

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1032

Reversed & Remanded

PROCEDURAL HISTORY: On June 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from May 7, 2017 through May 20, 2017 and assessing an overpayment of \$886 (decision # 123848). Claimant filed a timely request for hearing. On June 29, 2017, ALJ Meerdink convened a hearing at which claimant did not appear, and on June 30, 2017 issued Hearing Decision 17-UI-86982 dismissing claimant's request for hearing due to her failure to appear. On July 19, 2017, claimant filed a request to reopen the hearing. On August 4, 2017, ALJ Micheletti conducted a hearing, and on August 11, 2016, issued Hearing Decision 17-UI-90207, allowing claimant's request to reopen the hearing and otherwise affirming the Department's decision. On August 16, 2017, ALJ Micheletti issued Hearing Decision 17-UI-90527, amending Hearing Decision 17-UI-90207 to correct the weeks that it stated claimant had claimed benefits but not changing the substance of that hearing decision. On August 29, 2017, claimant filed an application for review of Hearing Decision 17-UI-90527 with the Employment Appeals Board (EAB).

CONCLUSION AND REASONS: 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 in Hearing Decision 17-UI-90527 with respect to allowing claimant's request to reopen the hearing are **adopted**. However, the portion of Hearing Decision 17-UI-90527 affirming decision # 123848 and concluding that claimant did not actively seek work during the weeks at issue and was overpaid benefits for those weeks is reversed, and this matter is remanded for further development of the record on those issues.

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.* 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).

However, 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).

In Hearing Decision 17-UI-90527, the ALJ concluded claimant did not actively seek work during the weeks of May 7, 2017 through May 20, 2017 and therefore was overpaid \$886 in benefits. The ALJ reasoned that claimant was ineligible to receive benefits for the weeks at issue since she was not exempt from conducting five work seeking activities per week under OAR 471-030-0036(5)(b)(A), and did not conduct five work seeking activities during either week at issue. We agree with the ALJ that claimant was not exempt from conducting five work seeking activities per week under OAR 471-030-0036(5)(b)(A). However, there is insufficient evidence in the record to support the ALJ's conclusion that claimant did not conduct five work seeking activities per week during the weeks at issue, or, therefore, that she was overpaid \$886 in benefits.

At the outset of the hearing, when claimant expressed uncertainty about how to present her case, the ALJ reassured claimant that he would "guide" her through the hearing process, presumably so that her inexperience would not affect the outcome. Audio at ~3:40. At hearing, claimant testified that, although she did not report any work search activities to the Department for the weeks at issue because she thought she was exempt from the general work seeking requirements, she in fact did seek work during that time from potential employers other than her regular employer. Audio at ~19:18. Claimant actively sought work during the weeks at issue if she conducted five work search activities each week. The ALJ therefore should have followed up claimant's testimony with further inquiry regarding her work search efforts in addition to maintaining contact with her regular employer to determine whether or not she was ineligible to receive benefits during the weeks at issue. On remand, the ALJ should specifically ask claimant to identify all the employers she sent resumes to or contacted about potential employment during the weeks at issue and what jobs she was seeking with those employers, to describe all efforts she made during the weeks at issue to discover if jobs of the type she was seeking were available, and to describe all other work seeking activities she engaged in during the weeks at issue. As appropriate, the ALJ should follow up claimant's testimony or make a further inquiry that is sufficient to determine whether claimant made at least two direct employer contacts and performed at least three other work seeking activities during each of the two weeks at issue. Absent such an inquiry, EAB cannot determine whether or not claimant actively sought work during the weeks at issue, or therefore whether she was overpaid \$886 in benefits.

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 accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant actively sought

work during the weeks at issue and was overpaid \$886 in benefits for those weeks, Hearing Decision 17-UI-90527 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 17-UI-90527 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: September 28, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-90527 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

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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