

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0884

Affirmed
Ineligible Weeks 15-15 Through 17-15

PROCEDURAL HISTORY: On June 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision (decision #161055) concluding that claimant did not actively seek work from April 5 through May 2, 2015 (weeks 15-15 through 17-15). Claimant filed a timely request for hearing. On July 2, 2015, ALJ S. Lee conducted a hearing, and on July 7, 2015, issued Hearing Decision 15-UI-41138, affirming decision #161055. On July 21, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

In his written argument, claimant provided information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) On June 30, 2014, claimant filed an initial claim for benefits. Claimant's weekly benefit amount was \$417.

(2) In December 2014, claimant reopened his unemployment claim. On December 30, 2014, the Department sent him Publication 195 which explains the work search requirements a claimant must meet to be considered actively seeking work and therefore eligible for unemployment benefits. The publication specifies that an individual who is laid off by the individual's regular employer, but who does not have "a definite scheduled return to work date" of four weeks or less, must complete at least five work-seeking activities each week for which benefits are claimed.¹

¹ We take notice of this language in the June 2014 version of Publication 195, a publication which is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing.

(3) On April 6, 2015, claimant was laid off from his work as a logger for Fall Creek Logging. Claimant's supervisor told claimant that he and other laid off employees could expect to return to work "approximately April 27, 2015." Audio Record at 19:39.

(4) Claimant claimed and was denied unemployment benefits for weeks 15-15 through 17-15 (April 5 through May 2, 2015), the weeks at issue.

(5) During the weeks at issue, claimant regularly contacted his employer and was told that no employees were being called back to work. Claimant was not called back to work on April 27, 2015 as he had expected. Other than contacting his employer, claimant performed no work-seeking activities during the weeks at issue.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that claimant did not actively seek work from April 5 through May 2, 2015.

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). The Department has the burden of persuasion to prove eligibility for benefits for any weeks in which the Department paid a claimant benefits. *See Nichols v. Employment Division*, 24 Or App 195 (1976). Under OAR 471-030-0036(5)(a) (February 23, 2014), an individual is actively seeking work if the individual performs at least five work seeking activities during each week claimed, unless the individual is on a temporary layoff. An individual on temporary layoff is defined as one who has been laid off by the individual's regular employer for a period of four weeks or less, and is considered to be actively seeking work if the individual remains in contact with that employer for a period of up to four weeks after the layoff. OAR 471-030-0036(5)(b)(A). An individual does not meet the requirements of this provision if the individual "had not, 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." OAR 471-030-0035(5)(b)(B).

On the date claimant's regular employer laid him off, his supervisor gave him no definite date on which he was expected to return to work. Claimant was therefore not subject to the special work search requirements for individuals on a temporary layoff and was required to complete five work seeking activities for each week claimed. Claimant failed to do so and therefore did not actively seek work during the weeks at issue.

In his written argument, however, claimant contended that the ALJ "used the wrong criteria to determine [claimant's] eligibility: The regulations do not require a 'date-certain' to return to work and the employer provided only an approximate date." Claimant's Written Argument at 5. Claimant argued that the relevant regulation, OAR 471-030-0036(5)(b) requires only that an individual be given a return to work date that is within four weeks of the date on which the individual was laid off, but that the return to work date need not be fixed or certain. We disagree.

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 at Decision 2015-EAB-0884.

As explained in Publication 195, the Department interprets the special work search provisions for an individual on temporary layoff under OAR 471-030-0036(5)(b) as applying only to an employee who has been given “a definite scheduled return to work date” of four weeks or less when laid off. The Oregon Court of Appeals will “defer to an agency’s interpretation of its own rule unless it is inconsistent with the rule’s text, context or other source of law.” *Isayeva v. Employment Department*, 266 Or App 806, 312 (2014), citing *Callaway v. Employment Department*, 225 Or App 650, 654-655 (2009). Claimant has presented no evidence or argument that the Department’s interpretation of its rule regarding work search requirements for a claimant on temporary layoff is “inconsistent with the rule’s text, context or other source of law.” Claimant thus failed to show that he was subject to the work search requirements for an individual on temporary layoff and failed to meet his burden to demonstrate that he actively sought work during the weeks at issue.

Claimant did not actively seek work from April 5 through May 2, 2015 (weeks 15-15 through 17-15). He is ineligible to receive unemployment benefits for these weeks.

DECISION: Hearing Decision 15-UI-41138 is affirmed.

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

DATE of Service: August 26, 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.