

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1214

Reversed & Remanded

PROCEDURAL HISTORY: On July 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 101040) concluding that claimant did not actively seek work from March 20 through April 9, 2016 (weeks 12-16 through 14-16). On September 7, 2016, the Department served notice of an administrative decision (decision # 102746) concluding that claimant therefore was not entitled to the \$1,610 in benefits he received for weeks 12-16 through 14-16, and must repay that amount to the Department. On September 9, 2016, claimant filed a late request for hearing on decision # 101040 and a timely request for hearing on decision # 102746. On October 4, 2016, ALJ Seideman conducted hearings, and on October 6, 2016 issued Hearing Decision 16-UI-68691, allowing claimant's late request for hearing on decision # 101040 and affirming that decision, and Hearing Decision 16-UI-68692, affirming decision # 102746. On October 26, 2016, claimant filed timely applications for review of Hearing Decisions 16-UI-68691 and 16-UI-68692 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-68691 and 16-UI-68692. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-1214 and 2016-EAB-1215). No adversely affected party appealed that portion of Hearing Decision 2016-EAB-1214 allowing claimant's late request for hearing on decision # 101040. EAB therefore limited its review to whether claimant actively sought work during weeks 12-16 through 14-16, and whether he was overpaid benefits for those weeks. EAB considered both hearing records in their entirety and claimant's written argument.

CONCLUSIONS AND REASONS: Hearing Decisions 16-UI-68691 and 16-UI-68692 are reversed, and these matters remanded to the Office of Administrative Hearings (OAH) for additional proceedings.

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). For an individual on temporary layoff of four weeks or less with the individual's regular employer, if the individual had, as of the layoff date, been given a date to return to full-time work or work for which remuneration is paid or payable that

equals or exceeds the individual's weekly benefit amount, such individual is actively seeking work by remaining in contact with and being capable of accepting and reporting for any suitable work with that employer for a period of up to four calendar weeks following the end of the week in which the temporary layoff occurred. OAR 471-030-0036(5)(b). For an individual on temporary layoff of more than four weeks, however, such individual must immediately seek work consistent with the requirements of subsection OAR 471-030-0036(5)(a), which requires individuals 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. OAR 471-030-0036(5)(c).

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. *Id.*

In Hearing Decision 16-UI-68691, the ALJ determined that, during the weeks at issue, claimant was 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, because, although he was on temporary layoff with his regular employer, the layoff exceeded four weeks.¹ The ALJ found as fact that claimant testified he did not conduct five work seeking activities during any week at issue, and therefore concluded that claimant did not actively seek work during the weeks at issue, and is ineligible for benefits for those weeks.² In Hearing Decision 16-UI-68692, the ALJ concluded that, based on Hearing Decision 16-UI-68691, claimant's representations to the Department when claiming benefits that he actively sought work during the weeks at issue were false as a matter of law, and claimant therefore was not entitled to the \$1,610 in benefits he received for those weeks, and must repay that amount to the Department under ORS 657.310(1).³

We agree with the ALJ that claimant's layoff with his regular employer exceeded four weeks, and that to be eligible for benefits, claimant was 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. However, we disagree with the ALJ's "finding" that claimant testified that he did not conduct five work seeking activities during any week at issue. The ALJ never asked claimant about his work seeking activities during the weeks at issue, instead relying on the Department representative's testimony that when claiming benefits for the weeks at issue, claimant listed the same two employer contacts each week, maintaining contact with his regular employer and contacting one other employer. Audio Record (October 4, 2016, 9:30 a.m.) at 16:30. In written argument, however, claimant plausibly asserted, and submitted documentation purporting to establish, that he did conduct five work seeking activities during each week at issue, but did not list them all when claiming benefits because he mistakenly believed that

¹ Hearing Decision 16-UI-68691 at 2-4.

² *Id.*

³ Hearing Decision 16-UI-68692 at 1-4.

he was on temporary layoff of four weeks or less, and therefore only required to maintain contact with his regular employer.

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. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant actively sought work during the weeks at issue and was overpaid benefits for those weeks, Hearing Decisions 16-UI-68691 and 16-UI-68692 are reversed, and these matters are remanded for further development of the record.

On remand, the ALJ should conduct a full inquiry into whether claimant conducted at least five work seeking activities during each week at issue, with at least two of those being direct contact with an employer who might hire the individual. Work seeking activities include but are not limited to registering for job placement services with the Department, attending job placement meetings sponsored by the 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. OAR 471-030-0036(5)(a)(A). 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. OAR 471-030-0036(5)(a)(B).

DECISION: Hearing Decisions 16-UI-68691 and 16-UI-68692 are set aside, and this matter remanded for further proceedings consistent with this order.⁴

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

DATE of Service: November 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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⁴ The failure of any party to appear at the hearing on remand will not reinstate Hearing Decisions 16-UI-68691 and 16-UI-68692 or return these matters to EAB. Only a timely application for review of the subsequent hearing decisions will cause these matters to return to EAB.