

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0495

*Hearing Decisions 17-UI-80792, 17-UI-80802 and 17-UI-80798 Affirmed
Ineligible Weeks 49-16 through 01-17, 03-17, and 05-17 through 06-17*

PROCEDURAL HISTORY: On March 7, 2017, the Oregon Employment Department (the Department) served notice of three administrative decisions: decision # 91123 concluding that claimant did not actively seek work from December 4, 2016 through January 7, 2017 (weeks 49-16 through 01-17), decision # 92332 concluding that claimant did not actively seek work from January 15 through 21, 2017 (week 03-17) and decision # 100800 concluding that claimant did not actively seek work from January 29 through February 11, 2017 (week 05-17 through 06-17). Claimant filed a timely request for hearing regarding each decision.

The Office of Administrative Hearings (OAH) scheduled hearings regarding decisions # 91123, # 92332 and # 100800 for April 11, 2017. On April 11, 2017, ALJ Meerdink conducted a consolidated hearing regarding the three decisions, and on April 12, 2017, issued Hearing Decisions 17-UI-80792, 17-UI-80802 and 17-UI-80798, respectively, affirming each decision. On April 27, 2017, claimant filed timely applications for review of Hearing Decisions 17-UI-80792, 17-UI-80802 and 17-UI-80798 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-80792, 17-UI-80802 and 17-UI-80798. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2017-EAB-0493, 2017-EAB-0494 and 2017-EAB-0495).

FINDINGS OF FACT: (1) Knife River Corporation, a construction materials supplier, employed claimant as a truck driver beginning in 2007 and through the weeks at issue. Although claimant was considered a full time employee, claimant's work was job and weather dependent and he was required to contact the employer each work day to determine if there would be work available.

(2) During most of the weeks of December 2016, and January and February of 2017, winter weather restricted the number of jobs available and claimant's work was sporadic and limited to part time work. On or about December 10, 2016, claimant filed an initial claim for unemployment benefits. Claimant claimed but was denied benefits for the week including December 4 through December 10, 2016 (week 49-16) and claimed and received benefits or waiting week credit for the weeks including December 11,

2016 through January 7, 2017 (weeks 50-16 through 01-17), January 15, 2017 through January 21, 2017 (week 03-17) and January 29, 2017 through February 11, 2017 (week 05-17 through 06-17). These are the weeks at issue. When filing each of his weekly claims, claimant reported to the Department that he was on temporary layoff but did not report a return to work date and reported only one to four work seeking activities, typically reporting that he only contacted the employer to seek work.

(3) Eventually, the Department performed an audit of claimant's claims. A Department representative contacted the employer which reported to the representative, "For layoffs we are in the construction industry, always weather dependent [with] no definite return to work dates. Everyone is on call and subject to customer demands and weather." The employer "does not give return to work dates." Audio Record ~ 9:00 to 10:00. Consequently, the Department denied claimant's claims for the weeks at issue.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. Claimant did not actively seek work during the weeks at issue 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). 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). With limited exceptions, individuals are "required to conduct at least five work seeking activities per week,¹ with at least two of those being direct contact with an employer who might hire the individual." *Id.* One exception to the work seeking requirements of OAR 471-030-0036(5)(a) is an individual on temporary layoff of four weeks or less. An individual who is on a temporary layoff for four weeks or less with the individual's regular employer and had, as of the layoff date, been given a date to return to work, is considered to have actively sought 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 layoff occurred. OAR 471-030-0036(5)(b)(A) (February 23, 2014). The individual does not meet the requirements of OAR 471-030-0036(5)(b)(A) 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. OAR 471-030-0036(5)(b)(B).

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. The Department established that during the weeks at issue, although claimant's employment was reduced to less than full time work, claimant was not put on a temporary layoff of four weeks or less, and that his regular employer had not given him a date on which he would return to work that was within four weeks of either his last day worked or a reported layoff date. Accordingly, under OAR 471-030-0036(5), to be eligible for benefits, claimant was required to perform a minimum of five work seeking activities per week, with at least two of those being direct contact with

¹ Examples of 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 a potential employer. OAR 471-030-0036(5)(a).

an employer who might hire him. It is undisputed that claimant did not conduct at least five work seeking activities during those weeks as required under OAR 471-030-0036(5)(a). Because he did not, claimant did not actively seek work during the weeks at issue and is ineligible for benefits for those weeks.

DECISION: Hearing Decisions 17-UI-80792, 17-UI-80802 and 17-UI-80798 are affirmed.

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

DATE of Service: May 24, 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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