

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1273

Affirmed
Requests to Reopen Allowed
Late Request for Hearing Allowed
Ineligible ~ Overpayment

PROCEDURAL HISTORY: On April 4, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from December 25 through December 31, 2016 and from January 8 through February 25, 2017 (decision # 110630). On April 24, 2017, decision # 110630 became final without claimant having requested a hearing. On May 17, 2017, the Department served notice of an administrative decision, based on decision # 110630, assessing a \$2,303 overpayment (decision # 160137). On June 3, 2017, claimant filed a timely request for hearing on decision # 160137, and a late request for hearing on decision # 110630. On June 12, 2017, the Office of Administrative Hearings served notice of hearings scheduled for June 26, 2017. Claimant failed to appear at the hearings, and for that reason, on June 26, 2017, ALJ Snyder issued Hearing Decision 17-UI-86618 dismissing claimant's request for hearing on decision # 110630 and Hearing Decision 17-UI-86558 dismissing claimant's request for hearing on decision # 160137.

On June 13, 2017, claimant filed a timely motion to reopen the June 26, 2017 hearings. OAH served notice of hearings scheduled for September 1, 2017. Claimant failed to appear at the hearings, and for that reason, on September 1, 2017, ALJ Wyatt issued Hearing Decision 17-UI-91837 dismissing claimant's request to reopen the June 26, 2017 hearing on decision # 110630, and Hearing Decision 17-UI-91836 dismissing claimant's request to reopen the June 26, 2017 hearing on decision # 160137. On September 15, 2017, claimant filed a timely motion to reopen the September 1, 2017 hearings. On October 6, 2017, ALJ Wyatt conducted hearings at which claimant appeared. On October 13, 2017, ALJ Wyatt issued Hearing Decision 17-UI-94527 allowing claimant's request to reopen the June 26, 2017 hearing and his late request for hearing regarding decision # 110630, and concluding that claimant is ineligible for benefits for December 25 through December 31, 2016 and from January 8 through February 25, 2017 because he did not actively seek work. On October 13, 2017, ALJ Wyatt also issued Hearing Decision 17-UI-94529 allowing claimant's request to reopen the June 26, 2017 hearing

regarding decision # 160137 and concluding that claimant was overpaid and must repay \$2,303 in benefits.

On November 2, 2017, claimant filed applications for review of Hearing Decisions 17-UI-94527 and 17-UI-94529 with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-94527 and 17-UI-94529. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-1272 and 2017-EAB-1273).

With claimant's applications for review, he submitted written arguments in which he asserted that he did engage in working seeking activities other than direct employer contacts during the period at issue, and that his work search requirements should be modified to exclude direct employer contacts pursuant to 471-030-0036(5)(f) due to poor economic conditions and prospective job openings in his rural labor market, weather conditions and seasonal factors affecting his occupation, and other factors detailed in the rule.

However, there is no evidence to show that the Department modified claimant's work search requirements. Had the Department modified claimant's work search requirements, it would have given him notice that it had done so. OAR 471-030-0036(5)(f) provides that the Department "shall provide a written copy of the work search requirements to the individual if the individual's work search requirements are modified." In other words, for a modified work search to qualify as "actively seeking work," claimant must have received permission from the Department to conduct a modified work search before the weeks at issue began. The record shows claimant was given the standard, non-modified, work search advisement that he was required to conduct at least five work seeking activities per week, with at least two of those being direct employer contacts. Claimant did not make at least two direct employer contacts during each week at issue. Absent evidence that the Department modified claimant's work search requirements and gave him notice of that modification before the weeks at issue, OAR 471-030-0036(5)(f) does not apply to claimant's work search requirements, and claimant did not actively seek work during the weeks at issue.

Claimant also asserted in his written arguments that, with respect to the overpayment assessed, he was not liable for the overpayment because he did not "willfully" make a false statement or representation. It is not alleged that claimant's conduct was willful. However, while claimant may have innocently believed he met the Department's work search requirements, and reported as such, decision # 110630 is final and states that claimant did not actively seek work during the weeks at issue. Claimant was given waiting week credit and paid benefits for the weeks at issue based on his failure to accurately report that he was not actively seeking work during those weeks. Regardless of claimant's knowledge or intent, that representation that he was actively seeking work during each week at issue was incorrect and claimant is liable to repay the \$2,303 in benefits he received as a consequence of that representation, or have those benefits deducted from any future benefits otherwise payable to him.

EAB reviewed the entire hearing records in these matters. On *de novo* review and pursuant to ORS 657.275(2), the hearing decisions under review are **adopted**.

DECISION: Hearing Decisions 17-UI-94527 and 17-UI-94529 are affirmed.

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

DATE of Service: December 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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