

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1390

Reversed & Remanded

PROCEDURAL HISTORY: On September 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from July 24, 2016 to August 13, 2016 (decision # 132252). On October 12, 2016, the Department served notice of a second decision, based on decision # 132252, assessing a \$663 overpayment, \$132.60 monetary penalty and 5 penalty weeks (decision # 193552). On October 13, 2016, decision # 132252 became final without claimant having filed a request for hearing. On October 28, 2016, claimant filed a late request for hearing on decision # 132252 and a timely request for hearing on decision # 193552. On November 21, 2016, ALJ Seideman conducted two hearings, and on November 22, 2016 issued Hearing Decision 16-UI-71550, allowing claimant's late request for hearing on decision # 132252 and affirming the Department's decision that he was not available for work from July 24, 2016 to August 13, 2016, and Hearing Decision 16-UI-71551, affirming the assessment of an overpayment and penalties. On December 12, 2016, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-71550 and 16-UI-71551. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-1389 and 2016-EAB-1390). However, no adversely affected party requested review of the portion of Hearing Decision 16-UI-71550 in which the ALJ allowed claimant's late request for hearing. We therefore confine our review of that matter to claimant's availability for work.

CONCLUSIONS AND REASONS: Hearing Decisions 16-UI-71550 and 16-UI-71551 must be reversed and this matter remanded to the Office of Administrative Hearings.

As a preliminary matter, it is not material to this case that claimant was on a leave of absence during the weeks at issue. The employer's un rebutted testimony shows that the employer had no work available for claimant during that period, so regardless of claimant's personal plans, claimant was laid off work during the entire period. It is also immaterial to this case, however, that claimant was laid off from his regular employment during the weeks at issue. Although some individuals laid off from regular work are excused from seeking work as a condition of being eligible for benefits, that exception only applies if

the length of the layoff was four weeks or less. On this record, claimant's layoff period began July 5, 2016 and he was not scheduled to return to work until August 11, 2016, which is more than four weeks later. Claimant's argument that he only claimed three weeks of benefits is also immaterial to whether that exception applies, because the applicable four-week time period applies to the length of the layoff, not the length of time the laid off individual claims benefits.

The issue in dispute in this case is the effect claimant's decision to travel outside his normal labor market during the weeks at issue should have on his eligibility for unemployment insurance benefits. ORS 657.155(1)(c) requires individuals be available for work and actively seek week as a condition of being eligible for unemployment insurance benefits. However, an individual is presumed unavailable if he is out of his normal labor market area for the major portion of any week unless he conducts a bona fide work search in the area to which he traveled. ORS 657.155(2)(a)(A); OAR 471-030-0036(3)(d). Claimant is considered to be "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). That includes conducting "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.* However an individual who is considered to have actively sought work may still be ineligible for benefits if he imposed "conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time."

In Hearing Decision 16-UI-71550 the ALJ concluded that, although claimant said he sought work in Michigan while out of his labor market for personal reasons, claimant was nevertheless not eligible for benefits. The ALJ reasoned that "[u]nemployment insurance benefits are . . . not an assistance program to help a person go to another state to care for a relative," and, since "claimant sought no other work in Oregon, other than keeping in touch with his employer," "was not willing to move [to Michigan] because of his Oregon ties," and "[n]o employer would hire him a few days while he was getting ready to return to Oregon," claimant was not available for work and had not actively sought work during the weeks at issue. The record fails to support the ALJ's conclusions.

Claimant repeatedly testified during the hearing that he actively sought work while in Michigan. He described his activities to include contacting potential employers, reviewing job listings, and asking friends and family if they were aware of any temporary work he could perform while in Michigan. Despite that testimony, the ALJ failed to conduct a week-by-week inquiry to determine whether claimant's work seeking activities in Michigan included at least five activities that an ordinary and reasonable person would do to obtain work in Michigan, or whether two of those weekly activities included direct employer contact. Without such an inquiry, the record will not support a determination as to whether claimant was actively seeking work outside his labor market and therefore overcame the presumption that he was not available for work while outside his labor market.

There is no dispute that claimant was not willing to relocate his permanent residence to Michigan if he obtained work there. However, ORS 657.155 and OAR 471-030-0036 do not include any such requirement. In fact, OAR 471-030-0036(3)(a) specifically requires that individuals be willing to accept temporary employment, and OAR 471-030-0036(5)(b) and (c) specifically require individuals temporarily laid off from their regular employment to seek work even if they are scheduled to return to work with their regular employers at some later date. Claimant's unwillingness to relocate his permanent residence to Michigan for work during the short period of time in which he planned to remain in Michigan is, therefore, only relevant if it otherwise rendered him unavailable for work, for example, if

he was not willing to accept permanent, full time or temporary work, was not capable of accepting or reporting for suitable work opportunities in that labor market while in that labor market, or if the short duration of his stay in Michigan imposed a "condition[] which substantially reduce[d]" his opportunities to return to work at the earliest possible time.¹

On this record it appears that claimant was willing to accept and was capable of reporting for work opportunities in Michigan, albeit only for as long as he intended to remain in Michigan. Claimant's unwillingness to relocate might constitute a condition that substantially reduced his opportunities to return to work at the earliest possible time, however, depending on the types of work claimant sought and what he disclosed to potential employers about his plans to leave Michigan prior to August 11th to return to Oregon and his regular job with the employer. Absent an inquiry, though, the record does not support a determination as to whether claimant's unwillingness to relocate to Michigan rendered him unavailable for work. On remand, the ALJ should, as previously noted, ask claimant what his work seeking activities were during each of the three weeks at issue. The ALJ should also ask claimant what he told employers about his plans, for example, whether he disclosed to potential employers that, if hired, he planned to end any employment prior to August 11th to return to Oregon or placed any other limitations on his availability or work seeking activities that "substantially" reduced his work opportunities while in Michigan.

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 ask claimant about his work seeking activities or whether he imposed conditions that substantially reduced his opportunities to return to work at the earliest possible time, he did not develop the record necessary for a determination of whether claimant actively sought work and was available for work while outside his labor market between July 24, 2016 and August 13, 2016. Hearing Decisions 16-UI-71550 is, therefore, reversed, and the matter remanded for development of the record.

The ALJ's determination in Hearing Decision 16-UI-71551 that claimant was overpaid benefits for the weeks of July 24, 2016 through August 13, 2016 was based entirely on his determination in Hearing Decision 16-UI-71550 that claimant was not eligible for those benefits. Because we have concluded that the record failed to support that determination, there is an insufficient basis upon which to conclude that claimant was overpaid benefits. Hearing Decision 16-UI-71551 must therefore be reversed, and remanded pending a determination of claimant's eligibility for benefits. We note that, even if the ALJ concludes on remand that claimant was not overpaid based on his eligibility, he might still be liable for penalty weeks for willfully misrepresenting to the Department on three occasions that he was not away from his permanent residence during the weeks at issue when, in fact, he was.

DECISION: Hearing Decisions 16-UI-71550 and 16-UI-71551 are set aside, and these matters remanded for further proceedings consistent with this order.

¹ Any work separation resulting from temporary employment outside an individual's labor market would, necessarily, require adjudication by the Department under ORS 657.176 to determine if the separation was disqualifying.

NOTE: The failure of any party to appear at the hearing(s) on remand will not reinstate Hearing Decisions 16-UI-71550 and 16-UI-71551 or return these matters to EAB. Only timely applications for review of the subsequent hearing decision(s) will cause these matters to return to EAB.

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

DATE of Service: December 21, 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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