

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1379-R

Appeals Board Decision 2015-EAB-1379 Adhered To On Reconsideration

PROCEDURAL HISTORY: On September 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 1157-9) concluding claimant did not actively seek work from August 16, 2015 to August 22, 2015 (week 33-15). Claimant filed a timely request for hearing. On November 10, 2015, ALJ Murdock conducted a hearing, and on November 13, 2015 issued Hearing Decision 15-UI-47641, affirming the Department's decision. On November 19, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On November 30, 2015, EAB issued Appeals Board Decision 2015-EAB-1379, adopting Hearing Decision 15-UI-47641. On December 14, 2015, claimant timely filed a written argument. Under the authority granted to us by ORS 657.290(3), we will reconsider Appeals Board Decision 2015-EAB-1379 to review issues raised in claimant's timely written argument.

CONCLUSIONS AND REASONS: Claimant's request for reconsideration is granted. On reconsideration, Hearing Decision 15-UI-47641 is re-affirmed.

Claimant first argued that the Department violated claimant's constitutional rights to "proper notice and a fair hearing" by issuing him "erroneous information about claims filed on or after February 23, 2014" in the notice of hearing, which, he alleged, "misdirected Claimant/Appellant as he prepared for the hearing and negatively impacted Claimant's/Appellant's ability to effectively participate during the hearing." Claimant requested that EAB direct the Department "to credit one waiting week to Claimant/Appellant to remedy the violation in lieu of remanding the matter for further hearing."

The Notice of Hearing mailed to claimant notified him of the date, time, law and rules applicable to his hearing, and included versions of the applicable rule for claims filed before February 23, 2014 and for claims filed on or after that date. The format the Office of Administrative Hearings (OAH) chose to use to illustrate which portions of the rule were modified for claims filed after February 23, 2014 --placing omitted text in brackets -- may have seemed confusing, particularly since OAH chose not to explain what the bracketed text meant. Claimant has not shown how this formatting violates OAR 471-040-0015 (Notice of Hearing) or constitutes a denial of constitutional due process, and such a violation is not apparent to us. In addition, EAB does not have the statutory authority to award claimant the relief he

sought. ORS 657.275 confines EAB's authority with respect to relief from unemployment insurance hearing decisions to affirming, modifying or setting aside decisions reached by administrative law judges, and remanding for additional evidence if necessary, and does not include ordering the Department to make equitable reparation.

Next, claimant requested that EAB consider new information, specifically a letter dated December 7, 2015 from claimant's employer "to correct misinformation provided by [] the employer's third party unemployment claim administrator to the Employment Department" regarding claimant's unemployment status during the week at issue. Claimant asserted that the Department witness presented this misinformation during her testimony at the hearing. Even if we agreed with claimant that the information provided by the Department during the hearing was incorrect, disregarded all of it, and admitted claimant's new information into the record, the outcome of this decision would remain the same.

Considering claimant's testimony alone, he acknowledged that the employer's business had undergone a partial closure during the two weeks at issue during which he was not working full time, and that the employer's decisions about returning employees to work were at least partially dependent on the weather. Although claimant worked part time both weeks, he was required as a condition of benefits (or waiting week credit) to immediately begin actively seeking work unless, at the time he was temporarily laid off work, he had been given a date to return to full time work. Claimant's description of events, that he was laid off and instructed to call every day to ask about the possibility of returning to work, demonstrates that he did not meet that requirement. Accordingly, based solely on claimant's testimony, claimant was on a temporary layoff of an unknown duration without having been given a date to return to full time work. Claimant remained subject to the requirement in OAR 471-030-0036(5) that he actively seek work immediately after being temporarily laid off by the employer, and the record fails to show that he did so, making him ineligible for benefits (or waiting week credit) during the week at issue.

The letter claimant asks EAB to admit into evidence stated that claimant's last day of work before he was laid off was August 17, 2015, making the effective date of his layoff August 18, 2015. However, the employer stated in the letter that the employer did not instruct claimant of his return to work date until August 21, 2015. OAR 471-030-0036(5)(b)(A), the only provision under which claimant would not have been required to begin seeking work immediately after his layoff as a condition of eligibility, requires that the employer be given a date to return to full-time work "as of the layoff date." The employer's letter demonstrates that, with respect to claimant's layoff, the provision does not apply, and, as previously noted, claimant was subject to the requirement in OAR 471-030-0036(5) that he seek work immediately after his layoff as a condition of eligibility for benefits or waiting week credit. Therefore, because the new information claimant sought to have admitted into evidence would not affect the outcome of our decision, we need not determine whether or not the evidence was admissible.¹

Finally, claimant argued that the Department's witness provided erroneous and irrelevant testimony about the facts at issue. For the reasons stated above, even if we agreed with claimant's argument, the outcome of this decision would remain the same. Irrelevant testimony about weeks that were not at

¹ EAB is statutorily authorized to perform a *de novo* review on the record. ORS 657.275(2). OAR 471-041-0090 provides that EAB may only consider a party's new information if, in addition to being relevant and material, the party offering the new information shows that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing.

issue had no bearing on our original decision in this matter, and erroneous testimony about the events in question would not have changed the outcome of this matter because, as we have stated herein, even if we considered only claimant's testimony when reaching this decision, our decision would remain the same as it was in Appeals Board Decision 2015-EAB-1379.

DECISION: On reconsideration, Hearing Decision 15-UI-47641 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 15, 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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