

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1032

Affirmed
Ineligible Weeks 7-16 through 10-16

PROCEDURAL HISTORY: On March 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 101208) concluding that claimant did not actively seek work from February 14 through March 12, 2016 (weeks 7-16 through 10-16). 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. On June 2, 2016, claimant submitted a written argument to EAB. To address the issue raised in claimant's argument, EAB exercised its discretion under ORS 657.275(3) and reconsidered Appeals Board Decision 2016-EAB-0561. On June 7, 2016, EAB issued Appeals Board Decision 2016-EAB-0561-R, reversing Hearing Decision 16-UI-58620, and remanding the matter for further development of the record. On August 15, 2015, ALJ S. Lee conducted a hearing, and on August 23, 2016, issued Hearing Decision 16-UI-66159, affirming decision # 101208. On September 2, 2016, claimant filed an application for review with EAB.

FINDINGS OF FACT: (1) On February 13, 2016, claimant's employer, Whitman's Auto Care, notified claimant that he would be working reduced hours due to lack of work until March 12, 2016, when his hours would return to normal.

(2) On February 23, 2016, claimant reopened his claim for unemployment benefits. A weekly benefit amount of \$490 was established.

(3) From February 14 through March 12, 2016 (weeks 7-16 through 10-16), the weeks at issue, claimant filed weekly claims for unemployment benefits. Other than remaining in contact with his employer, claimant performed no work search activities during the weeks at issue.

(4) During the weeks at issue, claimant worked for the employer eight hours every Saturday. Claimant earned \$136 per week.

(5) On March 12, 2016, claimant returned to working normal hours for the employer.

(6) During the fourth quarter of 2015 (October 4, 2015 through January 2, 2016) claimant worked 344 hours for the employer. During the first quarter of 2016 (January 3 through March 2, 2016) claimant worked 361 hours for the employer. During the second quarter of 2016 (March 3 through June 2, 2016) claimant worked 276 hours for the employer. (An individual working full time works 520 hours per quarter). 8/15/16 Hearing, Audio recording at 35:02.¹

CONCLUSION AND REASONS: We agree with the ALJ and conclude that claimant did not actively seek work during the weeks at issue.

To be eligible to receive benefits, unemployed individuals must 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). An “active work search” consists of at least five work seeking activities per week, with at least two of these activities 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). Individuals who are on temporary layoff of four weeks or less and who have been given a date to return to work within four calendar days of the layoff date are excused from conducting an active work search. OAR 471-030-0036(5)(b).

During the weeks at issue, claimant’s work hours were reduced but he was not laid off. Claimant, who admitted that he did not conduct an active work search during the weeks at issue, was therefore not excused doing so under the rule applicable to individuals who are temporarily laid off. Claimant, however, argues that he was excused from the work search requirements because he was “partially unemployed.” Under OAR 471-030-0060(1) (December 25, 2005), a “partially unemployed individual” is one who has been working full time for an employer “and remains attached to their usual and regular employer,” who begins working for the employer some but less than the individual’s customary full time hours due to lack of full time work, who earns less than the weekly benefit amount, and who expects to return to full time work for the employer. The conditions of ORS 657.155 as respects registration shall not apply to such an individual. OAR 471-030-0060(3).

According to claimant, because he was “partially unemployed” during the four weeks at issue, he was not required to actively search for work during this period. We disagree. The record shows that claimant had not been working full time for his regular employer during the fourth quarter of 2016, the quarter in which his hours were reduced. The record also shows that claimant worked full time only during one quarter out of the six quarters that preceded the quarter in which he was laid off. Because

¹ During the third quarter of 2015 (June 28 through October 3, 2015) claimant worked 528 hours. During the second quarter of 2015 (March 29 through June 27, 2015), claimant worked 393 hours. During the first quarter of 2015 (January 4 through March 28, 2015) claimant worked 494 hours. During the fourth quarter of 2014 (September 28, 2014 through January 3, 2015), claimant worked 478 hours. Under OAR 471-041-0090(3) (October 29, 2016), we take official notice of these facts, which are contained in Department records. Any party that objects to our taking notice of these facts must submit its objections in writing, setting forth the basis for its objection, within ten days of the date on which this decision is mailed. Unless such an objection is received, the noticed facts will remain part of the record.

claimant was not working full time for the employer when he began working reduced hours, he was not “partially unemployed” and excused from making an active work search under OAR 471-030-0060(1).²

Claimant failed to actively search for work during weeks 7-16 through 10-16. He is ineligible to receive benefits during these weeks.

DECISION: Hearing Decision 16-UI-66159 is affirmed.

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

DATE of Service: September 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.

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² In Appeals Board Decision 2016-EAB-0561-R, EAB reversed Hearing Decision 16-UI-58620, and specifically remanded the matter to the ALJ so that the Department could provide its interpretation of OAR 471-030-0060, and explain whether it applied to claimant’s situation. The Department representative who testified at the August 15, 2016 hearing, was unable to provide such any such explanation, however. At one point, she asserted that the rule did not apply to claimant because he was not laid off under the Worker Adjustment and Retraining Notification (WARN) Act . 8/15/16 Hearing, Audio recording at 16:24). At another point, she testified that she saw nothing in OAR 471-030-0060(1) that would not apply to claimant’s situation. 8/15/16 Hearing, Audio recording at 23:33. When and if the applicability of OAR 741-030-0060 becomes an issue in future hearings, we expect that the Department will provide a witness who is knowledgeable about the Department’s interpretation and application of this rule.