

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0153**

*Ineligible – Weeks 49-17 through 51-17*  
*Overpayment Assessed - \$1,148*

**PROCEDURAL HISTORY:** On December 29, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the weeks including December 3 through December 23, 2017 and assessing a \$1,148 overpayment (decision # 90654). Claimant filed a timely request for hearing. On February 6, 2018, ALJ M. Davis conducted a hearing and issued Hearing Decision 18-UI-102605, affirming the Department's decision. On February 13, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) On December 1, 2017, New Wave Electric, Inc. informed claimant that he was being laid from his employment as an electrician apprentice without giving him a return to work date.

(2) At the time of claimant's layoff, claimant was not a member of a union, although he was a member of an apprenticeship training program. The program required claimant to accept other work offered by the program if he was ever laid off from work obtained through the program. However, the program did not prohibit claimant from accepting temporary work not offered by the program as long as claimant accepted program work when offered.

(3) On December 5, 2017, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant's claim was valid and that his weekly benefit amount was \$574. When filing his initial claim, claimant reported that his layoff began on December 1, 2017 and that his return to work date was January 1, 2018. Audio Record ~ 7:40 to 8:00. Claimant claimed and received waiting week credit or \$574 in benefits for each of the weeks including December 3 through December 23, 2017 (weeks 49-17 through 51-17), the weeks at issue. 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, \$574 in benefits for weeks 50-17 and 51-17. The total amount of regular benefits claimant was paid for those weeks was \$1,148.

(4) During each of the weeks at issue, claimant remained in contact with his regular employer but did not perform any other work search activities.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. Claimant did not actively seek work and was ineligible for benefits for each of the weeks including December 3 through December 23, 2017 (weeks 49-17 through 51-17). Claimant was overpaid \$1,148 in regular benefits and must repay the Department that amount or have it deducted from future benefits otherwise payable.

**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).<sup>1</sup>

Where, as here, the Department paid a claimant benefits or gave waiting week credit for weeks claimed, and then subsequently denied that he 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). The Department met its burden.

Among the requirements to qualify for the exception to the actively seeking work requirement that applies to individuals temporarily laid off from their regular employment, the length of the planned layoff must have been four weeks or less, starting from the end of the week in which the layoff occurred. Claimant's planned layoff began on December 1, 2017, and the end of that week was December 2<sup>nd</sup>. Therefore, claimant must have been scheduled to return to work within four weeks of December 2<sup>nd</sup>, which would have been December 30<sup>th</sup>. Because January 1, 2018, the date on which claimant reported to the Department that he was scheduled to return to work, was more than four weeks after his layoff began, the exception to the actively seeking work requirement was not applicable to claimant's layoff.<sup>2</sup>

Because the circumstances of claimant's layoff did not qualify him for the exception to the actively seeking work requirement, 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 one activity per week by maintaining contact with his regular employer.

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<sup>1</sup> The union member exception to the work search requirements of OAR 471-030-0036(5)(a) did not apply here because claimant was not a union member. *See*, OAR 471-030-0036(5)(d).

<sup>2</sup> The record shows that at the time of claimant's layoff, the employer did not give claimant a date on which he was expected to return to work, and later, the employer reported to the Department that claimant was not expected to return to work until April 2018. Exhibit 1; Audio Record ~ 8:00 to 10:00. As of the hearing date, claimant had not yet returned to work. Audio Record ~16:45 to 17:15.

Because he did not perform five activities a week, he did not “actively seek work” and he is ineligible for either waiting week credit or benefits during the weeks at issue, weeks 49-17 to 51-17.

**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 in part upon claimant’s weekly certifications to the Department that he actively sought work during each of the three benefit weeks from December 3 through December 23, 2017, claimant received waiting week credit and \$1,148 (\$574 x 2) 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 \$1,148 in regular benefits or have that amount deducted from any future benefits otherwise payable to him under ORS chapter 657.

In sum, claimant was ineligible for waiting week credit or benefits for each of the weeks including December 3 through December 23, 2017 (weeks 49-17 through 51-17). In addition, claimant was overpaid and must reimburse the Department \$1,148 in regular benefits either directly or through deduction from future benefits payable to him.

**DECISION:** Hearing Decision 18-UI-102605 is affirmed.

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

**DATE of Service:** March 9, 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](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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