimant performed only two activities per week by maintaining contact with his regular employer and directly contacting one other employer. Because claimant did not perform five work-search activities per week, he did not “actively seek work” and he is ineligible for benefits for the weeks at issue, weeks 09-17 through 11-17.

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 weekly certifications to the Department that he was actively seeking work during each of the three weeks at issue, claimant received \$1,770 (\$590 x 3) in regular benefits to which he was not entitled. With regard to claimant’s benefit claims for each of those weeks, the Department established that he did not actively seek work even though that may have been due to his misunderstanding of the rules. Claimant’s certifications to the Department that he was actively seeking work during those weeks were, therefore, false. Regardless of claimant’s knowledge or intent in making those false reports to the Department, he is liable under ORS 657.310(1) to either repay \$1,770 in regular benefits or have that amount deducted from any future benefits otherwise payable to him under ORS chapter 657.

In sum, claimant is ineligible for benefits for each of the weeks including February 26 through March 18, 2017 (weeks 09-17 through 11-17). In addition, claimant was overpaid \$1,770 in benefits repay or have deducted from future benefits payable to him.

DECISION: Hearing Decisions 17-UI-90150 and 17-UI-90151 are affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 5, 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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