

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0244

Affirmed
Ineligible
Late Claims Denied

PROCEDURAL HISTORY: On December 6, 2018, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding claimant was not eligible for benefits for the weeks including December 31, 2017 through August 11, 2018 because he did not file his claims for benefits in accordance with Department rules (decision # 90550) and the second concluding claimant was not eligible for benefits for the weeks including September 16, 2018 through November 24, 2018 also because he did not file his claims for benefits in accordance with Department rules (decision # 94401). Claimant filed a timely request for hearing on each decision. On February 14, 2019, ALJ Seideman conducted a consolidated hearing, and on February 15, 2019, issued Order No. 19-UI-124819, affirming decision # 90550 and Order No. 19-UI-124820, affirming decision # 94401. On March 4, 2019, claimant filed applications for review of Order Nos. 19-UI-124819 and 19-UI-124820 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 19-UI-124819 and 19-UI-124820. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-0245 and 2019-EAB-0244, respectively).

EAB considered claimant's written argument and the entire hearing record when reaching this decision.

FINDINGS OF FACT: (1) In June 2017, while working as an apprentice electrician, claimant suffered a work injury for which he received worker's compensation benefits. Claimant returned to work for a short time in late November 2017, after which he was laid off by his employer.

(2) On or about November 30, 2017, claimant filed an initial claim for unemployment insurance benefits (BYE 47-18). Thereafter, claimant filed weekly claims for benefits for the weeks including November 26 through December 30, 2017. Claimant was a member of a closed union, and during those weeks and thereafter, maintained contact with his union in seeking subsequent employment as an apprentice electrician even though he had residual physical restrictions from his work injury that prevented him from performing much of that work.

(3) In December 2017 while at a WorkSource Oregon office, claimant had a conversation with an employee there and discussed his previous work as an apprentice electrician, his work injury, his physical restrictions and his claims for benefits. Claimant understood from his conversation with the employee that day that he “should not” and “could not” file any weekly claims for benefits if he was unwilling to seek work, other than electrician work, which he was physically able to perform. Transcript at 6, 15-16, 21-23. Because claimant was unable to identify the date on which or person with whom he spoke in December 2017, the actual conversation in question could not be reviewed and what the employee precisely told claimant in that conversation is unknown. However, in accordance with Department policy, an employee in such a situation generally would generally advise an unemployed individual such as claimant that “if you are not physically and mentally able to work, you do not have to claim” and that he might not qualify for benefits if he did claim. Transcript at 14. Because claimant was not willing to seek work other than work as an electrician, and understood from his conversation that he “should not” and “could not” file a weekly claim for benefits under such circumstances, he did not file weekly claims for benefits for the period December 31, 2017 to August 11, 2018.

(4) On August 15, 2018, claimant called a Department employee and requested a hearing on a prior administrative decision which had denied him benefits. The Department records its phone calls. Because that request was identified by date and taken over the phone, the Department was able to locate and review the conversation. The Department employee who spoke to claimant stated, as required during telephone hearing requests, in pertinent part,

"You have requested a hearing. This is an official request to appeal your Administrative Decision. We will schedule a hearing with an Administrative Law Judge regarding this issue...To protect your rights while this appeal is pending you must continue to file weekly claims while unemployed."

Transcript at 6-7.

(5) Also in August 2018, claimant learned from a pamphlet that he might be able to obtain benefits while injured and unable to work in his trade. He spoke a different Department employee regarding that information and was told that the information was true – that if he remained in contact with his union, which he had been doing, he might qualify for benefits while still injured and unable to find work through his union. Accordingly, at claimant’s request, the Department employee reopened claimant’s claim. Claimant then claimed benefits for the weeks including August 12 through September 15, 2018.

(6) On or around September 16, 2018, claimant spoke with another Department employee who contacted him about his recent claims. As with his December 2017 conversation, the actual date and employee with whom claimant conversed remains unknown. In accordance with Department policy, the employee in question would have typically cautioned claimant “if you are not physically and mentally able to work, you do not have to claim” and might not qualify for benefits if he did. However, claimant understood from his conversation with the employee that day that to qualify for benefits he needed to seek work other than as an electrician because he was restricted from working as an electrician. He also understood from that conversation that he “cannot” claim any further unless he sought other work. Transcript at 33. Claimant did not attempt to clarify the conflicting information he had received from the Department and thereafter did not file claims for benefits for the weeks including September 16, 2018 through November 24, 2018.

(7) Shortly after November 24, 2018, claimant again learned that he might be eligible for benefits if he remained in contact with his union even though he had residual physical restrictions from his work injury that kept him from performing most of the work as an electrician. On or about December 3, 2018, claimant contacted the Department and filed claims for benefits for the weeks including December 31, 2017 through August 11, 2018 and September 16, 2018 through November 24, 2018 (weeks 01-18 through 32-18 and 38-18 and 47-18). These are the weeks at issue. The Department did not pay claimant benefits for those weeks.

(8) Claimant had prior unemployment insurance claims with the Department and during those claim periods as well as during the period between December 1, 2017 and November 24, 2018, claimant received various notices and decisions from the Department, like the administrative decisions in this case dated December 6, 2018, that advised him, "Do not stop filing for weekly benefits if you are requesting unemployment during the appeal process." Record Documents, Administrative Decisions at 2; Transcript at 8-9.

(9) No Department employee instructed claimant that he was not allowed to claim benefits for any of the weeks at issue.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant is not eligible for benefits for the weeks at issue.

An "initial claim" is a new claim by a claimant to establish a benefit year or other eligibility period. OAR 471-030-0040(1)(b) (February 23, 2014). In order to claim benefits for a week of unemployment, a claimant must file a claim for the week. OAR 471-030-0045(2). The claim must be filed no later than seven days following the end of the week for which benefits, waiting week credit, or non-compensable credit is claimed. OAR 471-030-0045(4). By logical extension of the holding in *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) where, as here, claimant was not paid benefits or given waiting week credit during the weeks at issue, claimant has the burden to show by a preponderance of the evidence that he was eligible to receive benefits for those weeks. Therefore, claimant has the burden to establish that he claimed benefits in accordance with Department rules.

Here, there was no dispute that claimant did not file a timely claim for benefits for any of the weeks at issue. He filed each and every one of his claims for those weeks on December 3, 2018, which was more than seven days following the end of any week for which benefits were claimed. Accordingly, he failed to claim benefits for any of the weeks at issue within the time limit imposed by OAR 471-030-0045(4), and is thus ineligible for benefits for those weeks as a matter of law.

Claimant argued at hearing and in his written argument that should not be denied benefits because he stopped claiming them based on what he contended was erroneous information¹ given to him by state representatives that he could not or should not claim benefits for a given week unless he was willing and able to seek work other than union work as an electrician. Transcript at 16, 25; Written argument at 2.

¹ See, OAR 471-030-0036(5)(d). An individual who is a member in good standing of a closed union, *i.e.*, one that does not allow its members to seek non-union work, is considered to be actively seeking work, and potentially eligible for benefits, if the individual remains in contact with that union, and is "capable of accepting and reporting for work [based on union standards] when dispatched by that union."

Essentially, claimant asserted that for that reason the Department should be estopped from denying him benefits for any week he did not timely claim benefits for.

The doctrine of equitable estoppel “requires proof of a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it.” *Keppinger v. Hanson Crushing, Inc.*, 161 Or App 424, 428, 983 P2d 1084 (1999) (citation omitted). In addition, to establish estoppel against a state agency, a party “must have relied on the agency’s representations and the party’s reliance must have been reasonable.” *State ex rel SOSOC v. Dennis*, 173 Or App 604, 611, 25 P3d 341, rev den, 332 Or 448 (2001) (citing *Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995)).

Here, the parties disputed whether a false representation was ever made to claimant, and whether it was reasonable for claimant to rely upon such representations. Claimant asserted that in December 2017 he was falsely told by a WorkSource Oregon employee that he “should not” and “could not” file any weekly claims for benefits if he was unwilling to seek work, other than electrician work, which he was physically able to perform. Transcript at 6, 15-16, 21-23. He further asserted that in September 2016 he was falsely told by a different employee “If you can’t be an electrician right now, you need to go find another job and you need to go work in sales, or - or be a cashier, or you need to do something...[and]... You cannot claim any further.” Transcript at 33. However, the Department’s witness asserted that she “reviewed the prior records, any comments that were made on this individual’s claim, to see if anyone had actually told him that he cannot claim, or he should never claim or anything like that. That is not the case.” Transcript at 8. She also explained that in accordance with Department policy, an employee in such a situation speaking to an unemployed individual who was not able to work would generally advise the unemployed individual “if you are not physically and mentally able to work, you do not have to claim” and might not qualify for benefits if he or she did. Transcript at 14. She further asserted that whenever claimant received a decision from the Department denying him benefits, or a communication acknowledging his request for a hearing, which had often occurred in the past, it included an admonition such as “Don’t stop filing for weekly benefits if you’re requesting unemployment during the appeal process” or “to protect your rights while this appeal is pending, you must continue to file weekly claims while unemployed,” which claimant did not dispute. Transcript at 8, 29, 37-38. Claimant did not show that it was more likely than not that the Department employees made false representations to him. Moreover, given the conflicting information claimant alleges to have received during the weeks described in this decision, and the periods of time in which claimant claimed and was paid benefits during those weeks under circumstances substantially identical to weeks in which he claimed he was falsely told not to claim, any reliance on such conflicting information was not objectively reasonable.

Claimant also argued that the Department could have settled the dispute over whether factual misrepresentations were ever made to claimant by producing the recordings of his prior telephone calls with the Department’s adjudicator(s). In this regard, we note that claimant could not establish when and with whom those calls took place, without which it was practicably impossible for the Department to produce the records claimant requested. We also note that claimant has the burden of proof on this issue, not the Department; it was therefore incumbent upon claimant to provide the information necessary for the Department to identify the disputed records, or even to subpoena the records from the Department. The record shows claimant did neither.

Viewing the record as a whole, the evidence regarding whether one or more Department employees falsely represented to claimant that he “should not” or “could not” file claims for benefits for the weeks at issue because he was unwilling to seek work, other than electrician work, is no more than evenly balanced. Where the evidence is no more than evenly balanced, the party with the burden of proof, here claimant, has not met its burden. Accordingly, we found as fact that “No Department employee instructed claimant that he was not allowed to claim benefits for any of the weeks at issue.” Because we have not found that the Department employees made a false representation to claimant, let alone “made it with the intention that it would induce action” by him, we conclude that claimant failed to meet his burden to establish that the Department should be estopped from denying him benefits for the weeks at issue for that reason.

While we have concluded that claimant failed to establish *as fact* that the Department intentionally made false representations to him that he was not allowed to claim benefits for any of the weeks at issue, it does appear based upon orders issued in other contested case unemployment insurance hearings related to claimant’s claim that it is likely that the Department erroneously concluded *as a matter of law* that claimant would not qualify for benefits if he did not seek work other than electrician work under the circumstances presented here. However, the doctrine of equitable estoppel is intended to remedy the negative effects an agency’s factual misrepresentations can have on individuals. The Department made an error of law. Errors of law are not subject to remedy through equitable estoppel, because those errors are correctable through the agency’s hearings and appeals processes. In other words, the doctrine of equitable estoppel is not the appropriate remedy for any errors of law by the Department because if claimant had simply continued to file claims for benefits for the weeks at issue, as he was advised to do by the Department’s various notices and its advice in August of 2018, the Department’s error of law would have been corrected in due course.

Claimant filed late claims for benefits for each of the weeks at issue. Accordingly, claimant is ineligible to receive benefits for those weeks.

DECISION: Order Nos. 19-UI-124819 and 19-UI-124820 are affirmed.

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

DATE of Service: April 11, 2019

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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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判决会影响您的失业救济金。如果您不明白本判决，请立即联系就业上诉委员会。如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، وإذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311

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