

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1466

Modified
(Modificado)

Eligible – Weeks 19-17 through 21-17
(Elegible – Semanas 19-17 hasta 21-17)
Ineligible – Weeks 04-17 through 18-17
(Inelegible – Semanas 04-17 hasta 18-17)
Overpayment Assessed - \$5,138
(Inpuesto por Sobre pago \$5,138)

PROCEDURAL HISTORY: On June 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the weeks of January 22, 2017 through May 27, 2017 and assessing a \$6,239 overpayment (decision # 104935). Claimant filed a timely request for hearing. On November 2, 2017, ALJ Monroe conducted an interpreted hearing, continued on November 30, 2017, and on December 8, 2017 issued Hearing Decision 17-UI-98671, affirming the Department's decision. On December 19, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: The ALJ admitted Exhibits 1 and 2 into evidence, but failed to mark them as such. As a clerical matter, we have identified those exhibits based on the ALJ's description of them, marked the Department's documents as Exhibit 1 and claimant's documents as Exhibit 2. Transcript (November 30, 2017 hearing) at 4-5.

FINDINGS OF FACT: (1) Claimant's regular employment prior to the weeks at issue was as a field representative for Willamette Valley Fruit Company (WVFC), for whom he last worked in September 2017.¹ Claimant's work tasks included tractor operator, forklift operator, crew leader, and pesticide applicator.

¹ We take notice of these facts, which are contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record.

(2) On January 27, 2017, claimant filed an initial claim for unemployment insurance benefits. Claimant's claim was determined to be valid with weekly benefit amount of \$367. Claimant claimed and was paid \$367 in benefits for each week from January 22 through May 27, 2017 (weeks 04-17 through 21-17), the weeks at issue.

(3) Claimant was experienced with the requirements for filing claims for benefits having had prior claims for which he received benefits. 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, "at the time he filed the initial claim and when he was claiming each week." Transcript (November 2, 2017) at 6.

(4) When claimant filed each of his weekly benefit claims for the weeks at issue, he only reported three work search activities – direct contacts with potential employers to inquire about job openings. Exhibit 1. To complete the claim filing process, claimant was required to certify that he actively sought work during each week claimed. Based on claimant's certifications, the Department paid, and claimant received, \$367 in benefits for each of the weeks at issue. The total amount of benefits claimant was paid for those weeks was \$6,239.

(5) In fact, with the exception of weeks including May 7 through May 21, 2017 (weeks 19-17 through 21-17), claimant also performed other work search activities, such as reviewing newspaper and Craigslist want ads, during the period in question but was unaware during which weeks he performed those additional work search activities. During each of the weeks including May 7 through May 21, 2017 (weeks 19-17 through 21-17)) claimant directly contacted five different employers to inquire about or apply for job openings. Exhibit 2.

(6) Subsequently, a Department audit of claimant's weekly claims concluded that he had not performed the required number of weekly work search activities for benefit eligibility and decision # 104935 was issued.

CONCLUSIONS AND REASONS: We agree with the ALJ, in part. Claimant did not actively seek work and was ineligible for benefits for each of the weeks including January 22 through May 6, 2017 (weeks 04-17 through 18-17). However, claimant actively sought work and was eligible for benefits for each of the weeks including May 7 through May 27, 2017 (weeks 19-17 through 21-17). Accordingly, claimant was only overpaid \$5,138 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 or she was eligible for 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).

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). To actively seek work, an individual must do 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). OAR 471-030-0036(5)(a) states that the minimum requirements for an individual to be considered to be "actively seeking work"

are the performance of 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.

In Hearing Decision 17-UI-98671, without discussing the direct contacts claimant reported to the Department or to the ALJ at hearing, the ALJ concluded that claimant did not actively seek work during any of the weeks at issue. Hearing Decision 17-UI-98671 at 3. We disagree, in part.

Here, the Department alleged that claimant failed to actively seek work during each of the weeks including January 22 through May 27, 2017 (weeks 04-17 through 21-17), because he failed to perform at least five work seeking activities each week. At the two hearings on this issue, with the exception of weeks 19-17 through 21-17, the Department established that claimant only performed three direct contacts each week during weeks 04-17 through 18-17, and thus, did not perform the required five work seeking activities for benefit eligibility. For each of those weeks, claimant did not provide evidence showing otherwise. Claimant asserted that he reported only three direct contacts when he filed his claims for those weeks because he “wasn’t understanding,” but did not dispute that he was advised multiple times of the work seeking requirements for benefit eligibility. Transcript (November 30, 2017) at 31. Although, when asked what other work seeking activities he performed during each of those weeks other than the direct contacts reported, he responded that he often looked at Craigslist and newspaper ads, he also admitted that he did not perform those other activities each week and could not identify during which weeks he performed them. *Id.* at 13-18. However, claimant did provide documentary evidence showing that he performed five direct employer contacts during each of the weeks including May 7 through May 27, 2017 and, accordingly, established that he actively sought work and was eligible for benefits for those weeks.² Exhibit 2.

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.*

² The Department’s assertion that claimant was required to fill out an application or submit a resume for a direct contact to be valid was not persuasive. Transcript (November 2, 2017) at 7-8; Transcript (November 30, 2017) at 24. See, Oregon Employment Department, UI Benefit Manual §360 (Rev. 02/28/16)(“Claimants do not have to submit an application or resume for a contact to be a direct contact. If a claimant contacts an employer and is told that employer is not hiring, that contact is sufficient to be considered a direct contact.”).

Similarly, the Department’s assertion that claimants “are required every week to make two brand new work contacts of new Employers...which means applying for two new jobs with new Employers” also was not persuasive. Transcript (November 30, 2017) at 6. Both ORS 657.155 and OAR 471-030-0036(5) discuss the eligibility requirement to actively seek work but neither state that direct contacts with different employers each week are required. OAR 471-030-0036(5)(a) states that “an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity.” If repeated direct contacts are what an ordinary and reasonable person in claimant’s circumstances and labor market would make to return to work at the earliest opportunity, then repeated direct contacts are sufficient to establish an active work search.

Based upon claimant's weekly certifications to the Department that he actively sought work during each of the fourteen benefit weeks from January 22 through May 6, 2017, claimant received \$5,138 (\$367 x 14) 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. Claimant's certifications to the Department that he actively sought 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 \$5,138 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 January 22 through May 6, 2017 (weeks 04-17 through 18-17) but is eligible for benefits for each of the weeks including May 7 through May 27, 2017 (weeks 19-17 through 21-17). In addition, claimant was overpaid and must reimburse the Department \$5,138 in regular benefits either directly or through deduction from future benefits payable to him.

DECISION: Hearing Decision 17-UI-98671 is modified, as outlined above. *Decisión de la Audiencia 17-UI-98671 se modifica, de acuerdo a lo indicado arriba.*

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

DATE of Service: January 19, 2018

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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.