

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0134

Reversed & Remanded

PROCEDURAL HISTORY: On April 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant failed to actively seek work from March 5, 2015 to April 18, 2015 (decision # 113720). On April 24, 2015, the Department served notice of a decision based on decision # 113720 assessing a \$2,196 overpayment, \$549 monetary penalty and 16 penalty weeks (decision # 194881). On May 13, 2015, decision # 113720 became final without a request for hearing having been filed. On May 14, 2015, decision # 194881 became final without a request for hearing having been filed. On September 28, 2015, claimant filed late requests for hearing.¹ On October 6, 2015, ALJ Kangas issued Hearing Decisions 15-UI-45417 and 15-UI-45418, dismissing claimant's late requests for hearing subject to his right to renew the requests by submitting responses to an appellant questionnaire by October 20, 2015. On October 16, 2015, claimant submitted his responses. On November 10, 2015, ALJ Vincent conducted a consolidated hearing. On November 13, 2015, the ALJ issued Hearing Decision 15-UI-47647, allowing claimant's late request for hearing on decision # 113720 and concluding claimant did not actively seek work from March 5, 2015 to April 18, 2015, and Hearing Decision 15-UI-47648, allowing claimant's late request for hearing on decision # 194881 and concluding claimant was overpaid benefits in the amount of \$2,196, but did not make a misrepresentation and was not liable for penalties. On December 1, 2015, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-47647 and 15-UI-47648. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0133 and 2016-EAB-0134).

As a preliminary matter, no adversely affected party requested review of the portions of Hearing Decisions 15-UI-47647 and 15-UI-47648 allowing claimant's late requests for hearing and concluding that claimant was not liable for penalties. We therefore confine this decision to the following issues: whether claimant actively sought work between March 5, 2015 and April 18, 2015 in accordance with

¹ Claimant also intended the request for hearing to apply to an approximately \$25,000 overpayment issued in a previous year. That matter is not before EAB at this time and will not be addressed.

ORS 657.155(1)(c) and OAR 471-030-0036(5); and whether claimant received benefits to which he was not entitled during the same weeks under ORS 657.310(1) or ORS 657.315.

CONCLUSIONS AND REASONS: Hearing Decisions 15-UI-47647 and 15-UI-47648 should be reversed, and these matters remanded for additional proceedings.

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.² For the reasons that follow, the record in these matters require further development.

Missing Exhibit: In Hearing Decision 15-UI-47647, the ALJ made the following evidentiary ruling:

Ex. 1 was received from the Department and admitted into evidence on November 11, 2015. The hearing record closed on that date.³

The record OAH transmitted to EAB upon being notified of claimant's appeal is incomplete. No documents marked as Exhibit 1 were transmitted by OAH to EAB, nor are any documents consistent with the ALJ's description of Exhibit 1 contained in the record. Because EAB did not receive the exhibit, and it is not otherwise available to EAB through Department records, it appears that further proceedings at OAH are or may be necessary before a complete record can be provided.

Active Work Search: ORS 657.155(1)(c) requires, as a condition of eligibility for unemployment insurance benefits, that individuals claiming benefits actively seek work. Under OAR 471-030-0036, the Department has defined what it means to actively seek work, in pertinent part, as follows:

(5)(a) 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. Unless otherwise directed by the director or an authorized representative of the employment department, an individual who is not on temporary layoff as described in subsection (b), is not a union member as described in subsection (d), nor is filing a continued claim for the first week of an initial or additional claim as described in subsection (e), shall be 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.

(A) Work seeking activities include but are not limited to registering for job placement services with the Employment Department, attending job placement meetings sponsored by the Employment Department, participating in a job club or networking group dedicated to job placement, updating a resume, reviewing the newspaper or job placement web sites without responding to a posted job opening, and making direct contact with an employer.

² ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986).

³ Hearing Decision 15-UI-47647 at 1.

(B) Direct contact with an employer means making contact with an employer in person, by phone, mail, or electronically to inquire about a job opening or applying for job openings in the manner required by the hiring employer.

* * *

(d) For an individual who is a member in good standing of a union that does not allow members to seek non-union work, such 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.

* * *

(f) In determining whether to modify the requirements in this section for an individual the Employment Department may consider among other factors, length of unemployment, economic conditions in the individual's labor market and prospective job openings, weather conditions affecting occupations or industries, seasonal aspects of the individual's regular occupation, expected date of return to work in regular occupation, seniority status of individual, registration with a union hiring hall and normal practices for obtaining the type of work which the individual is seeking pursuant to section (1) of this rule. The Department shall provide a written copy of the work search requirements to the individual if the individual's work search requirements are modified.

* * *

In decision # 113720, the Department found as fact that claimant had not “maintained contact” with his union, and concluded that claimant did not meet the minimum requirements to be considered actively seeking work because he did not remain “in good standing with his union.” The ALJ agreed that claimant did not actively seek work. The ALJ found as fact that the Pacific Coast Longshore Contract between the International Longshoremen Workers Union (ILWU) and the Pacific Maritime Association (PMA) stated:

19.5 A Union member shall be considered in good standing if he makes timely tender of the periodic dues, and initiation fees uniformly required as a condition of becoming and remaining a member in the Union.

20.2232 Evidence of application for unemployment compensation benefits to be considered timely must be in the hands of PMA no later than the second Tuesday following the Friday payday on which PMA issues notification of eligibility for unemployment compensation so that the unemployment compensation benefit can be applied to the correct payroll week. If evidence of application is not in the hands of PMA by the second Tuesday then the difference between the man's actual earnings and the guarantee [*sic*] maximum benefit will be added to the man's earnings for the applicable payroll week.⁴

⁴ Hearing Decision 15-UI-47647 at 2, Finding of Fact 7.

The ALJ also found as fact,

During the period at issue the claimant filed his claims through the Department's web site, and did not follow the requirement that the claimant provided [*sic*] weekly evidence of an application for unemployment compensation to the ILWU.⁵

Based on those findings, the ALJ concluded,

The claimant's governing Contract required that he file claims weekly through his union rather than through the Department's claims process. The claimant did not do so and therefore cannot be said to have been a member in good standing of his union. The claimant is disqualified from the receipt of benefits for the period at issue.⁶

As a preliminary matter, to the extent the Department and the ALJ based claimant's denial of benefits on the Pacific Coast Longshore Contract provision 20.2232, the record fails to support the denial. Provision 20.2232 set forth an ILWU and PMA-required procedure for union members to claim benefits *in order to receive* "the difference between the man's actual earnings and the guarantee [*sic*] maximum benefit added to the man's earnings for the applicable payroll week." Contrary to the ALJ's decision, neither that provision, nor Oregon law, requires that claimant file his weekly claims through his union in order to be eligible for benefits. Nor does that provision state that compliance with the ILWU and PMA-required procedure is necessary to be considered "a member in good standing of his union." The facts fail to support any finding that provision 20.2232 has any effect on an individual's eligibility for benefits under ORS 657.155.

The Department alluded to claimant having failed to file his weekly claims appropriately, insofar as he failed to file through the ILWU on a particular form the Department and ILWU had, in 1975, agreed that ILWU members would use for purposes of filing. Claimant's failure to use a specific form for purposes of claiming benefits does not make him ineligible for benefits, however. The laws and rules that govern how an individual files for benefits are set forth in ORS chapter 657 and OAR chapter 471, and nowhere in those chapters are there references to ILWU, PMA, a contract between the Department and those entities, or any other requirement that mariners or longshoremen file their claims on particular forms or through a particular union. Nor are we aware of any authority except ORS chapter 657 and OAR 471 under which the Department may impose such a requirement. On remand, the ALJ must ask the Department about the existence and nature of any such agreement between the Department and either ILWU or PMA respecting how members claim benefits, and the source of any authority for such an agreement.

With regard to claimant's ability to claim the closed union exception to the Department's work search requirement, the record fails to show that claimant was not a member "in good standing" with his union. According to the contract, as it was recited by the ALJ, the only requirement for a member to "be

⁵ Hearing Decision 15-UI-47647 at 2, Finding of Fact 9.

⁶ The ALJ incorrectly concluded claimant was "disqualified" because of his work search activities. An individual is considered eligible or ineligible for benefits under ORS 657.155; whether an individual is disqualified from receiving benefits under ORS 657.176 is a different issue that is not before us in this matter.

considered in good standing” is paying his dues and initiation fees. Claimant testified, unrefuted, that he had paid his dues, was “in good standing” with his union at the time of the events in question, and had never been told by his union that he was not in good standing. The preponderance of the evidence therefore shows that claimant was “in good standing” with his union during the weeks in issue. Also potentially at issue is whether claimant fulfilled his obligation to “remain in contact” with his union while claiming benefits. Neither party defined what the phrase “remain in contact” meant for purposes of claimant’s relationship in his union. Nor did the Department’s witness define what that term meant for purposes of applying OAR 471-030-0036 to the facts of this case.⁷ The record therefore fails to show whether claimant “remain[ed] in contact” with his union during the weeks in issue, and, on remand, the ALJ should inquire about the meaning of that term at claimant’s union. In addition, for purposes of the administrative rule, once the meaning of that term is established, the ALJ must make a sufficient inquiry about claimant’s conduct to determine whether or not he satisfied the requirement.

With respect to claimant’s work search activities, generally, both the Department and the ALJ concluded that claimant was not “in good standing” and had not remained in contact with his union, and, therefore, was not eligible for benefits. Under OAR 471-030-0036(5)(a), however, the closed union exception is only available to a “union member as described in subsection (d).” A union member who is *not* “as described in subsection (d)” is not ineligible for benefits, but is only ineligible for the exception.

OAR 471-030-0036(5)(d) describes a union member eligible for the exception as “a member in good standing of a [closed] union” who 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.” In this matter, even though claimant was a member “in good standing,” he did not claim benefits through his union, exclusively sought non-union work, claimed he was physically incapable of performing his work through the union during the weeks at issue, and, as such, was not capable of accepting or reporting for work when dispatched by the union during the weeks in issue. In other words, claimant was *not* a “union member as described in subsection (d),” and, therefore, *was* required to conduct at least five work seeking activities per week as a condition of being eligible for benefits. Therefore, the question is *not* confined to whether claimant qualified for the closed union exception to the work search requirement, but whether, as required by OAR 471-030-0036(5)(a), (5)(a)(A) and (5)(a)(B), claimant performed five work seeking activities each week. Although the Department’s witness acknowledged at the hearing that claimant had reported non-union work seeking activities each week at issue, the witness did not provide that information, nor did the ALJ ask for it. On remand, the ALJ should ask *both* the Department and claimant about claimant’s work seeking activities during each of the weeks at issue in sufficient detail to determine whether claimant conducted five work seeking activities each week.

Claimant also raised an issue potentially implicating his ability to work during the weeks at issue. An individual is considered able to work for purposes of ORS 657.155(1)(c) only if physically and mentally capable of performing the work the individual is actually seeking during all of the week.⁸ The ALJ should ask claimant about the nature and type of any physical and mental condition that might have

⁷ The Department’s interpretation of its rule receives deference unless it is inconsistent with the rule’s text, context, or any other source of law. *See accord Ring v. Employment Dep’t.*, 205 Or App 532, 134 P.3d 1096 (2006), *citing Don’t Waste Oregon Com. V. Energy Facility Siting*, 320 Or 132, 142, 881 P.2d 119 (1994).

⁸ OAR 471-030-0036(2) (February 23, 2014).

affected his ability to work, and specifically inquire whether he was physically and mentally capable of performing the types of work he sought during the weeks at issue.

Overpayment: ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent.⁹ However, ORS 657.315(1) provides, in relevant part, that an individual who has been overpaid benefits because of an error not caused by the individual's false statement, misrepresentation of a material fact or failure to disclose a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding the individual is not eligible for the benefits, is liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter for any week or weeks within 52 weeks following the week in which the decision establishing the erroneous payment became final.

The Department concluded, based on decision # 113720, that claimant was overpaid, and that he had "willfully made a misrepresentation and failed to report a material fact to obtain benefits."¹⁰ The Department identified claimant's false statement as "certify[ing] he was actively seeking work," when, according to decision # 113720, for claimant to be considered actively seeking work as a closed union member, claimant was required and had "failed to remain in good standing with his union."¹¹ Applying ORS 657.310, the Department determined that claimant was liable to repay the overpaid benefits to the Department in the amount of \$2,196, and was liable for penalties because he had made a misrepresentation.¹²

In Hearing Decision 15-UI-47648, the ALJ concluded that claimant had not made a willful misrepresentation and did not owe penalties to the Department, but agreed that claimant had been overpaid "because he misreported his union status" and was liable, under ORS 657.310(1) "either to repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable."¹³ The ALJ identified claimant's false statement as "misreport[ing] his union status."¹⁴

The preponderance of the evidence in the record on review fails to support the conclusion that claimant made a false statement or was overpaid benefits for reasons attributable to him such that he is required to repay the overpayment. The record as it currently stands shows that claimant reported to the

⁹ ORS 657.310(1).

¹⁰ See Decision # 194881.

¹¹ *Id.*

¹² *Id.*

¹³ Hearing Decision 15-UI-47648 at 4.

¹⁴ *Id.*

Department that he had actively sought work during the weeks at issue, and that he actually had sought work. The record also shows that claimant did not qualify for the closed union exception during the weeks at issue, did not claim that the union exception applied to him, and did not make any false statements regarding his union association. Regardless whether the Department or ALJ ultimately conclude that claimant was eligible for benefits based on his work search activities, the record does not, at present time, show that claimant made any false statement or misstatement about either his union membership or his work search activities when he claimed benefits. If, on remand, the ALJ concludes claimant was overpaid, he must develop the record with respect to what claimant reported to the Department, and whether, regardless of claimant's knowledge or intent in making such reports, those reports accurately or inaccurately reflected his actual activities during the weeks at issue. Without that information, we cannot determine whether any such overpayment should be controlled by ORS 657.310(1) (requiring repayment or deduction) or ORS 657.315 (restricting collection of the overpayment to deduction from benefits otherwise payable).

Because the ALJ failed to develop the record necessary for a determination in these matters, Hearing Decisions 15-UI-47647 and 15-UI-47648 must be reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decisions 15-UI-47647 and 15-UI-47648 are set aside, and these matters remanded for further proceedings consistent with this order.¹⁵

Susan Rossiter and J. S. Cromwell

DATE of Service: February 16, 2016

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.

¹⁵ **NOTE:** The failure of any party to appear at the hearing(s) on remand will not reinstate Hearing Decisions 15-UI-47647 and 15-UI-47648 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision(s) will cause this matter to return to EAB.