

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0264**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On January 28, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work from January 4 through 24, 2015 (weeks 01-15 through 03-15) (decision # 132910). Claimant filed a timely request for hearing. On March 3, 2014, ALJ S. Lee conducted a hearing and on March 6, 2015 issued Hearing Decision 15-UI-34701, concluding that claimant actively sought work he was able to perform from January 4 through 10, 2015 (week 01-15), but did not actively seek work he was able to perform from January 11 through February 21, 2015 (weeks 02-15 through 07-15). On March 12, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 15-UI-34701 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings.

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). An individual is considered able to work for purposes of ORS 657.155(1)(c) only if physically and mentally capable of performing the work the individual is actually seeking during all of the week. OAR 471-030-0036(2) (February 23, 2014). 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). With few exceptions, none of which apply here, 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.* "Direct contact" means "making contact with an employer . . . to inquire about a job opening or applying for job openings in the manner required by the hiring employer." OAR 471-030-0036(5)(a)(B). Where, as here, the Department does not pay a claimant benefits, the claimant has the burden to establish that he is entitled to receive those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

At hearing, the ALJ instructed claimant to fax her and the Department a record of his work search activities during the weeks at issue by 5:00 p.m. on March 3, 2015 for inclusion in the hearing record. Claimant agreed to do so, and the Department did not object to the admission of claimant's work search into the hearing record. Audio Record at 31:45- 34:20. In Hearing Decision 15-UI-34701, stated that

claimant did not submit the work search record, and that he therefore failed to establish he actively sought work he was able to perform during weeks 02-15 through 07-15.<sup>1</sup> The ALJ therefore concluded that claimant failed to meet his burden to establish that he is eligible for benefits for those weeks.<sup>2</sup>

In written argument, however, claimant established that he faxed his work search record to the ALJ and the Department before 5:00 p.m. on March 3, 2015, and had no indication that either of the faxes was not received. We construe claimant's argument as a request for EAB to consider his work search record under OAR 471-041-0090 (October 29, 2006). OAR 471-041-0090(2) states that EAB may consider new information when the party offering the information establishes that the new information is relevant and material to EAB's determination, and that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. Claimant's work search record is relevant and material to whether claimant actively sought work he was able to perform during the weeks at issue. The ALJ's apparent failure to receive claimant's fax of his work search record was a circumstance beyond claimant's reasonable control that prevented him from offering the information into evidence.

Claimant's request for consideration of his work search record therefore is allowed. However, further inquiry into claimant's work search record during the weeks at issue is necessary to determine whether claimant actively sought work he was able to perform during each of those weeks. Due process of law also requires that the Department be given the opportunity to cross-examine claimant regarding his work search record, and to respond to the information contained therein. Hearing Decision 15-UI-34701 therefore is reversed, and this matter remanded to OAH for another hearing.

**DECISION:** Hearing Decision 15-UI-34701 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE of Service:** April 29, 2015

**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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<sup>1</sup> Hearing Decision 15-UI-34701 at 3-4.

<sup>2</sup> *Id.*