

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1281

Reversed
Late Request for Hearing Allowed
Eligible Week 27-16

PROCEDURAL HISTORY: On August 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision (# 72616) concluding that claimant was not available for work from July 3 through 9, 2016 (week 27-16). On September 15, 2016, decision # 72616 became final without a request for hearing having been filed. On October 3, 2016, claimant filed an untimely hearing request. On October 27, 2016, ALJ M. Davis conducted a hearing, and issued Hearing Decision 16-UI-70050, dismissing claimant's hearing request as untimely. On November 15, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On April 29, 2015, claimant filed an initial claim for unemployment benefits. Claimant claimed, and the Department paid him, benefits for the week of July 3 through July 9, 2016 (week 27-16), the week at issue. Claimant's customary occupation is truck driver, and his labor market is LaGrande, Oregon.

(2) On June 30, 2016, claimant left his home in La Grande to travel to Eureka, Montana to look for work. While he was in Montana, claimant applied for a truck driver position at Bill Pluid Logging; claimant had previously worked for this employer. Claimant also checked the help wanted advertisements in the Eureka newspaper for available positions, and looked for truck driver jobs in Columbia Falls, Whitefish and Kalispell, Montana. Exhibit 1, Claimant's 9/30/16 letter to the Department.

(3) On July 4, 2016, claimant left Montana and returned to his home in LaGrande.

(4) On July 5, he applied for truck driver positions with RD Mac, Inc. and Waste Pro in La Grande.

(5) On July 6, 2016, claimant went online to research available truck driver positions with Swift Trucking, Andrus Trucking, and LaGrande Amusement. Exhibit 1, Claimant's 9/30/16 letter to the Department.

(6) On July 7, 2016, claimant applied for a truck driver position with Rock Solid Construction in LaGrande. On July 8, 2016, claimant checked the help wanted advertisements in local and regional newspapers for available positions. Exhibit 1, Claimant's 9/30/16 letter to the Department.

CONCLUSION AND REASONS: Claimant's late request for hearing is allowed. Claimant was available for work during week 27-16.

In Hearing Decision 16-UI-70050, the ALJ dismissed as untimely claimant's request for a hearing on decision # 72616, the decision finding him unavailable for work during week 27-16. The ALJ decided to do so, however, only after she conducted a hearing on the merits of the decision. Thus, in actual fact, the ALJ allowed claimant's request for a hearing. The conclusion the ALJ reached in Hearing Decision 16-UI- 70050 – that claimant failed to show good cause for filing a late hearing request – is inconsistent with the record. EAB has repeatedly held that it is plain error to dismiss a request for hearing or a request to reopen a hearing after a hearing on the merits has been conducted. In such cases, EAB has concluded that the requirements of due process can only be met if EAB considers the merits of the administrative decision at issue. *See, e.g., Darrel L. Scudder* (Employment Appeals Board, 10-AB-3722, December 3, 2010) and Appeals Board Decision 2014-EAB-1665 (October 31, 2014). Consistent with our reasoning in these cases, claimant's late request for hearing is allowed, and we will determine whether claimant was available for work during the only week at issue, the week of July 3 through 9, 2016 (week 27-16), the week at issue.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). An individual who leaves the individual's normal labor market area for the major portion of any week is presumed to be unavailable for work. ORS 657.155(2)(a). The presumption may be overcome if the individual establishes that the individual has conducted a bona fide¹ search for work and has been reasonably accessible to suitable work in the labor market area in which the individual spent the major portion of the week to which the presumption applies, or was required to be outside the individual's normal labor market area to apply for suitable employment within the individual's normal labor market. ORS 657.155(2)(b). Thus, an individual shall be considered available for work only if he establishes that he was physically present in the normal labor market area as defined by OAR 471-030-0036(6), every day of the week, unless the individual is actively seeking work outside his or her normal labor market area. OAR 471-030-0036(3) (February 23, 2014).

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). With few exceptions, none of which apply here, 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).

Here, claimant's labor market was LaGrande, Oregon. He was outside of his labor market for two days during the week at issue because he had traveled to Montana to look for work. The record shows that he made a good faith effort to find work in Montana, applying for a position with an employer for which he had previously worked, checking "help wanted" advertisements in the local paper, and traveling to three

¹ "Bona fide" means "in or with good faith." www.websters-dictionary-online.org

different towns to look for jobs. We also note that when claimant returned to La Grande, he conducted an active work search in his normal labor market that also met the requirements of OAR 471-030-0036(5)(a) during the rest of the week: he contacted three different employers, and checked online and newspaper advertisements for available positions.

Claimant's active work search during the week at issue, both in and outside of his labor market, demonstrates that he was available for work despite being outside of his labor market. He is eligible to receive benefits during week 27-16.²

DECISION: Hearing Decision 16-UI-70050 is set aside, as outlined above.

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

DATE of Service: November 17, 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 Even if claimant had not looked for work in Montana, it appears more likely than not that he was eligible for benefits under OAR 471-030-0036(3)(d)(B), which provides that an individual not physically present in the individual's labor market for every day of the week claimed is eligible for benefits if "[t]he individual is infrequently absent from the normal labor market area for reasons unrelated to work search, for less than half of the week, and no opportunity to work or referral to work was missed by such absence."