

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0371

Affirmed
Ineligible - Weeks 49-16 through 06-17

PROCEDURAL HISTORY: On February 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the week of December 4 through December 10, 2016 (week 49-16) (decision # 144951). On February 16, 2017, the Department served notice of a second administrative decision concluding claimant did not actively seek work during the weeks including December 11, 2016 through February 11, 2017 (weeks 50-16 through 06-17) (decision # 150522). Claimant filed timely requests for hearing. On March 8, 2017, the Office of Administrative Hearings (OAH) served notice of a consolidated hearing on both decisions scheduled for March 22, 2017. On March 22, 2017, ALJ S. Lee conducted a consolidated hearing, and on March 24, 2017, issued Hearing Decision 17-UI-79616, affirming decision # 144951, and Hearing Decision 17-UI-79613, affirming decision # 150522. On March 28, 2017, claimant filed applications for review of Hearing Decisions 17-UI-79616 and 17-UI-79613 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-79616 and 17-UI-79613. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0370 and 2017-EAB-0371). EAB considered the entire hearing record in reaching these decisions.

In written argument, claimant requested that EAB review the final orders in two previous cases concerning claimant's work seeking activities in which the respective ALJs concluded that claimant had actively sought work during weeks when the only employer contact claimant had made was with his direct employer. As a preliminary matter, we have no jurisdiction over either of the other cases as no party has requested EAB review of either case. Nor, we note, do decisions based on other hearing records regarding claimant's work search activities during other weeks claimed in December 2015 and March 2016 have preclusive effect over our decision about the weeks at issue in these two cases. For the sake of addressing claimant's argument, however, we have reviewed the orders in the other two cases and found that they do not affect our analysis in this case. In neither case did the ALJ directly address the issue of whether claimant made the required two direct employer contacts during the weeks at issue, and based on the ALJs' findings in those cases and the relevant administrative rules, it is likely

that had we reviewed those cases we would have concluded that claimant did not actively seek work during the weeks at issue, and the ALJs' conclusions that claimant had actively sought work during the weeks at issue were made in error.

Regarding the cases over which EAB has jurisdiction, EAB considered the entire hearing record and considered the remainder of claimant's written argument to the extent it was based on the record, in reaching these decisions. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) On December 21, 2015, claimant filed an initial claim for unemployment insurance benefits (BYE 2016-49). On January 29, 2016, February 29, 2016 and March 31, 2016, the Department mailed to claimant at his address of record a work search advisory (UI PUB 195) that advised claimant that to be eligible for benefits, he was required to complete at least five work-seeking activities for each week he claimed benefits. UI PUB 195 further advised that two of the five work seeking activities completed each week were required to be direct contacts with an employer who might hire him.¹ Claimant received the work search advisories. On March 21, 2016, a Department representative orally advised claimant of those eligibility requirements and clarified that his direct employer contacts had to be with "new" employers. Audio Record ~ 20:00 to 21:00.

(2) On December 8, 2016, Knife River Corporation, claimant's regular employer, notified claimant that he was being temporarily laid off from full-time work as a truck driver. When it laid claimant off, the employer did not give claimant a date on which he would return to full-time work. However, the employer instructed claimant to contact the employer daily to determine if it had work for claimant the following day.

(3) On December 18, 2016, claimant filed a second initial claim for unemployment insurance benefits (BYE 2017-49).

(4) Claimant claimed and was paid benefits for the week including December 4 through December 10, 2016 (week 49-16) under BYE 2016-49. Claimant claimed and received waiting week credit or was paid benefits for the weeks including December 11, 2016 through February 11, 2017 (weeks 50-16 through 06-17) under BYE 2017-49. These are the weeks at issue.

(5) 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 layoff date, but did not provide a return to work date because he was not given one by the employer.

(6) During the week including December 4 through December 10, 2016 (week 49-16)(BYE 2016-49) claimant remained in daily contact with the employer and performed 8 hours of work on December 8, 2016.

¹ We take notice of these facts, which are contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record.

(7) During each of the weeks including December 11, 2016 through January 14, 2017 (weeks 50-16 through 02-17) (BYE 2017-49), claimant contacted his regular employer daily to determine if he would return to work the following day. Claimant performed 8 hours or less of work on one day during each of weeks 50-16, 52-16 and 01-17. These were his only work seeking activities during those weeks.

(8) During the week including January 15 through 21, 2017 (week 03-17), claimant contacted the employer twice, contacted a construction company and looked at Craigslist and the local newspaper in an effort to find work.

(9) During the week including January 22 through 28, 2017 (week 04-17), claimant contacted the employer twice, contacted a construction company and looked at Craigslist and the local newspaper in an effort to find work.

(10) During the week including January 29 through February 4, 2017 (week 05-17), claimant contacted the employer three times, contacted an excavation company and looked at Craigslist and the local newspaper in an effort to find work.

(11) During the week including February 5 through 11, 2017 (week 06-17), claimant contacted the employer twice, worked two days for the employer and contacted a ranch in an effort to find work.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. Claimant did not actively seek work during weeks including 49-16 through 06-17 and is ineligible for benefits for those weeks.

To be eligible to receive benefits, unemployed individuals must 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 retroactively denied benefits for the weeks at issue because it concluded claimant did not actively seek work during the weeks at issue. 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 for the following reasons.

It is undisputed that when claimant filed each of his weekly claims, he certified to the Department that he was on "temporary layoff" and had been given a date to return to full-time work within 28 days of his layoff date. Audio Record ~ 9:00 to 11:30; 14:10 to 16:00. It is also undisputed that, in fact, the employer had not given claimant a date on which he would return to full-time work. Accordingly, claimant did not qualify for the modified work search requirements permitted for an individual on a temporary layoff under OAR 471-030-0036(5)(b)(A). He was, therefore, required to seek work by doing five work-seeking activities per week, including two being direct contact with an employer, and, according to the Department's oral instruction to claimant, the direct contact was required to be with new employers, not his regular employer.

On this record, claimant did not 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 as required by OAR 471-030-0036(5)(a). Although during at least four of the weeks at issue, weeks 03-17 through 06-17, claimant contacted an employer besides his regular employer in an effort to find work, contacting his regular employer did not qualify as a direct employer contact under the rule as claimant knew from the work search advisories he received and his discussion with a department representative on March 21, 2016. Because claimant failed to engage in at least five work search activities, with at least two being direct potential new employer contacts, 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 weeks 49-16 through 06-17.

DECISION: Hearing Decisions 17-UI-79616 and 17-UI-79613 are affirmed.

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

DATE of Service: April 21, 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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