

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0476

Affirmed
Ineligible

PROCEDURAL HISTORY: On March 10, 2016, the Oregon Employment Department (the Department) served notices of two administrative decision, the first concluding claimant did not actively seek work during the weeks of December 20, 2015 through January 16, 2016 (decision # 135243) and the second concluding claimant did not actively seek work during the week of January 31, 2016 through February 6, 2016 (decision # 140512). Claimant filed timely requests for hearing on both administrative decisions. On April 11, 2016, ALJ Shoemake conducted a consolidated hearing, and on April 15, 2016 issued two hearing decisions, the first affirming decision # 135243 (Hearing Decision 16-UI-57376) and the second reversing decision # 140512. On April 23, 2016, claimant filed an application for review of Hearing Decision 16-UI-135243 with the Employment Appeals Board (EAB).

Claimant and his employer A & P Logging, Inc. both submitted separate written arguments in support of claimant's eligibility for benefits. Neither certified their written argument was provided to the other parties as required by OAR 471-041-0080 (October 29, 2006). The employer's written argument also sought to present information not presented during the hearing. Claimant contended in his argument that the new information the employer sought to offer was appropriate for EAB to consider since claimant "didn't even know why I was in trouble when I had the hearing or [a representative from A & P Logging] would have been on the phone as my witness." However, claimant testified during the hearing that a Department representative informed him on or about March 15, 2016, well before the April 11, 2016 hearing, that he was being denied benefits for the weeks of December 20, 2015 through January 16, 2016 because the return to work date he had been given would not allow him to fall within the exception to the general work search requirements available for claimants on a temporary layoff. Audio at ~14:30. As of that conversation, claimant was on reasonable notice that the return to work date the employer had given to him when he was laid off would be an important, if not dispositive, issue at the hearing. Accordingly, claimant did not show that factors or circumstances beyond his reasonable control prevented him from offering evidence from the employer during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider either argument and did not consider the employer's new information. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Claimant began working for A & P Logging, Inc. as a log truck driver in approximately 1999. Throughout his employment, A & P periodically laid claimant off due to the weather and the requirements of governmental agencies having regulatory authority over its logging operations. A & P never gave its laid off employees specific return to work dates when they were laid off because it was unable to predict with certainty when it might resume operations. On December 17, 2015, A & P laid claimant off and one of its representatives indicated to claimant that he could expect to return to work in about a month.

(2) On December 28, 2015, claimant filed an initial claim for unemployment benefits. When claimant filed his claim online, an advisement appeared on the Department's website informing him he needed to actively seek work during each week he claimed benefits unless he was on a temporary layoff of four weeks or less. The advisement stated that actively seeking work was defined as five work seeking activities in the week of which two needed to be direct employer contacts. Audio at ~11:25. Claimant stated in his online application that A & P had laid him off on December 17, 2015 and had given him a return to work date of January 16, 2016, which was 29 days after the date of his layoff and which fell on a Saturday when claimant did not customarily work. On approximately December 28, 2015, the Department mailed its Publication 195 to claimant setting out the requirements for a temporary layoff that would exempt him from general work seeking requirements.

(3) Claimant claimed benefits during the weeks of December 20, 2015 through January 16, 2016 (weeks 51-15 through 02-16), the weeks at issue. During week 51-15, claimant did not list any work seeking activities when he filed his weekly claim. During weeks 52-15 and 01-16, claimant stated in his weekly claim report that his work seeking activities were limited to contacting A & P Logging to inquire whether it had any work for him and that he expected to return to work on January 16, 2016. When claimant filed his weekly claim for week 02-16, the work search activities he reported were limited to contacting A & P and he stated he was going to return to work on January 18, 2016. On January 18, 2016, claimant resumed working for A & P.

CONCLUSIONS AND REASONS: Claimant did not actively seek work from December 20, 2015 through January 16, 2016 (weeks 51-15 through 02-16). 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 some 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). An exemption to these general work seeking requirements exists if an individual was temporarily laid off by his regular employer and, as of the date of the layoff, was given a return to work date that was four weeks or less from the date of the layoff. OAR 471-030-0036(5)(b). An individual on temporary layoff is considered to be actively seeking work by remaining in contact with his employer and being capable of accepting and reporting for suitable work with that employer for up to four calendar weeks after the layoff. OAR

471-030-9936(5)(b)(A). If the individual was not given a return to work date or if the return to work date given was more than four weeks from the date of the layoff, the individual is required to immediately seek work in accordance with the general work seeking requirements of OAR 471-030-0036(5)(a) to remain eligible for benefits.

While claimant evaded the ALJ's questions for a long period, he finally conceded the employer did not give him a specific return to work date when he was laid off on December 17, 2015, but said that he could expect to return to work in a month. Audio at ~18:46, ~18:29. The return to work dates claimant provided to the Department when he filed his initial claim and during weeks 52-15 and 01-16 were based on his calculation of one month from the layoff. Audio at ~16:30, ~17:35. From this record, it appears that the employer did not give claimant a definite and certain *date* by which he was going to return to work after the temporary layoff commenced. To the extent the comment the employer's representative supposedly made to claimant at the time of the layoff -- that he could expect to begin working in "a month"-- can be construed as a definite return to work date, it was at best a commitment that he would resume working within a calendar month or within 30 or 31 days after December 17, 2015, which was on January 16 or 17, 2016. Since OAR 471-030-0036(5)(b) requires the return to work date be within four weeks, or 28 days of the layoff to qualify as a "temporary layoff," the employer's statement to claimant does not constitute a temporary layoff as that term is defined in OAR 471-030-0036(5)(b). While claimant might have believed in good faith he would return to work within 28 days, or that one month was close enough to 28 days to satisfy the requirements of OAR 471-030-00136(5)(b), that regulation does not admit of any exceptions to its operation. Because claimant was not given a return to work date within four weeks of his layoff, he needed to meet the general work search requirements of OAR 471-030-0036(5)(a) for benefit eligibility.

At hearing, claimant appeared to state at some points in his testimony that he did not look for work during the weeks at issue other than to maintain contact with A & P, at other points he appeared to state that he was looking elsewhere for work during those weeks but neglected to provide his work searches to the Department. Audio at ~22:12, ~23:05, ~23:52. However, claimant contended that he faxed his work searches for the weeks at issue to the Department sometime after the weeks at issue and did not retain copies of them and could not attempt to reconstruct them in hearing testimony because he was unable to recall them. Audio at ~23:52, ~24:31. In response to claimant's testimony, the Department's representative testified that the Department received a faxed work search from claimant for the week of January 31 through February 6, 2016 (week 05-16), and no other weeks. Audio at ~25:58, ~26:39. Since claimant did not rebut this testimony, it appears likely that claimant only faxed his work search for that week to the Department. Given that the work searches that claimant provided to the Department for the weeks at issue were insufficient to meet the requirements of OAR 471-030-0036(5)(b), claimant did not subsequently provide work searches to the Department for those weeks and was unable to testify at hearing about his work search activities during those weeks, it is most likely that the only work search activities he engaged in was to remain in communication with his regular employer, A & P Logging. Such limited search activities were insufficient to satisfy the five work seeking activities required by OAR 471-030-0036(5)(a) during the weeks at issue.

Claimant did not actively seek work during weeks 51-15 through 02-16. Claimant is not eligible to receive benefits for those weeks.

DECISION: Hearing Decision 16-UI-57376 is affirmed.

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

DATE of Service: May 27, 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.

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