

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0715

Reversed & Remanded

PROCEDURAL HISTORY: On February 27, 2017, the Oregon Employment Department (the Department) served notice of the following two administrative decisions: decision # 123708 concluded that claimant failed to actively search for work from December 11, 2016 through January 7, 2017 (weeks 50-16 through 1-17) and decision # 124158 concluded that claimant failed to actively search for work from January 8 through 21, 2017 (weeks 2-17 and 3-17). Claimant filed timely requests for hearing. On May 18, 2017, ALJ Frank conducted a consolidated hearing, and on May 26, 2017, issued the following hearing decisions: Hearing Decision 17-UI-84369, which modified decision # 123708 and concluded that claimant did not actively search for work during weeks 50-16 through 52-16, but actively searched for work during week 1-17; and Hearing Decision 17-UI-84368, which affirmed decision # 124158. On June 8, 2017, claimant filed applications for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-84368 and 17-UI-84369. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0714 and 2017-EAB-0715).

Based on a *de novo* review of the entire record in these cases, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion that claimant actively searched for work during week 1-17 are **adopted**.

FINDINGS OF FACT: (1) On December 5, 2016, claimant's regular employer, Rocky Mountain Construction, laid him off from his job as a laborer. The date on which claimant was expected to return to work was dependent on weather conditions.

(2) Claimant claimed benefits for the period December 11, 2016 through January 7, 2017 (weeks 50-16 through 1-17) and January 8 through 21, 2017 (weeks 2-17 and 3-17). When claimant filed his claims for each of these weeks, he indicated that he was on a temporary layoff. Claimant was paid benefits for weeks 50-16 through 2-17, but was not paid benefits for weeks 3-17.

CONCLUSION AND REASONS: Hearing Decisions 17-UI-84368 and 17-UI-84369 are affirmed in part, and reversed and remanded in part for further development of the record.

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 has been laid off by an employer and who was given, on the layoff date, a date to return to work for the employer that is no more than four weeks from the layoff date, 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).

When claimant filed his claims for benefits for the weeks at issue, weeks 50-16 through 52-16, 2-17 and 3-17, he indicated that he was on a temporary layoff. Claimant's last day work for his customary employer, Rocky Mountain Construction, was Monday, December 5, 2016; his layoff therefore began on Tuesday, December 6, the first day he did not work. Claimant provided inconsistent information regarding the date he was expected to return to full time work. When he restarted his unemployment claim on December 16, claimant told the Department his return to work date was January 9, more than 28 days from the date on which his layoff began. Audio recording at 11:47. At the hearing, however, claimant testified that his employer told him he would return to full time work on January 3 or 4; January 3 is within 28 days of claimant's layoff date. Audio recording at 10:58. Given the inconsistencies in claimant's statements about his expected return to work date, and weather dependent nature of that date, we conclude it more likely than not that claimant did not have, on the date he was laid off, a return to work date within 28 days of the layoff date. We therefore agree with the ALJ's conclusion that claimant was not on a temporary layoff within the meaning of OAR 471-030-0036(5)(b)(A) and was required to perform an active work search.

The ALJ failed to conduct an inquiry to determine if claimant conducted an active work search as required by ORS 657.155(1)(c), however. At the hearing, the Department witness testified that the only work search activity claimant listed when he filed his claims for weeks 50-16 through 52-16, 2-17 and 3-17 was to contact Rocky Mountain Construction. Audio recording at 8:17. Claimant, however, testified that he did look for work during these weeks, and was "out talking to every project I know." Audio recording at 13:04, 14:41. The ALJ never asked claimant about any specific work search activities he performed during the weeks at issue, however. Instead, after claimant testified that he had looked for work and kept records of his work search activities, the ALJ asked if claimant's records "coincide with what [the Department representative] reported or not?" and claimant responded that they (presumably the records) did. The ALJ failed to confirm what was claimant's understanding of the Department report concerning his work search, and failed to question claimant about his work search efforts. On remand, the ALJ must ask claimant about any records he kept concerning his work search, and ask claimant to list the work search activities he performed during each of the weeks still at issue --weeks 50-16 through 52-16, 2-17 and 3-17 -- based on records claimant may have kept or claimant's own recollection. The ALJ must ask any other questions necessary to determine whether claimant engaged in an active work search during the remaining weeks at issue.

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 Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary to determine if claimant performed an active work search as required by ORS 657.155(1)(c), Hearing Decisions 17-UI-84368 and 17-UI-84369 are reversed, and these matters remanded for further development of the record.

DECISION: Hearing Decisions 17-UI-84368 and 17-UI-84369 are set aside, and these matters remanded for further proceedings consistent with this order.

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

DATE of Service: July 10, 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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