

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0638

Reversed
Eligible

PROCEDURAL HISTORY: On March 17, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from December 28, 2014 through January 3, 2015 (decision # 73149). On March 19, 2015, claimant filed a timely request for hearing. On April 9, 2015, claimant re-requested a hearing. On April 16, 2015, ALJ Kangas issued Hearing Decision 15-UI-37031, dismissing claimant's April 9th request as untimely, subject to her right to renew the request by responding to an appellant questionnaire within 14 days of the date her decision was mailed. On April 20, 2015, the Office of Administrative Hearings (OAH) received claimant's request. On May 4, 2015, OAH mailed a letter canceling Hearing Decision 15-UI-37031. On May 19, 2015, ALJ Holmes-Swanson conducted a hearing, and on May 20, 2015 issued Hearing Decision 15-UI-38770, allowing claimant's request for hearing and concluding that claimant was not eligible for benefits from December 28, 2014 through January 3, 2015 because she did not actively seek work. On June 1, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party requested review of the portions of the ALJ's decisions allowing claimant's request for hearing or concluding that claimant was available for work from December 28, 2014 through January 3, 2015. The Department's witness also conceded that claimant was available for work from December 28, 2014 through January 3, 2015.¹ We therefore confine our review to the remaining issue, the adequacy of claimant's work search activities during that week.

FINDINGS OF FACT: (1) On November 15, 2014, claimant filed an initial claim for unemployment insurance benefits. Her weekly benefit amount was \$549.² Claimant filed a weekly claim for

¹ Audio recording at ~41:04.

² We take notice of this fact, which is 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 in writing, 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 fact will remain in the record.

unemployment insurance benefits for the week of December 28, 2014 through January 3, 2015, which is the week at issue.

(2) Between November 2014 and January 2015, claimant worked for Backup Therapy Staffing, LLC. Backup Therapy Staffing, LLC was a staffing agency. The employer assigned claimant to work as a physical therapist assistant at its clients' facilities at a pay rate of \$35 per hour.

(3) Claimant worked during the week ending December 27, 2014, and was assigned to work during the week of December 28, 2014 through January 3, 2015 but the employer canceled the assignment for the week at issue. At the time, the employer had scheduled claimant to return to work on January 5, 2015 and work a minimum of four hours each day from January 5, 2015 through January 9, 2015 at her standard rate of pay, which would total at least \$700.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant actively sought work during the week at issue.

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). However, for individuals on a temporary layoff of four weeks or less with her regular employer, "If the individual had, as of the layoff date, been given a date to return to full-time work or work for which remuneration is paid or payable that equals or exceeds the individual's weekly benefit amount, such individual is actively seeking 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 temporary layoff occurred." OAR 471-030-0036(5)(b). "Full-time work" is 40 hours per week, except where, due to custom, practice or agreement, a normal work week of more or less than 40 hours per week is utilized. OAR 471-030-0022.

In Hearing Decision 15-UI-38770, the ALJ asserted that, to be considered "actively seeking work" while on a temporary layoff, OAR 471-030-0036(5)(b) "requires an employee to be returning to full time work no more than four weeks from the layoff," and, since claimant conceded she was not returning to "full time work," the ALJ concluded that claimant did not actively seek work during the week at issue.³ Likewise, the Department's witness stated during the hearing that claimant must have sought work with other employers if she would work less than 40 hours a week after her layoff ended.⁴ However, OAR 471-030-0036(5)(b) does not state that an employee must return to full-time or 40 hours of work per week after a layoff before that rule applies. It provides that an individual on temporary layoff of four weeks or less with "a date to return to full-time work *or work for which remuneration is paid or payable that equals or exceeds the individual's weekly benefit amount*" is considered to have actively sought work if she remains in contact with her regular employer and is capable of accepting or reporting for work with that employer.⁵ Therefore, although claimant was not going to return to full-time work, she

³ Hearing Decision 15-UI-38770 at 4.

⁴ Audio recording at ~47:30.

⁵ Emphasis added.

may still be excused from the requirement of seeking work with other employers if, while on a temporary layoff of four weeks or less, she had a date to return to work for which her remuneration is greater than her weekly benefit amount.

In this case, claimant's weekly benefit amount was \$549. She was, at the time of her temporary layoff, scheduled to return to work on January 5th, which was a specific date less than four weeks after her layoff date, and work a minimum of 20 hours at a rate of \$35 per hour, which totals \$700, an amount greater than her weekly benefit amount. Having met the requirements under OAR 471-030-0036(5)(b), claimant was not required to seek work except by maintaining contact with Backup Therapy Staffing, LLC and remaining capable of accepting or reporting for work with that employer. As there is nothing in this record to suggest claimant did not meet that requirement, we conclude that claimant actively sought work during the week of December 28, 2014 through January 3, 2015, and she is eligible for benefits during that week.⁶

DECISION: Hearing Decision 15-UI-38770 is set aside, as outlined above.⁷

J. S. Cromwell and D. P. Hettle, *pro tempore*;
Susan Rossiter, not participating.

DATE of Service: July 16, 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. 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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⁶ The Department, having paid claimant benefits and now seeking to deny them, had the burden of proving by a preponderance of the evidence that benefits should not have been paid. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). The Department did not offer any evidence suggesting that claimant failed to maintain contact with Backup Therapy Staffing, LLC, or that she was not capable of accepting or reporting for work with Backup Therapy Staffing, LLC during the week of December 28, 2014 through January 3, 2015.

⁷ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.