

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0884

Reversed
Eligible

PROCEDURAL HISTORY: On February 22, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the weeks of December 4, 2016 through December 31, 2016 (decision # 121146). Claimant filed a timely request for hearing. On June 28, 2017, ALJ Snyder conducted a hearing, and on July 3, 2017 issued Hearing Decision 17-UI-87173, affirming the Department's decision. On July 24, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond his reasonable control prevented him from offering that information during the hearing. Under OAR 471-041-0090 (October 29, 2006), EAB therefore considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) As of December 3, 2016, claimant was working for his regular employer felling timber.

(2) On December 3, 2016, a representative of claimant's regular employer notified claimant that he was laid off. The first day claimant missed work as a result of the layoff, and the first day of the layoff, was December 5, 2016. At the time of the layoff, the employer representative told claimant he would return to work the Monday after Christmas, which was December 26, 2016.

(3) Claimant claimed and was paid benefits for the weeks of December 4, 2016 through December 31, 2016 (weeks 49-16 through 52-16), the weeks at issue¹. When claimant claimed his weekly benefits, he stated he was on a temporary layoff with his regular employer. In claimant's weekly claim reports he did not list any work seeking activities other than remaining in contact with his regular employer.

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 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.

(4) On December 26, 2016, claimant did not return to work. Claimant's return to work was delayed because his regular employer had not signed a contract for a job felling timber by the date anticipated. Sometime after December 26, 2017, the contract was signed. Claimant worked for his regular employer for six hours on December 30, 2016.

CONCLUSIONS AND REASONS: Claimant actively sought work during the weeks of December 4, 2016 through December 31, 2016.

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 contacts 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).

In Hearing Decision 17-UI-87173, the ALJ concluded claimant did not actively seek work during the weeks at issue by remaining in contact with his regular employer and needed to perform five work seeking activities to maintain his eligibility for benefits. The ALJ reasoned that, while the return to work date of December 26, 2016 claimant was given was within 28 days of his December 5, 2016 layoff, it was "contingent on the [regular] [e]mployer finalizing a contract for a new job," and asserted that the existence of this contingency eliminated December 5, 2016 from constituting a return to work date within the meaning of OAR 471-030-0036(5)(b)(A). Hearing Decision 17-UI-87171 at 3. The ALJ therefore concluded that because claimant did not perform five work seeking activities during the weeks at issue as he was required to do, he did not actively seek work.

To constitute a temporary layoff, OAR 471-030-0036(5)(b)(A) requires, among other things, that claimant have been given a date on which he would return to work as of the date he was laid off, and that the return to work date was within four weeks of the layoff. Although the actual date that claimant would return to work might have technically been contingent on the employer entering into the new contract, there is no evidence in the record that claimant was informed that his return to work date was contingent on any event. There is no requirement in OAR 471-030-0036(5)(b) that, for a temporary layoff of less than four weeks, the stated return to work date must not be objectively contingent on anything, whether or not claimant was informed of that contingency. Because the employer gave claimant a specific return to work date as of the date of the layoff that was within four weeks of the layoff, and there is no evidence that claimant was notified that the return to work date that he was given was or might be contingent on any factor(s), claimant fell with the exemption from the usual work seeking activities for individuals on temporary layoffs under OAR 471-030-0036(5)(b). As such, claimant fulfilled the work seeking activities required of him for the first four weeks that he was laid off, or through December 30, 2016, by remaining in contact with his regular employer. Claimant therefore is eligible to receive benefits for the weeks of December 3, 2016 through December 31, 2016, the weeks at issue.

DECISION: Hearing Decision 17-UI-87173 is set aside, as outlined above.

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

DATE of Service: August 17, 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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