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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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AAA 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0706

Affirmed
Ineligible Weeks 50-16 through 51-16 and 01-17 through 04-17
Eligible Weeks 05-17 through 06-17

PROCEDURAL HISTORY: On February 22, 2017, the Oregon Employment Department (the Department) served notice of two administrative decisions, one concluding claimant did not actively seek work during the weeks including December 11 through December 24, 2016 (weeks 50-16 through 51-16) (decision # 65350), and the other concluding claimant did not actively seek work during the weeks including January 1 through February 11, 2017 (weeks 01-17 through 06-17) (decision # 70244). Claimant filed timely requests for hearing on both decisions. On April 26, 2017, the Office of Administrative Hearings (OAH) served notice of a consolidated hearing on both decisions scheduled for May 19, 2017. On May 19, 2017, ALJ Meerdink conducted a consolidated hearing, and on May 22, 2017, issued Hearing Decision 17-UI-83936, affirming decision # 65350, and Hearing Decision 17-UI-83939, modifying decision # 70244 and concluding that claimant did not actively seek work during the weeks including January 1 through January 28, 2017 (weeks 01-17 through 04-17) but actively sought work during the weeks including January 29 through February 11, 2017 (weeks 05-17 through 06-17). On June 7, 2017, claimant filed applications for review of Hearing Decisions 17-UI-83936 and 17-UI-83939 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-83936 and 17-UI-83939. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0706 and 2017-EAB-0705, respectively). EAB considered the entire hearing record in reaching these decisions.

FINDINGS OF FACT: (1) Bend Concrete Service Co. employed claimant as a concrete finisher and scheduler during the period at issue in these consolidated proceedings. During the months of December 2016 and January 2017, central Oregon was inundated with snow by several major snowstorms. Due to the severe weather, the employer notified claimant that he would be laid off from full time work until the weather permitted his return to full time work. Claimant was not given a date on which he would return to full time work.

(2) On November 26, 2016, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed and was paid benefits for the weeks including December 11 through December 24, 2016 (weeks 50-16 through 51-16) and January 1 through February 11, 2017 (weeks 01-17 through 06-17), the weeks at issue.

(3) 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 or any work activities other than maintaining contact with his employer.

(4) On or about April 5, a department representative spoke with claimant by phone. Claimant explained that his work repeatedly had been interrupted by snow, that he was last laid off on December 31, 2016 and at that time was told he would return to work on January 28, 2017. When that date went by without returning to work, he began to seek work with other employers because it was beyond 28 days from his last layoff date. He told the representative he would send in his work search information for the period after January 28, 2017, which he did. Exhibit 1.

(5) During each of the weeks including January 29 through February 11, 2017 (weeks 05-17 through 06-17), claimant performed at least five work-seeking activities, with at least two of those direct contacts with employers that might hire him. Exhibit 1.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant did not actively seek work during weeks including December 11 through December 24, 2016 (weeks 50-16 through 51-16) and January 1 through January 28, 2017 (weeks 01-17 through 04-17) and is ineligible for benefits for those weeks. Claimant actively sought work during the weeks including January 29 through February 11, 2017 (weeks 05-17 through 06-17) and is eligible for benefits for those two 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 the weeks at issue. 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, in part.

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 although he did not report a return to work date. Claimant also admitted that his lay off was due to weather, and he believed each time his work was interrupted by weather, he would return to work within 28 days. Audio Record ~ 26:00 to 29:00. 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 did not dispute that during weeks 50-16 through 51-16 and weeks 01-17 through 04-17, he did not seek work other than by maintaining contact with his regular employer because he believed that he would return to work within 28 days and did not have to, which he admitted was a misunderstanding of the rule. Audio Record ~ 30:45 to 31:45. Because claimant failed to engage in the required number and nature of work search activities during those weeks at issue, the Department established that claimant is ineligible for benefits for weeks 50-16 through 51-16 and weeks 01-17 through 04-17.

However, the Department's witness admitted that claimant's work searches for weeks 05-17 through 06-17, reflected on Exhibit 1, were adequate under the rule and that based on that record claimant was eligible for benefits for those weeks. Audio Record ~ 21:00 to 22:10. Because that record reflects that claimant performed at least five work-seeking activities during each of those weeks, with at least two of those being direct contact with an employer which might have hired him, we agree that he is eligible for benefits during those weeks.

In sum, claimant is ineligible for benefits for weeks 50-16 through 51-16 and weeks 01-17 through 04-17, but is eligible for benefits for weeks 05-17 through 06-17.

DECISION: Hearing Decisions 17-UI-83936 and 17-UI-83939 are affirmed.

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

DATE of Service: <u>June 30, 2017</u>

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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