

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0597

Reversed & Remanded

PROCEDURAL HISTORY: On February 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from December 11, 2016 to January 7, 2017 (decision # 102206). On March 15, 2017, the Department served notice of an administrative decision concluding claimant did not actively seek work from January 29, 2017 to February 25, 2017 (decision # 120925). Claimant filed timely requests for a hearing on both decisions. On May 2, 2017, ALJ Murdock conducted a consolidated hearing, and on May 3, 2017 issued Hearing Decision 17-UI-82453, affirming decision # 102206, and Hearing Decision 17-UI-82454, affirming decision # 120925. On May 15, 2017, 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 17-UI-82453 and 17-UI-82454. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0597 and 2017-EAB-0598).

CONCLUSIONS AND REASONS: These matters are reversed and remanded to the Office of Administrative Hearings.

ORS 657.155(1)(c) requires that individuals actively seek work every week as a condition of being eligible for unemployment insurance benefits. OAR 471-030-0036(5) defines “actively seeking work,” in pertinent part, as performing at least five work seeking activities per week, including at least two direct contacts with employers who might hire the individual. OAR 471-030-0036(5)(b)(A) provides, however, that individuals “on temporary layoff of four weeks or less with the individual’s regular employer” may be excused from those work seeking activities if “as of the layoff date,” the individual had “been given a date to return to full-time work” or work that paid the same as or more than his weekly benefit amount with the individual’s regular employer. OAR 471-030-0036(5)(b)(A) also states that “[t]he individual no longer meets the requirements of this [exception] if four calendar weeks have passed following the week in which the temporary layoff occurred” and must then actively seek work by performing at least the required number of work seeking activities each week.

The ALJ disregarded claimant's testimony that his regular employer gave him return to work dates at the time of each layoff, found as fact that claimant's return to work after each of his layoff periods depended on the weather and road conditions, and reasoned that he "did not have a definite date to return to full-time work" and did not qualify for the temporary layoff exception to the requirement that he actively seek work. Hearing Decisions 17-UI-82453 and 17-UI-02454 at 1, 3. We disagree with the ALJ and conclude that the record was not sufficiently developed to reach a conclusion in these cases.

As a preliminary matter, Department records establish that the Department initially paid claimant benefits for all the weeks at issue in these cases. Where the Department initially paid benefits, and now seeks to reclaim them, the Department has the burden to prove by a preponderance of the evidence that benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In this case, claimant credibly testified that his regular employer initially gave him return to work dates for both layoff periods. Audio recording at ~ 9:30-10:00, 11:30. Although claimant also agreed that his actual return to work could be subject to conditions pertinent to the type of work he did, that is both true in every case and immaterial to whether claimant qualifies for the temporary layoff exception to the actively seeking work requirement. A threshold determination under the referenced administrative rule requires only that claimant's regular employer gave him a "date" to return to work from each layoff period; it does not require that the employer actually returned claimant to work on that date or that no contingencies exist that might result in delay.

The parties agreed at the hearing that claimant's first layoff period began on December 13, 2016. Claimant's testimony that he "was given a date initially" by the employer to return to work on January 9, 2017, which fell within four weeks of the layoff date, was not refuted. Audio recording at ~ 9:30-10:00. In order to establish whether and for what period claimant qualifies for the temporary layoff exception to the actively seeking work requirement, however, the ALJ must confirm the accuracy of those dates with the parties, ascertain whether the employer planned to return claimant to full time work or work that would pay the same as or more than his weekly benefit amount, and determine at what point the employer decided to extend claimant's layoff period to more than four weeks, thus ending the period in which claimant was excused from actively seeking work.

The parties agreed that claimant's second layoff period began on January 28, 2017, and the Department did not refute claimant's testimony that "they [the employer] give us a return date" from the layoff. Audio recording at ~ 11:30. On remand, the ALJ must ask claimant what return to work date the employer gave him at the time the employer laid him off work. Just as with the first layoff period, the ALJ must also ascertain whether the employer planned to return claimant to full time work or work that would pay the same as or more than his weekly benefit amount, and determine at what point the employer decided to extend claimant's layoff period to more than four weeks, thus ending the period in which claimant was excused from actively seeking work.

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 develop the record necessary for a determination of whether claimant qualified for the

temporary layoff exception to the actively seeking work requirement for any portion of the two layoff periods at issue in these cases, Hearing Decisions 17-UI-82453 and 17-UI-82454 are reversed, and these matters remanded for development of the record.

DECISION: Hearing Decisions 17-UI-82453 and 17-UI-82454 are set aside, and this matter remanded for further proceedings consistent with this order.¹

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

DATE of Service: May 19, 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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¹ **NOTE:** The failure of any party to appear at the hearing(s) on remand will not reinstate Hearing Decisions 17-UI-82453 and 17-UI-82454 or return these matters to EAB. Only timely applications for review of any subsequent hearing decision(s) will cause these matters to return to EAB.