

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0948

Modified
Eligible Weeks 04-17 through 07-17
Ineligible Week 09-17

PROCEDURAL HISTORY: On April 10, 2017, the Oregon Employment Department (the Department) served notice of administrative decision # 130818, concluding that claimant did not actively seek work from January 22 through February 18, 2017 (weeks 04-17 through 07-17) and February 26 through March 4, 2017 (week 09-17). Claimant filed a timely request for hearing. On July 11, 2017, ALJ Micheletti conducted a hearing, and on July 17, 2017 issued Hearing Decision 17-UI-88130, concluding that claimant actively sought work during week 04-17, but not weeks 05-17 through 07-17 or 09-17. On August 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. However, claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion that claimant actively sought work during week 04-17, and therefore is eligible benefits for that week, are **adopted**. The remainder of this decision addresses whether claimant actively sought work during weeks 05-17 through 07-17 and 09-17, and therefore is eligible for benefits for those weeks.

FINDINGS OF FACT: (1) Claimant claimed benefits for the weeks 05-17 through 07-17 and week 09-17, the weeks at issue. The Department paid claimant benefits for those weeks.¹

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, setting forth the basis of the objection 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.

(2) During the weeks at issue, claimant was a member of a union that allowed members to seek non-union work.

(3) During weeks 05-17 through 07-17, claimant inquired about job openings each week with the same two employers he had contacted during week 04-17 because each time he contacted those employers, they told him they expected to have work available at any time. Claimant also reviewed three different job placement websites each week and applied for jobs online, just as he had done during week 04-17.

(4) During week 09-17, claimant arranged through his union and former employer to return to work for his former employer, and did not search for work with other employers.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the Department failed to establish claimant did not actively seek work during weeks 05-17 through 07-17. Claimant therefore is eligible for benefits for those weeks. We agree with the ALJ that claimant did not actively seek work during week 09-17, and therefore is not eligible for benefits for that week.

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). Where, as here, the Department initially pays a claimant benefits, the Department has the burden to establish that the claimant is not eligible for those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

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). For an individual who is a member in good standing of a union that does not allow members to seek non-union work, such individual is actively seeking work by remaining in contact with that union and being capable of accepting and reporting for work when dispatched by that union. OAR 471-030-0036(5)(d). With few other exceptions, none of which apply here, 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.* Work seeking activities include but are not limited to registering for job placement services with the Department, attending job placement meetings sponsored by the Department, participating in a job club or networking group dedicated to job placement, updating a resume, reviewing the newspaper or job placement web sites without responding to a posted job opening, and making direct contact with an employer. OAR 471-030-0036(5)(a)(A). Direct contact with an employer means making contact with an employer in person, by phone, mail, or electronically to inquire about a job opening or applying for job openings in the manner required by the hiring employer. OAR 471-030-0036(5)(a)(B).

In Hearing Decision 17-UI-88130, the ALJ found as fact that although claimant was a member of a union during the weeks at issue, it was not a "closed" union that did not allow members to seek non-union work.² The ALJ therefore determined that to be actively seeking work during the weeks at issue, claimant had to conduct at least five work seeking activities per week, including two direct employer contacts with an employer that might have hired him.³ The ALJ further found as fact that claimant

² Hearing Decision 17-UI-88130 at 1.

³ *Id.* at 3.

“contacted two employers and conducted three [other] work seeking activities” during week 04-17, and concluded that claimant therefore actively sought work that week. However, the ALJ found as fact that claimant “did not perform five work seeking activities” per week during weeks 05-17 through 07-17, and concluded that claimant therefore did not actively seek work during those weeks.⁴ Finally, the ALJ found as fact that during week 09-17, claimant merely arranged through his union and former employer return to work for his former employer, and therefore did not actively seek work that week.⁵

We agree with the ALJ that claimant’s union allowed members to seek non-union work, and that to be actively seeking work during the weeks at issue, claimant was required to conduct at least five work seeking activities per week, including two direct employer contacts with an employer that might have hired him. We also agree with the ALJ that during week 09-17, claimant merely arranged through his union and former employer to return to work for his former employer, and did not search for work with other employers. Claimant therefore did not conduct five work seeking activities during week 09-17, did not actively seek work that week, and is not eligible for benefits for that week.

However, we disagree with the ALJ’s finding that claimant did not conduct five work seeking activities during weeks 05-17 through 07-17. At hearing, claimant testified that during those weeks, he inquired about job openings each week with the same two employers that he had contacted during week 04-17 because each time he contacted those employers, they told him they expected to have work available at any time. Audio Record at 31:10-35:30. Claimant also testified that he reviewed three different job placement websites each week and applied for jobs online, just as he had done during week 04-17. *Id.* Absent a preponderance of evidence to the contrary, claimant’s testimony was sufficient to show that in contacting the same two employers each week to inquire about job openings, he was making direct contact with two employers that might have hired him during weeks 05-17 through 07-17. Claimant’s testimony was also sufficient to show, absent a preponderance of evidence to the contrary, that in reviewing three different job placement web sites each week and applying for jobs online, he conducted a minimum of three other work seeking activities per week. Claimant therefore conducted at least five work seeking activities per week, with at least two of those being direct contact with an employer who might have hired him. He actively sought work during weeks 05-17 through 07-17, and is eligible for benefits for those weeks.

In sum, we disagree with the ALJ and conclude the Department failed to establish claimant did not actively seek work during weeks 05-17 through 07-17. Claimant therefore is eligible for benefits for those weeks. We agree with the ALJ that claimant did not actively seek work during week 09-17, and therefore is not eligible for benefits for that week.

DECISION: Hearing Decision 17-UI-88130 is modified, as outlined above.⁶

J. S. Cromwell and D. P. Hettle;

⁴ *Id.* at 1, 4.

⁵ *Id.* at 2, 4.

⁶ This decision partially reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

Susan Rossiter, not participating.

DATE of Service: August 28, 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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