

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0548

Affirmed
Ineligible

PROCEDURAL HISTORY: On March 17, 2017, the Oregon Employment Department (the Department) served three notices of three administrative decisions: decision # 82721, concluding claimant did not actively seek work from January 22, 2017 to January 28, 2017; decision # 83548, concluding claimant did not actively seek work from February 5, 2017 to February 11, 2017; and decision # 84315, concluding claimant did not actively seek work from February 26, 2017 to March 4, 2017. Claimant filed a timely request for hearing on all three decisions. On April 18, 2017, ALJ Meerdink conducted a consolidated hearing, and issued the following: Hearing Decision 17-UI-81220 affirmed decision # 82721; Hearing Decision 17-UI-81238 affirmed decision # 83548; and Hearing Decision 17-UI-81219 affirmed decision # 84315. On May 4, 2017, claimant filed applications for review of all three hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions Hearing Decisions 17-UI-81219, 17-UI-81220 and 17-UI-81238. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2017-EAB-0547, 2017-EAB-0548 and 2017-EAB-0549).

FINDINGS OF FACT: (1) For the past eleven years, claimant has been regularly employed by the same business as a vegetation management spray technician. The work was seasonal, in that extreme or inclement weather caused claimant's work to stop. Claimant typically maintained contact with the employer all winter by calling the employer every day. The employer let claimant know when the employer needed him to work. Generally speaking, when it rained he did not work; when it did not rain he worked. The employer did not give claimant a return to work date because the job was weather-dependent. Claimant put his job first and worked whenever the employer had work available for him.

(2) On December 3, 2016, claimant filed an initial claim for unemployment insurance benefits. At that time he had last worked for his regular employer on November 1, 2016 and reported that he expected to return to work on February 1, 2017. Claimant filed weekly claims for benefits for the weeks of January

22, 2017 to January 28, 2017 (week 4-17), February 5, 2017 to February 11, 2017 (week 6-17) and February 26, 2017 to March 4, 2017 (week 9-17). The Department paid claimant benefits each week.¹

(3) Claimant did not keep records of the work searches he performed during the three weeks at issue. He contacted his regular employer every day. He also applied for some customer service jobs, with UPS and with the Oregon Department of Transportation during the weeks at issue and went to online work search websites and several trade websites. Claimant reported some work search activities to the Department, but did not report that he performed five or more activities in any of the three weeks at issue. Claimant did perform five or more activities in other weeks that are not at issue in this case.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant did not actively seek work during the weeks at issue and he is therefore ineligible to receive unemployment insurance benefits during 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, with at least two of those being direct contact with an employer who might hire the individual." *Id.* 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). Where, as here, the Department has paid benefits, the Department has the burden to establish that benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

During the three weeks at issue, claimant was often laid off work from his regular employer due to the weather. His circumstances do not qualify him for the temporary layoff exception to the work search requirement, however. At the time of his initial claim filing, he reported that he would be laid off for approximately three months, which exceeds the four-week layoff period covered by the exception. With regard to the three weeks at issue, claimant testified that his work was weather-dependent and although he maintained daily contact with the employer, neither he nor the employer could predict when the weather would clear enough that claimant could return to work. Nor, given that claimant's work was weather-dependent, was claimant's return to work ever expected to be a return to full time work. The record therefore establishes that claimant was not laid off for a period of four weeks or less, nor was he laid off with a date to return to full time work, during the three weeks at issue. He does not qualify for the temporary layoff exception to the actively seeking work requirement, and he must therefore have actively sought work during each of the three weeks at issue in order to qualify for benefits.

¹ We take notice of this fact, which is 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 fact will remain in the record.

Although claimant sometimes, perhaps frequently, satisfied the requirement that he actively seek work by conducting five work seeking activities during other weeks he claimed benefits, the fact that he might have satisfied the requirement during some weeks does not excuse him from satisfying it during the three weeks at issue. Claimant must have performed five work seeking activities, including two direct employer contacts, during any week in which he expects to be eligible for benefits. In this case, claimant did not report five work seeking activities to the Department in any of the three weeks at issue. He did not maintain records listing his weekly work seeking activities, and at the hearing was unable to rebut the Department's evidence that he did not perform five activities in any of the weeks at issue. The preponderance of the evidence therefore suggests that claimant did not actively seek work during the weeks at issue. He is therefore ineligible to receive benefits during those three weeks.

DECISION: Hearing Decisions 17-UI-81219, 17-UI-81220 and 17-UI-81238 are affirmed.

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

DATE of Service: May 23, 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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