

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0741

Affirmed
Ineligible Weeks 41-14 through 50-14

PROCEDURAL HISTORY: On December 19, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 112014) concluding claimant was ineligible for benefits from October 5, 2014 through December 6, 2014 (weeks 41-14 through 49-14). Claimant filed a timely request for hearing. On January 28, 2015, ALJ Seideman conducted a hearing, and on January 29, 2015 issued Hearing Decision 15-UI-32580, affirming the Department's decision and concluding that claimant is also ineligible for benefits from December 7, 2014 through January 3, 2015 (weeks 50-14 through 53-14). On February 17, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On April 1, 2015, EAB issued Decision 2015-EAB-0173, reversing the ALJ's decision and remanding this matter to the Office of Administrative Hearings (OAH) for another hearing. On May 27, 2015, ALJ Seideman conducted a hearing, and on May 29, 2015 issued Hearing Decision 15-UI-39292, concluding claimant is ineligible for benefits from October 5, 2014 through December 13, 2014, and eligible for benefits from December 14, 2014 through January 3, 2015. On June 16, 2015, claimant filed an application for review with EAB.

No adversely affected party requested a hearing on the portion of Hearing Decision 15-UI-39292 in which the ALJ concluded that claimant is eligible to receive benefits for the period December 14, 2014 through January 3, 2015 (weeks 51-14 through 53-14) because he did actively seek work during those weeks. We therefore limit our review to whether claimant is eligible for benefits for the weeks from October 5, 2014 through December 13, 2014 (weeks 41-14 through 50-14).

FINDINGS OF FACT: (1) Claimant's regular employer was Donahue Construction. On September 26, 2014, Donahue Construction told claimant he was laid off, and would return to work December 1, 2014.

(2) Claimant filed an initial claim for unemployment benefits online on October 6, 2014. The online application set forth the Department's requirements for a claimant to be considered on "temporary layoff" and the differing work search requirements for benefit eligibility whether on "temporary layoff"

or not. Audio Record at 7:10 to 7:53. Claimant indicated he was on a temporary layoff when he filed his initial claim.

(3) Claimant filed weekly claims for benefits from October 5, 2014 through December 13, 2014 (weeks 41-14 through 50-15), the weeks at issue. The Department denied claimant benefits for weeks 41-14 and 46-14 due to excess earnings, and paid benefits for weeks 42-14 through 45-14, and 47-14 through 50-14.¹

(4) Claimant filed his weekly benefit claims online. When filing claims for each of weeks 41-14 through 47-14, claimant indicated that he was on a temporary layoff and did not report any work searches when filing his claims for those weeks.

(5) Claimant returned to work for Donahue Construction on November 9, 2014. On November 15, 2014, the employer told claimant he was laid off without a definite return to work date.

(6) On November 28, 2014, claimant attended a reemployment assessment (REA) interview during which a Department representative told claimant he was not on a temporary layoff under the Department's rules, and that he needed to engage in five work-seeking activities per week, with at least two of those being direct contact with an employer, to be eligible for benefits.

(7) When claimant filed his weekly claim online for week 48-14, he reported having engaged in two work seeking activities.

(8) When claimant filed his weekly claims online for weeks 49-14 and 50-14, he reported having engaged in two work seeking activities during each of those weeks.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant is ineligible for benefits from October 5, 2014 through December 13, 2014 (weeks 41-14 through 50-14).

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 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). OAR 471-030-0036(5) states that the minimum requirements for an individual to be considered "actively seeking work" are five work-seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual. OAR 471-030-0036(5)(b) provides, in pertinent part, that, for an individual on temporary layoff of four weeks or less with the individual's regular employer, if the individual had, as of the layoff date, been given a date to return to work, 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. After four calendar weeks have passed following the week in which the temporary layoff

¹ We take notice of these facts, which are 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 facts will remain in the record at 2015-EAB-0741.

occurred, the individual must seek work with other employers in addition to the individual's regular employer.

The Department has the burden of persuasion with respect to any weeks in which the Department initially paid, and now seeks to retroactively deny, benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By extension of that principle, claimant has the burden of persuasion with respect to weeks the Department denied benefits. Therefore, in this case, the Department has the burden with respect to weeks 42-14 through 45-14, and 47-14 through 50-14, and claimant has the burden with respect to weeks 41-14 and 46-14. The Department met its burden, and claimant did not.

Claimant did not qualify for the work search requirements permitted for an individual on a temporary layoff because his regular employer never gave him a date to return to full-time work within four weeks or less. Claimant asserted during the first hearing that he believed he was on a temporary layoff until he spoke with a Department representative on December 18, 2014. Audio Record at 14:04 to 14:56 (January 28, 2015). At the second hearing, claimant alleged that he performed and reported adequate work searches to the Department for weeks 41-14 through 50-14, but that the information was not sent to the Department via the online claim system because he indicated online that he was on a temporary layoff. Audio Record at 20:59 to 25:47 (May 27, 2015). However, claimant's explanation for his incomplete work searches does not show why the Department's records would show claimant reported fewer than five work search activities for weeks 48-14 through 50-14. The record as a whole shows claimant failed to engage in at least five work search activities for each of the weeks at issue. Accordingly, claimant did not actively seek work during each of those weeks. He therefore is ineligible for benefits for the weeks at issue.

DECISION: Hearing Decision 15-UI-39292 is affirmed.

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

DATE of Service: August 10, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.