

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0561-R

Request for Reconsideration Granted
Reversed & Remanded

PROCEDURAL HISTORY: On March 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant did not actively seek work from February 14 through March 12, 2016 (decision # 101208). Claimant filed a timely request for hearing. On April 21, 2016, ALJ S. Lee conducted a hearing, and on May 2, 2016 issued Amended Hearing Decision 16-UI-58620, affirming the Department’s decision. On May 16, 2016, claimant filed an application for review with the Employment Appeals Board (EAB). On May 18, 2016, EAB issued Appeals Board Decision 2016-EAB-0561, affirming the hearing decision under review. On June 2, 2016, claimant submitted a written argument to EAB. To address the issue raised in claimant’s written argument, EAB will exercise its discretion under ORS 657.275(3) and reconsider Appeals Board Decision 2016-EAB-0561.

Under ORS 657.290(3), EAB may, “upon its own motion or upon application of any party in interest,” and “irrespective of whether it has become final,” reconsider any previous decision to correct an error of fact or law. Claimant’s written argument essentially asks that EAB reconsider its decision in Appeals Board Decision 2016-EAB-0561 to correct errors of fact and law EAB made by affirming Hearing Decision 16-UI-58620.

In Appeals Board Decision 2016-EAB-0561, EAB affirmed the ALJ’s conclusion that claimant was ineligible for unemployment benefits for weeks 7-16 through 10-16 (February 14 through March 14, 2016), the weeks at issue. In Hearing Decision 16-UI-58620, the ALJ found that claimant had not been temporarily laid off from his regular employer because he continued to perform some work for his employer during the weeks at issue.¹ Instead, the ALJ found that claimant was “partially unemployed” during those weeks.² The ALJ then noted that to be eligible for unemployment benefits, only a claimant

¹ OAR 471-030-0036(5)(b)(A)(February 23, 2014) defines a person on temporary layoff as one who has, as of the layoff date been given a date to return to full time work (or work for which the remuneration exceeds the person’s weekly unemployment benefit amount) within four weeks of the layoff date.

² OAR 471-030-0060(1) (December 25, 2005) provides that an individual is “partially unemployed” if the individual had been working full time for a regular employer and remains attached to this regular employer, worked less than full time

who has been temporarily laid off from a regular employer is exempt from the requirement of conducting an active work search under ORS 657.155 and OAR 471-030-0036(5)(a).³ Because claimant performed no work seeking activities during the weeks at issue, the ALJ concluded he was ineligible for benefits during those weeks.

In his written argument, claimant contended that the ALJ erred by failing to apply the rules regarding a “partially unemployed” claimant. Claimant noted that OAR 471-030-0060(2) requires that a claimant who is “partially unemployed” submit a “Notice and Verification of Partial Unemployment” form to the Department to claim benefits. The “Notice and Verification of Partial Unemployment” form is furnished by the Department and explains the procedures for filing for benefits during periods of partial unemployment. *Id.* Claimant asserted that the Department erred in failing to provide him with a copy of the “Notice and Verification of Partial Unemployment” form.⁴

Although the ALJ determined that claimant was “partially unemployed” in Hearing Decision 16-UI-58620, the record lacks evidence sufficient to support her determination. At the hearing, the ALJ failed to elicit testimony or any other evidence regarding the applicability of OAR 471-030-0060(1) to claimant’s circumstances. On reconsideration, Appeals Board Decision 16-UI-58620 is reversed, and this matter remanded to the ALJ for further development of a record adequate to determine whether claimant was a “partially unemployed” individual during the weeks at issue, and eligible for benefits for those weeks.

On remand, the ALJ must ask the Department representative to explain how the Department interprets and applies OAR 471-030-0060(2), and to explain whether claimant qualified as “partially unemployed” under this interpretation. The ALJ must also inquire if the Department considered the possibility that claimant qualified as a “partially unemployed” individual” when claimant filed his reopened claim for benefits on February 23, 2016. If the Department representative testifies that it considered claimant’s possible status as “partially unemployed,” then the ALJ must ask if claimant was ever notified of this possibility, and whether he was ever given a copy of EAB Exhibit 1, the “Notice and Verification of Partial Unemployment” form. Finally, if the Department representative determines that claimant was a “partially unemployed” individual, the ALJ must inquire whether claimant was expected to conduct a work search during the weeks at issue.

Under ORS 657.270, an ALJ must give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires that the ALJ 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.

during the weeks at issue because of a lack of work, earned less than the individual’s weekly benefit amount during those weeks, and is expected to return to full time work for the regular employer.

³ ORS 657.155(1)(c) provides that to be eligible to claim unemployment benefits, an individual must be “able to work, available for work, and actively seeking and unable to obtain suitable work.” OAR 471-030-0036(5)(a) requires that a claimant conduct at least five work seeking activities per week; at least two of these activities must be direct contacts with an employer that is likely to hire the claimant.

⁴ A copy of the Department’s “Notice and Verification of Partial Unemployment,” Department form 192-A, has been marked as EAB Exhibit 1 and is included with this decision. Any party that objects to the admission of EAB Exhibit 1 must submit its objections to this office in writing, setting forth the basis of the objection, within ten days of the date on which this decision is mailed. Unless such an objection is received, EAB Exhibit 1 will remain part of the record.

ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop a record sufficient to determine if claimant is eligible for benefits for the weeks at issue, Hearing Decision 16-UI-58620 is reversed, and this matter remanded to the ALJ for development of the record.

DECISION: On reconsideration, Hearing Decision 16-UI-58620 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: June 7, 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.