

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0704

Affirmed

Ineligible Weeks 44-16 through 45-16, 47-16 through 49-16 and 52-16 through 03-17

PROCEDURAL HISTORY: On January 27, 2017, the Oregon Employment Department (the Department) served notice of three administrative decisions, one concluding claimant did not actively seek work during the weeks including October 30 through November 12, 2016 (weeks 44-16 through 45-16) (decision # 93245), a second concluding claimant did not actively seek work during the weeks including November 20 through December 10, 2016 (weeks 47-16 through 49-16) (decision # 93403) and a third concluding claimant did not actively seek work during the weeks including December 25, 2016 through January 21, 2017 (weeks 52-16 through 03-17) (decision # 93611). Claimant filed timely requests for hearing on all three decisions.

On April 27, 2017, the Office of Administrative Hearings (OAH) served notice of a consolidated hearing on all three decisions scheduled for May 12, 2017. On May 12, 2017, ALJ Frank conducted a consolidated hearing, and on May 19, 2017, issued Hearing Decision 17-UI-83846, affirming decision # 93245, Hearing Decision 17-UI-83848, affirming decision # 93403, and Hearing Decision 17-UI-83845, affirming decision # 93611. On June 7, 2017, claimant filed applications for review of Hearing Decisions 17-UI-83846, 17-UI-83848 and 17-UI-83845 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-83846, 17-UI-83848 and 17-UI-83845. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2017-EAB-0701, 2017-EAB-0704 and 2017-EAB-0702, respectively). EAB considered the entire hearing record in reaching these decisions.

FINDINGS OF FACT: (1) Wild Honey Excavation, Inc. employed claimant as a heavy equipment operator during the period at issue in these consolidated proceedings.

(2) During the months of October 2016 through January 2017, eastern Oregon experienced severe weather. Due to the weather conditions, the employer notified claimant on three occasions that he was being laid off from full time work until weather conditions improved. The employer never gave claimant a date on which he would return to full time work.

(3) On November 7, 2016, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed and was paid benefits for the weeks including October 30 through November 12, 2016, November 20 through December 10, 2016 and December 25, 2016 through January 21, 2017 (weeks 44-16 through 45-16, 47-16 through 49-16 and 52-16 through 03-17). These are the weeks at issue.

(4) 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 without reporting a return to work date. For weeks 44-16 through 45-16, claimant reported a layoff date of October 21, 2016. For weeks 47-16 through 49-16, claimant reported a layoff date of November 18, 2016. For weeks 52-16 through 03-17, claimant reported a layoff date of December 16, 2016. With the exception of week 48-16, when filing each of his weekly claims with the Department, claimant did not report any work search activities other than maintaining contact with his employer. For week 48-16, claimant reported that he maintained contact with his employer and made direct contacts with two other named employers in an effort to find work.

(5) In January 2017, the Department sent claimant a letter requesting additional information about whether the employer ever gave him a return to work date for any of the periods at issue and what work search activities in which he may have engaged. On January 25, 2017, claimant responded in writing that each time he was laid off, the employer told him that he would return to work within 4 weeks of the layoff, but did not give him a return to work date. Claimant did not describe any work search activities other than remaining in contact with his employer in which he had engaged in during the weeks at issue.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant did not actively seek work during weeks including October 30 through November 12, 2016, November 20 through December 10, 2016 and December 25, 2016 through January 21, 2017 (weeks 44-16 through 45-16, 47-16 through 49-16 and 52-16 through 03-17) 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, 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)(February 23, 2014).

The Department retroactively denied benefits for the weeks at issue after concluding claimant did not actively seek work during those weeks. Where, as here, the Department initially gives waiting week credit or 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.

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. However, in his response to the Department on January 25, 2017 and at hearing, claimant admitted that his layoffs were due to weather, and was told each time he was laid off that he would return to work within four weeks without being given date. Audio Record ~ 13:30 to 14:20; 17:20 to 18:30. For purposes of determining whether or not a claimant must seek work during a layoff, however, it does not matter if the layoff is four weeks or less unless the individual was also given a date to return to full time work at the time of the layoff. Because claimant’s return to work date was weather dependent and no return to work date was given to him when he was laid off, 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). Therefore, to be eligible for benefits, he was required to seek work by performing at least five work-seeking activities per week, with at least two of those work seeking activities being direct contact with an employer which might hire him, during all of the weeks at issue in these cases.

At hearing, claimant disputed that he did not perform the required work searches during the weeks at issue. However, when asked to provide evidence of those work searches, he stated that he did not have any because he disposed of his records after filing his weekly claims. Audio Record ~ 19:30 to 23:30. Because, on this record, claimant failed to engage in the required number and nature of work search activities during those weeks at issue, the Department established that claimant did not actively seek work in accordance with OAR 471-030-0036(5)(a) and, therefore, is ineligible for benefits for the weeks including October 30 through November 12, 2016, November 20 through December 10, 2016 and December 25, 2016 through January 21, 2017 (weeks 44-16 through 45-16, 47-16 through 49-16 and 52-16 through 03-17).

DECISION: Hearing Decisions 17-UI-83846, 17-UI-83848 and 17-UI-83845 are affirmed.

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

DATE of Service: July 7, 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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