

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0229

Reversed
Eligible

PROCEDURAL HISTORY: On January 7, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the weeks of November 29, 2015 through December 26, 2015 (decision # 80908). Claimant filed a timely request for hearing. On February 8, 2016, ALJ Shoemake conducted a hearing, and on February 12, 2016 issued Hearing Decision 16-UI-52957, affirming the Department's decision. On February 29, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On March 4, 2015, claimant filed an initial claim for unemployment insurance benefits. In April 2015, claimant was hired as a truck driver for F. V. Martin Trucking (the employer) and stopped claiming benefits.

(2) On December 1, 2015, the employer told claimant and its other drivers they would be on "temporary layoff" until January 4, 2016 due to the temporary shut-down of a mill and the inclement winter weather. Audio at ~11:56. On December 11, 2015, claimant called the Department to restart his unemployment insurance claim. Claimant told the representative with whom he spoke that he was not working due to a "temporary layoff" and he had been given a date of January 4, 2016 as the date he would return to work. Audio at ~10:22. Despite what claimant stated to the representative, the representative's notes of this conversation did not record that claimant's layoff was temporary or the date he had been given to return to work.

(3) Claimant claimed, but was not paid, benefits during the weeks of November 29, 2015 through December 26, 2015 (weeks 48-15 through 51-15), the weeks at issue. For weeks 48-15, 49-15 and 50-15, claimant reported no work seeking activities to the Department, and checked the box on his weekly online claim form stating "TLO," which was an abbreviation for "temporary layoff." Audio at ~7:13. During each of these weeks, claimant contacted the employer by telephone and asked if there was any more current information about whether he was going to return to on January 4, 2016. During week 51-15, claimant observed that the weather had not improved and became concerned about the likelihood he would return to work on January 4, 2016, the date the employer had promised. That week, claimant started to look for other work in the event the employer did not have work for him on January 4, 2016.

For the week of 51-15, when he filed his weekly claim report, claimant reported that he had made two direct employer contacts and engaged in two other work seeking activities.

(4) On approximately January 4, 2016, the employer notified claimant that he was not going to return to work.

CONCLUSIONS AND REASONS: Claimant actively sought work during the weeks of November 29, 2015 through December 26, 2015, and was not ineligible to receive benefits for those weeks due to a failure to seek work.

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). Unless an individual falls within certain specified exceptions, the individual is “required to conduct at least five work seeking activities per week” to establish that the individual has actively sought work. *Id.* If an individual is on a temporary layoff of four weeks or less with his regular employer, the individual is considered to have actively sought work if, as of the layoff date, the individual was given a date to return to full time work and during the four weeks following the calendar week in which the temporary layoff occurred, the individual remained in contact with the employer and was capable of accepting and reporting for suitable work. OAR 471-030-0036(5)(b)(A). The individual no longer falls within this exception to the requirement of actively seeking work after four weeks have passed following the week in which the temporary layoff began, and the individual becomes subject to the general work seeking requirements of OAR 471-030-0036(5)(a). OAR 471-030-0036(b)(A).

In Hearing Decision 16-UI-52957, the ALJ concluded that claimant was ineligible for benefits because he did not conduct sufficient work seeking activities and did not fall within the exception to the general work seeking requirements of OAR 471-030-0035(5)(a) for a temporary layoff. The ALJ did not accept claimant’s hearing testimony that, as of his layoff, he had a return to work date within four weeks, that the representative’s notes recording their conversation were inaccurate, and that the employer had, in fact, given him a return to work date, reasoning that the report of the Department representative that claimant did not tell her that when she spoke with him on December 11, 2015 was “more persuasive” than claimant’s testimony that he had done so. Hearing Decision 16-UI-52957 at 3. We disagree with the ALJ.

Where, as here, the Department paid benefits to claimant during the weeks at issue, the Department has the burden to show, by a preponderance of the evidence, that claimant was not eligible to receive benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). While claimant’s testimony disputed the accuracy of the Department representative’s report of their telephone conversation, that is not sufficient reason to doubt claimant’s testimony. There is nothing in the record that calls into question claimant’s credibility. Accordingly, because the evidence on this disputed issue is evenly balanced, we must resolve the uncertainty in the evidence against the Department since it carried the burden of persuasion. As such, the Department failed to demonstrate that claimant did not inform the representative of his return to work date or that claimant’s employer did not give him as of his layoff a return to work date of January 4, 2016.

Accepting that claimant had a return to work date of January 4, 2016, he was scheduled to return to work exactly four weeks following the end of the week in which the December 1, 2015 layoff occurred (i.e., a layoff from December 5, 2015 through January 3, 2015). Claimant was, therefore, actively seeking work if he remained in weekly contact with the employer during this period and was capable of accepting and reporting for any suitable work with that employer. He testified he did, and the Department did not dispute his testimony on either requirement. Audio at ~13:01. Claimant also testified that, as of his layoff date, he thought he was going to return to full-time work on January 4, 2016, which fulfills the final requirement that makes OAR 471-030-0036(5)(b) applicable to his work search requirements during the weeks at issue. Audio at ~18:08. Because claimant fell within the exception to the general work search requirements set out at OAR 471-030-0036(5)(b), the Department failed to demonstrate that maintaining contact with the employer was not sufficient to meet the work seeking requirements.

Claimant actively sought work during the weeks of November 29, 2015 through December 26, 2015. Claimant was not ineligible to receive benefits during this period on that ground.

DECISION: Hearing Decision 16-UI-52957 is set aside, as outlined above.

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

DATE of Service: March 28, 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.