

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1005

Hearing Decision 17-UI-89592 Affirmed
Late Request for Hearing Dismissed
Hearing Decision 17-UI-89594 Affirmed
Late Request for Hearing Allowed
Overpayment Assessed

PROCEDURAL HISTORY: On October 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from September 11, 2016 through September 24, 2016 (decision # 91440). On November 1, 2016, decision # 91440 became final without claimant having filed a request for hearing. On November 16, 2016, the Department served notice of an administrative decision (decision # 124059) assessing an overpayment of \$534 based on decision # 91440. On December 1, 2016, claimant filed an untimely request for hearing on decision # 91440. On December 6, 2016, decision # 124059 became final without claimant having filed a request for hearing on that decision. On July 7, 2017, claimant faxed second request for hearing on decision # 91441 and a late request for hearing decision # 124059. On August 2, 2017, ALJ M. Davis conducted two hearings, one at 1:30 p.m. on claimant's late request for hearing on decision # 91440, at which the Department did not appear, and one at 2:30 p.m. on claimant's late request for hearing on, and the merits of, decision # 124059, at which the also Department did appear. On August 3, 2017, ALJ Davis issued two hearing decisions, the first dismissing claimant's request for hearing on decision # 91440 (Hearing Decision 17-UI-89592) and the second allowing claimant's request for hearing on decision # 124509 and affirming that decision (Hearing Decision 17-UI-89594). On August 22, 2017, claimant filed applications for review on Hearing Decisions 17-UI-89592 and 17-UI-89594 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-89592 and 17-UI-89594. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-1005 and 2017-EAB-1006).

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 # 124509 are **adopted**. The remainder of this decision addresses whether claimant's late request for hearing on decision # 91440 should be allowed, and on the merits of decision # 124509.

FINDINGS OF FACT: (1) On September 22, 2016, claimant filed an initial claim for unemployment insurance benefits. That claim was determined valid with a weekly benefit amount of \$534. Claimant claimed benefits for the weeks of September 11, 2016 through September 24, 2016 (weeks 37-16 and 38-16). Claimant reported to the Department that he actively sought work during week 38-16, and was paid \$534 in benefits for that week.

(2) Shortly after November 16, 2016, claimant received in the same envelope a copy of decision # 91440, which stated it had been mailed on October 12, 2016, and a copy of decision # 124059, which stated it had been mailed on November 16, 2016. On December 1, 2016, claimant mailed a request for hearing on decision # 91440. The Department did not receive the request for hearing that claimant mailed.

(3) On January 4, February 1, March 11, April 5, May 3, June 7 and July 5, 2017, the Department mailed billing statements to claimant seeking to collect the \$534 that he was paid in benefits for week 38-16. Around early July 2017, claimant received a distraint warrant from the Department seeking to collect the \$534 from him.

(4) After receiving the distraint warrant around early July 2017, claimant realized that the Department had not received or had not processed the request for hearing he had mailed on December 1, 2016. On July 12, 2017, claimant faxed to the Department a copy of the same request for hearing he had mailed on December 1, 2016.

CONCLUSIONS AND REASONS: Claimant's late request for hearing on decision # 91440 is dismissed. On the merits of decision # 124059, claimant was overpaid \$534 in benefits for week 38-16 and he is liable to repay those benefits or to have them deducted from any future benefits otherwise payable to him.

Late Request for Hearing on Decision # 91440. ORS 657.269 provides that the Department's decisions become final unless a party files a request for hearing within 20 days. Under ORS 657.875, the 20 period in which the request for hearing must be filed may be extended a reasonable time upon a showing of good cause. OAR 471-040-0010(1)(a) (February 10, 2012) states that "good cause" exists if the action, delay or failure to act that resulted in the late filing arose from an excusable mistake or from factors beyond the applicant's reasonable control. OAR 471-030-0010(3) states that a "reasonable time" to extend the filing period is seven days after the circumstances that prevented the timely filing ceased to exist.

Claimant contended that he did not receive decision # 91440 until he received decision # 124059, with which decision # 91440 was enclosed in the same mailed envelope. Claimant's failure to timely file the request for hearing on decision # 91440 by November 1, 2016 therefore appears to have been due to his failure to receive that decision until shortly after November 16, 2016. From claimant's testimony at hearing, it appears most likely that he received the envelope containing decisions # 91440 and # 124059 very shortly after decision # 124059 was issued on November 16, 2016, and claimant did not contend or suggest that he mailed the December 1, 2016 request for hearing to the Department immediately after receiving decision # 91440 or within a week after actually having received decision # 91440. Audio of 1:30 p.m. Hearing at ~8:06. Accordingly, it appears based on the preponderance of the evidence in this

record that claimant did not file a request for hearing on decision # 91440 within seven days after he was in receipt of that decision, which was when the circumstances that prevented a timely filing of the request for hearing – his failure to earlier receive decision # 91440 – ceased to exist. Because claimant did not act within a “reasonable time” as OAR 471-030-0010(3), his request for hearing on decision # 91440 is dismissed and administrative decision # 91440 remains undisturbed.

Overpayment. ORS 657.310 provides that if an individual receives any benefits to which the individual is not entitled because the individual, *regardless of the individual’s knowledge or intent*, made or cause to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, the individual 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 the individual (emphasis added). ORS 657.155(1)(c) provides, among other things, that an individual is not entitled to receive benefits for any week in which the individual did not actively seek work.

Since decision # 91440 became final on November 1, 2016 and EAB has affirmed the dismissal of claimant’s late request for hearing on that decision, decision #91440 establishes as a matter of law that claimant did not actively seek work during week 38-18. And his representation to the Department that he sought work was necessarily false, also as a matter of law. Absent making a representation that he actively sought work, claimant did not dispute that he would not have received benefits from the Department for week 38-16. Audio at 2:30 p.m. Hearing at ~18:27. Claimant also agreed that he was paid \$534 in benefits for week 38-16. Consequently, regardless of claimant’s intentions when he represented he actively sought work during week 38-16 or if he thought he had actually actively sought work during that week, claimant is liable to repay the \$534 he received to the Department or to have that amount deducted from any future benefits otherwise payable to him.

DECISION: Hearing Decisions 17-UI-89592 and 17-UI-89594 are affirmed.

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

DATE of Service: September 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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