

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1371

Affirmed
Ineligible - Weeks 35-16 through 39-16

PROCEDURAL HISTORY: On September 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the weeks of August 28 through September 24, 2016 (weeks 35-16 through 38-16) (decision # 101338). On October 17, 2016, the Department served notice of a second administrative decision, concluding claimant did not actively seek work during the week of September 25 through October 1, 2016 (week 39-16) (decision # 125726). Claimant filed timely requests for hearing. On November 2, 2016, the Office of Administrative Hearings (OAH) served notice of a consolidated hearing on the two administrative decisions for November 15, 2016. On November 15, 2016, ALJ Vincent conducted a consolidated hearing, and on November 17, 2016, issued Hearing Decision 16-UI-71332, affirming decision # 101338, and Hearing Decision 16-UI-71334, affirming decision # 125726. On December 6, 2016, claimant filed applications for review of Hearing Decisions 16-UI-71332 and 16-UI-71334 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-71332 and 16-UI-71334. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-1371 and 2016-EAB-1372). EAB considered the entire hearing record in reaching these decisions.

FINDINGS OF FACT: (1) On June 24, 2016, claimant filed an initial claim for unemployment insurance benefits.

(2) On August 29, 2016, Western Pneumatic, claimant's regular employer, notified claimant that he was being temporarily laid off from work from August 30 to October 3, 2016, when he was scheduled to return to work.

(3) Claimant claimed and was paid benefits for the weeks including August 28 through October 1, 2016 (weeks 35-16 through 39-16). These are the weeks at issue.

(4) When claimant claimed benefits for each of the weeks at issue, he checked a box certifying that he was on a temporary layoff with his regular employer and that he was returning to work within 28 days of his original layoff date. When filing his claims, he did not provide any information or documentation regarding work searches performed. The only work-seeking activity claimant performed during each of the weeks at issue was to contact his regular employer once during each week to determine if he was returning to work.

(5) On September 16 and October 5, 2016, the Department mailed claimant a letter requesting the missing work search entries for the weeks claimed or an explanation why he did not seek work. Claimant did not respond to either letter and thereafter the Department issued its benefit denials.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude that claimant did not actively seek work during weeks 35-16 through 39-16 and is ineligible for benefits for 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). 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). OAR 471-030-0036(5)(a) states that the minimum requirements for an individual to be considered “actively seeking work” are five work-seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual. However, OAR 471-030-0036(5)(b) provides, in pertinent part:

(b) For an individual on temporary layoff of four weeks or less with the individual’s regular employer:

(A) If the individual had, as of the layoff date, been given a date to return to full-time work * * *, 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. The individual no longer meets the requirements of this subsection if four calendar weeks have passed following the week in which the temporary layoff occurred, therefore the individual must seek work consistent with [OAR 471-030-0036(5)(a)].

(B) The individual does not meet the requirements of [OAR 471-030-0036(5)(b)] if the individual had not, 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.

The Department seeks to retroactively deny benefits for the weeks at issue because claimant did not actively seek work during those weeks. Where, as here, the Department pays a claimant benefits for weeks claimed, the Department has the burden to establish by a preponderance of evidence that the claimant is not entitled to those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). The Department met its burden.

It is undisputed that claimant's only work search activity during each week at issue was to seek work with his regular employer. At hearing, claimant asserted that he did not perform any other work search because he believed he was on a temporary layoff and did not have to. Audio Record ~ 8:55 to 10:05. However, claimant did not qualify for the work search requirements permitted for an individual on a temporary layoff because the record does not show that his regular employer, as of the layoff date, gave claimant a date to return to work that was within four calendar weeks of the end of the week in which his layoff occurred. Four calendar weeks from the end of the week in which his layoff occurred was October 1, 2016 and claimant's return to work date was October 3, 2016. Accordingly, because claimant failed to engage in at least five work search activities during any of the weeks at issue, claimant did not actively seek work during any of those weeks. Claimant is therefore ineligible for benefits for the weeks at issue.

DECISION: Hearing Decisions 16-UI-71332 and 16-UI-71334 are affirmed.

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

DATE of Service: January 18, 2017

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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