

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1303**

*Modified*  
*Ineligible*

**PROCEDURAL HISTORY:** On August 27, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available and did not actively seek work during the weeks of May 31, 2015 through August 22, 2015 (decision # 140126). Claimant filed a timely request for hearing. On October 9, 2015, ALJ Vincent conducted a hearing, and on October 14, 2015 issued Hearing Decision 15-UI-45884, concluding claimant was not actively seeking work during the weeks of May 24, 2015 until August 22, 2015. On November 3, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

During the hearing, the ALJ stated that he had not received certain documents that claimant delivered to the Office of Administrative Hearings (OAH) on October 7, 2015 as proposed hearing exhibits, and agreed to hold the record open to enable him to admit those documents into evidence after being scanned into the electronic record. Audio at ~ 24:35, ~25:08. However, the ALJ neglected to mark those documents as a hearing exhibit after they were scanned. Because those documents were described at the hearing and were readily identifiable, EAB has marked them as EAB Exhibit 1, mailed copies of EAB Exhibit 1 to the parties along with this decision and provisionally admits EAB Exhibit 1 into evidence subject to any objections filed by the parties. A party who objects to the entry of EAB Exhibit 1 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

**FINDINGS OF FACT:** (1) Until sometime before June 3, 2015, claimant worked as a truck driver for Albertson's Stores. Union membership was required for this job and claimant was a member in good standing of Teamster's Local 305, a closed union. Also sometime before June 3, 2015, claimant sustained a hip and sacroiliac joint injury on the job, filed a worker's compensation claim and took a leave of absence from work due to the injury.

(2) Sometime shortly before June 3, 2015, claimant's physician determined that his physical condition had stabilized and released him to light duty work subject to medical restrictions. The restrictions included intermittent standing and intermittent walking for no more than 50 percent of his work day, no bending or climbing and no pushing, pulling, carrying or lifting in excess of 20 pounds. Around this time, also shortly before June 3, 2015, claimant's worker's compensation claim was closed. Claimant stopped receiving worker's compensation benefits. After claimant's claim was closed, Albertson's refused to allow claimant to return to work in a light duty position that accommodated his medical restrictions. As a result of claimant's physical limitations and his medical restrictions, he was unable to work as truck driver.

(3) On June 3, 2015, claimant filed an initial claim for unemployment benefits online. Claimant disclosed in the online application that he was on leave from his regular job due to his injury and his work restrictions. Around this time, claimant called the Department about his claim. The representative that claimant spoke with told him that she was aware he was a union member and had some medical restrictions. The representative asked claimant if he was able to perform any duties for Albertson's and claimant responded that he could because he had a release from his physician approving him for light duty work. Audio at ~13:07. Claimant then understood the representative to tell him that he did not need to look for work to maintain his eligibility for benefits because he was a union member, and he could answer the Department's claim report question for each week he claimed benefits by stating that he had actively sought work that week, even though he had not.

(4) Claimant claimed benefits for the weeks of May 31, 2015 through August 22, 2014 (weeks 22-15 through 33-15), the weeks at issue. During the weeks at issue, claimant did not look for any work other than through his union and made no direct employer contacts. Claimant answered the questions in the weekly claim report by stating that he had actively sought work that week. Claimant was aware that as result of his injury and his medical restrictions, the union did not have any work available for him that he was able to perform. Although claimant discussed with his union representative the possibility of returning to work for Albertson's in a light duty position, he was aware that Albertson's had refused to give him a light duty position after his worker's compensation claim was closed, and Albertson's did not have any suitable positions for him.

**CONCLUSIONS AND REASONS:** Claimant did not actively seek work during the weeks of May 31, 2015 through August 22, 2015. Claimant is not eligible to receive benefits during those weeks.

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). With few exceptions, 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). However, if, like claimant, an individual is a member in good standing union that does not allow members to seek non-union work, an individual is actively seeking work by remaining in contact with that union and being capable of accepting and reporting for work when dispatched by that union. OAR 471-030-0036(5)(d).

Claimant did not dispute that his work search activities during the weeks at issue consisted only of contacting his union representative. Audio at ~11:20. Claimant also agreed that, during the weeks at issue, he was not capable of reporting for the work that his union might have available for him and to which it might refer him, and that he was contacting the union for the purpose of trying to induce Albertson's to create a light duty position for him that fell within his medical restrictions. Audio at ~16:00, ~16:36, ~18:22, ~21:52. Claimant's sole justification for his very limited work search was the alleged representation made to him by a Department representative that, because he was a member of a union, he was exempt from the Department's usual work search requirements. *See* Audio at ~11:40, ~13:07, ~15:39, ~16:36, ~28:28. In essence, claimant appears to contend that, based on his alleged understanding of what the Department representative told him, the Department is estopped from taking the position that his maintaining contact with his union was, under the circumstances, not sufficient to meet the Department's requirements for an adequate work search.

Estoppel against a governmental entity requires a finding that an agency or its representative knowingly made false or misleading statements of a material fact to an individual and the individual justifiably and detrimentally relied upon those inaccurate statements in taking or not taking action. *See e.g. Employment Division v. Western Graphics*, 76 Or App 788, 791, 710 P2d 788 (1985). Here, undercutting claimant's account of what the Department representative supposedly told him on June 3, 2015, was the inability of the Department's witness at hearing to locate any record of a phone call that claimant made to the Department in which his work search requirements were addressed. Audio at ~29:32. Assuming the accuracy of claimant's account, while claimant might have understood the representative to inform him that he was exempt from the usual work search requirements, what he understood does not establish that the representative knowingly misled him. Claimant's account of his supposed conversation with the representative is also questionable because it makes no sense that the representative would have asked him if he was physically able to perform work for Albertson's and not whether he was able to perform the work to which the union would dispatch him. Assuming the representative did indeed tell claimant that he did not need to do anything to ensure an adequate work search other than maintaining contact with the union, it was unreasonable for claimant to rely on such a statement. If claimant's statements are taken at face value, he would have had to think that, as a union member, he did not need to pursue work he was capable of performing to maintain his eligibility for benefits but, rather, it was sufficient if he remained in contact with a union who had no work available for a person with his medical restrictions and could not refer him to any work. It was plainly unreasonable to interpret the Department's work search requirements as absolving union members from the requirement that they be physically capable of reporting and performing the work that the union had available for members. Because it is unlikely that the representative made the assurances to claimant that claimant recounted, and his reliance on such assurances if they were made was unreasonable, it is not appropriate to find an estoppel against the Department on these facts.

Having rejected claimant's estoppel argument, claimant admitted that he did not look for work during the weeks at issue beyond contacting his union when he was not capable of reporting for any work that it had available. Audio at ~11:20, ~16:00, ~16:36, ~18:10, ~21:52. Claimant did not meet the physical capacity requirement of OAR 471-030-0036(5)(d), which would allow him to actively seek work only by remaining in contact with his union if he was capable of accepting and reporting for work to which the union would dispatch him. Because claimant's circumstances fell outside this exception, he was required to comply with the more general work search requirements of OAR 471-030-0036(5)(a). By

only contacting his union during each of the weeks at issue, claimant's work search during those weeks was inadequate because it did not include five work seeking activities or two direct employer contacts each week. Claimant did not actively look for work during the weeks of May 31, 2015 through August 22, 2015. Accordingly, claimant is ineligible to receive benefits during those weeks.

**DECISION:** Hearing Decision 15-UI-45884 is modified, as set out above.

Susan Rossiter and J. S. Cromwell

**DATE of Service: December 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](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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