

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0915

Affirmed
Overpayment Assessed

PROCEDURAL HISTORY: On February 15, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work during the weeks of August 21, 2016 through August 27, 2016, September 4, 2016 through September 17, 2016 and September 25, 2016 through December 31, 2016 (decision # 113725). On March 7, 2018, decision # 113725 became final without a request for hearing having been filed. On June 14, 2018, the Department served notice of an administrative decision assessing a \$9,230 overpayment based on decision # 113725 (decision # 132959). On July 5, 2018, decision # 132959 became final without a request for hearing having been filed. On August 6, 2018, claimant filed untimely requests for hearings on decision # 113725 and decision # 132959. On August 13, 2018, ALJ Kangas issued Order No. 114812 and Order No. 114813 dismissing the requests for hearing on decision # 113725 and decision # 132959, respectively, due to having been untimely filed, subject to his right to renew the requests if claimant completed and filed the Appellant Questionnaire enclosed with those Orders within 14 days of the date of the mailing of the Orders. On August 17, 2018, claimant filed a timely response to the Appellant Questionnaire. On August 22, 2018, the Office of Administrative Hearings (OAH) issued a letter order cancelling Order No. 18-UI-114813 and returning the matter to the docket for the scheduling of a hearing on the timeliness of claimant's hearing request and, if appropriate, the merits of decision # 132959. Order No. 18-UI-114812 also was apparently cancelled and that matter also returned to the docket for the scheduling of a hearing on the timeliness of claimant's hearing request and, if appropriate, the merits of decision # 113725.

On August 29, 2018, the Office of Administrative Hearings (OAH) served notice of two hearings, the first at 2:30 p.m. on September 12, 2018 on decision # 113725 and the second at 3:30 p.m. on September 12, 2018 on decision # 132959. On September 12, 2018 at 2:30 p.m., ALJ Wyatt convened a hearing on decision # 113725, at which claimant did not appear, and issued Order No. 18-UI-116453 dismissing claimant's request for hearing due to his failure to appear. On September 12, 2018 at 3:30 p.m., ALJ Wyatt conducted a hearing on decision # 132959, at which claimant appeared, and on September 14, 2018 issued Order No. 18-UI-116557, allowing claimant's late request for hearing and affirming decision # 132959. On September 17, 2018, claimant filed applications for review of Order Nos. 18-UI-116453 and 18-UI-116557 with the Employment Appeals Board (EAB). Claimant's application for

review of Order No. 18-UI-116453 was treated under OAR 471-040-0040(6) (February 12, 2010) as a request to reopen the September 12, 2018 hearing on decision # 113725, and was forwarded to OAH. On September 25, 2018, ALJ Kangas issued Order No. 18-UI-117131 dismissing claimant request to reopen because claimant did not show good cause for failing to appear at the hearing on decision # 113725. On October 2, 2018, claimant filed an application for review of Order No. 18-UI-117131 with EAB. On October 19, 2018, EAB issued Appeals Board Decision 18-EAB-0959, affirming Order No. 18-UI-117131.

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 the conclusion allowing claimant's untimely request for hearing on decision # 132959 are **adopted**.

FINDING OF FACT: (1) Claimant claimed benefits for the weeks of August 21 through August 27, 2016, September 4 through September 17, 2016 and September 25 through December 30, 2016 (weeks 34-16, 36-16 through 37-16 and 39-16 through 52-16), the weeks at issue. Each week that claimant claimed benefits he certified to the Department that he was able to perform the work he was seeking. In total, claimant was paid \$9,230 in benefits for the weeks at issue.

CONCLUSIONS AND REASONS: Claimant is assessed a \$9,230 overpayment and is liable to repay that amount to the Department or to have it deducted from any future benefits otherwise payable to him.

ORS 657.155(1)(c) provides that an individual is eligible to receive benefits with respect to any week only if, among other things, claimant is able to work during that week. ORS 657.310(1) 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 caused 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 of those benefits deducted from any future benefits otherwise payable to the individual.

Claimant did not dispute that he was paid a total of \$9,230 in benefits for the weeks at issue. Claimant also did not dispute that he certified to the Department that he was able to work during each of the weeks at issue, and that absent making these certifications he would not have been paid benefits for those weeks. Transcript at 32. Decision # 113725, which became final on March 7, 2018 and has not been vacated, modified or overturned as of the date of this decision with respect to any of the weeks at issue, establishes as a matter of law that claimant was not able to work during the weeks at issue, and that his certifications that he was able to work were also false as matter of law.¹ Consequently, even if claimant was not aware that he was making misrepresentations to receive benefits for the weeks at issue, ORS 657.310(1) still requires him to repay the \$9,230 he received to which he was not entitled or to have \$9,230 deducted from any future benefits otherwise payable to him.

¹ While claimant filed a request to reopen the hearing on decision #113725 on September 17, 2018, that request was denied by Order No. 18-UI-117131, which was affirmed by EAB in Appeals Board Decision 18-EAB-0959. Unless and until 18-EAB-0959 is vacated or overturned in whole or in part, decision #113725 remains legally binding and will operate to establish as a matter of law that claimant was not able to work during the weeks at issue.

DECISION: Order No. 18-UI-116557 is affirmed.

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

DATE of Service: October 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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