

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1496

Reversed & Remanded

PROCEDURAL HISTORY: On August 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was available for work from July 19, 2015 to August 15, 2015 (decision # 90118). The employer filed a timely request for hearing. On November 20, 2015, ALJ Vincent conducted a hearing, and on November 30, 2015 issued Hearing Decision 15-UI-48454, concluding claimant was able to, available for, and actively seeking work from July 19, 2015 to July 25, 2015, and was not able to, available for, and actively seeking work from July 26, 2015 to August 15, 2015. On December 14, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party requested review of the portion of Hearing Decision 15-UI-48454 concluding claimant was eligible for benefits from July 19, 2015 to July 25, 2015, or that she was able to work and available for work throughout the entirety of the weeks at issue. We therefore confine further review of this matter to claimant's eligibility for benefits from July 26, 2015 to August 15, 2015 based on her work seeking activities.

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

CONCLUSIONS AND REASONS: Hearing Decision 15-UI-48454 should be reversed and this matter remanded for additional evidence.

To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c). An individual is considered to be actively seeking work "when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity," which the Department has decided requires individuals 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," unless the individual is temporarily laid off for four weeks or less with the individual's regular employer, and "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." OAR 471-030-0038(5)(a) and (b)(A). During such a layoff period, the individual is considered to be actively seeking work just by remaining in contact with and being capable of accepting and reporting for suitable work with that employer during the layoff period. OAR 471-030-0038(5)(b)(A).

In Hearing Decision 15-UI-48454, the ALJ concluded that claimant did not actively seek work from July 26, 2015 to August 15, 2015 because the work search exemption requires that claimant have a date certain to return to work within four weeks of her layoff from Eagle Eye, and claimant testified only that she was given a return to work date by Eagle Eye "about" three weeks in advance of her return to work. Hearing Decision 15-UI-48454 at 3. The record was not developed enough to support the ALJ's conclusion for two reasons.

First, claimant testified that, because she worked for Intermountain Staffing during the week ending July 25, 2015, and had a return to work date at Eagle Eye, her regular employer, on August 17, 2015, within four weeks of when she last worked for Intermountain Staffing, she was on a temporary layoff during the weeks at issue and was not required to seek work other than by remaining in contact with Eagle Eye. However, the Department's exception to the work search requirement is meant for individuals laid off from, and returning to work for, the same employer. Therefore, claimant is not exempt from the work search requirement based on the facts as they were developed at the hearing because the ALJ did not conduct a sufficient inquiry.

On remand, the ALJ should ask for claimant's last date of work for Eagle Eye, the effective date of her layoff with Eagle Eye, whether, at the time of the layoff, Eagle Eye gave claimant a return to work date, and whether claimant anticipated that her return to work for Eagle Eye was for full-time work or work for which the remuneration exceeded her weekly benefit amount. If the record developed on remand demonstrates that on the date Eagle Eye laid claimant off, it gave her a return to full time work date within four weeks, the ALJ should then confirm with claimant that she remained in contact with Eagle Eye during each week of her layoff and was capable of accepting and reporting to suitable work with Eagle Eye throughout that time.

Second, claimant testified that she did not immediately begin seeking work after her layoff because she allegedly received misleading information about her responsibility for seeking work from a Department employee, upon which she relied to her detriment. She argued that she should not be denied benefits during the weeks she relied upon that misleading information. In so doing, claimant is asking that the doctrine of equitable estoppel be invoked against the Department to bar it from denying her benefits during the weeks at issue.

To invoke estoppel, claimant must show that the Department knowingly made a material misstatement of fact on which claimant reasonably relied to her detriment. *See Employment Dept. v. Furseth*, 140 Or App 464, 915 P2d 1043 (1996); *Employment Div. v. Western Graphics Corp.*, 76 Or App 608, 710 P2d 788 (1985). Claimant testified that she told the Department employee she had last worked during the week ending July 25, 2015 and anticipated returning to work August 17, 2015, which prompted the employee to inform claimant that she need not seek work beyond maintaining contact with her regular

employer. However, we cannot determine that the Department knowingly made a material misstatement of fact, or that claimant reasonably relied on the Department employee's statements, unless the record is developed enough to determine whether claimant provided the Department with complete and accurate information about her specific circumstances.

On remand, the ALJ should ask claimant for details about the call, including the date and time she made the call, the name of the employee with whom she spoke, and whether she spoke with the employee anonymously or had provided the employee with personal identifying information so the employee had access to claimant's claim records during the call. If available and identifiable, the Department should call the employee with whom claimant spoke about her work search requirements to testify about what she told claimant, and under what circumstances. If the Department is unable to identify or call that individual to testify, the ALJ should ask the Department's witness whether the Department has any records of claimant's call, what was discussed during the call, whether the employee with whom claimant spoke had access to claimant's claim records at the time of the call, and whether Department records show that claimant was provided with any specific information about her claim or work seeking responsibilities. The ALJ should ask claimant whether she told the Department employee with whom she spoke specific details about her layoff, including identifying for the Department which of her former employers had laid her off work (Intermountain Staffing) and which employer she was scheduled to return to work with on August 17, 2015 (Eagle Eye). In the absence of such information, we cannot determine whether a material misstatement occurred, or whether claimant was entitled to rely on the information she received.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant actively sought work between July 26, 2015 and August 15, 2015, or whether the Department should be prohibited from denying her benefits during that period under the doctrine of equitable estoppel, Hearing Decision 15-UI-48454 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 15-UI-48454 is set aside, and this matter remanded for further proceedings consistent with this order.¹

Susan Rossiter and J. S. Cromwell

DATE of Service: December 17, 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

¹ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-48454 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

'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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