

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0238**

*Affirmed*  
*Ineligible*

**PROCEDURAL HISTORY:** On January 19, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the weeks from December 3, 2017 through January 6, 2018 (decision # 113601). Claimant filed a timely request for hearing. On February 26, 2018, ALJ Scott conducted a hearing and issued Hearing Decision 18-UI-103977, affirming the Department's decision. On March 5, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained new information regarding his work search activities during the week of December 31, 2017 through January 6, 2018. Claimant did not provide that information to the Department or at hearing, although the ALJ asked claimant if he had a record of his work search activities during that week. Audio Record at 23:55 to 24:41. Claimant's new information regarding his work search during the week of December 31 through January 6 also contradicts his sworn testimony at hearing. *Id.* Because claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the new information during the hearing, we considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) On November 24, 2017, claimant's regular employer laid him off work, and his manager told him the employer expected claimant to return to full time work on January 8, 2018.

(2) On November 27, 2017, claimant filed an initial claim for unemployment insurance benefits. When he filed his initial claim, claimant reported to the Department that his return to work date was January 8, 2018.

(3) Claimant claimed and was paid benefits for the weeks from December 3, 2017 through January 6, 2018 (weeks 49-17 through 1-18), the weeks at issue.<sup>1</sup>

<sup>1</sup> Claimant also claimed benefits for the week of November 26 through December 2, 2017 (week 48-17). Week 48-17 was claimant's waiting week. Claimant actively sought work during that week and it is not at issue.

(4) During the weeks from December 3 through December 31, 2017, claimant maintained contact with his regular employer. Claimant worked several shifts for his regular employer during these weeks. Claimant engaged in no other work search activities during those weeks.

(5) Sometime in December 2017, the employer changed claimant's return to work date to December 26, 2017.

(6) During the week of December 31 through January 6, 2018, claimant had one direct employer contact with his regular employer, and worked part time for that employer. Claimant did not engage in other work search activities during that week. Claimant reported no work search information to the Department when he filed his weekly claim for this week.

(7) On January 9, 2018, the Department requested additional information from claimant regarding his weekly claims, including his weekly work search information. Claimant responded to the Department on January 24, 2018 but did not provide additional work search information.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ. Claimant did not actively seek work and is ineligible for benefits for each of the weeks including December 3, 2017 through January 6, 2018 (weeks 49-17 through 1-18).

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 full time work or work for which remuneration exceeds the weekly benefit amount, 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 regular 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) (Italics added for emphasis). For an individual who is on temporary layoff of more than four weeks with the individual's regular employer, he or she is required to immediately actively seek work with *other employers* beginning with the week after the temporary layoff occurred. OAR 471-030-0036(c). (Italics added for emphasis).

Where, as here, the Department paid benefits for weeks claimed, and then subsequently concluded that the claimant was not eligible for those benefits, the Department has the burden to establish by a preponderance of evidence that the claimant was not entitled to the benefits paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). Here, the Department met its burden.

Among the requirements to qualify for the exception to the actively seeking work requirement that applies to individuals temporarily laid off from their regular employment is that the length of the planned layoff must have been four weeks or less, starting from the end of the week in which the layoff

occurred. Claimant's planned layoff began on November 25, 2017, and the end of that week was also November 25. Therefore, claimant must have been scheduled to return to work within four weeks of November 25, which would have been December 23, 2017, to qualify for the exception to the five work seeking activities requirement. Because January 8, 2018, the date on which the employer *originally* told claimant he would return to full time work, was more than four weeks after the end of the week in which his layoff began, the exception to the actively seeking work requirement, permitting claimant to seek work only with his regular employer, was inapplicable to claimant's layoff. Claimant asserts in his written argument that his subsequent return to work date of December 26 was within four weeks of his layoff date of November 24. Four weeks from the end of the week of his layoff was December 23. December 26 is after December 23, so is not within four weeks. Moreover, the relevant return to work date for purposes of the exception to the five work search requirement is the return to work date the regular employer gives the employee *as of the layoff date*. Here, that date was January 8, which is more than four weeks from November 25.

Because the temporary layoff exception provided by OAR 471-030-0036(5)(b) did not apply, claimant was required to perform five work seeking activities each week as a condition of being eligible to receive unemployment insurance benefits. Although claimant sought work with his regular employer during the weeks at issue and worked several shifts for that employer, because he was on a layoff of more than four weeks, his work search had to include work search activities with *other* employers, including temporary work opportunities. OAR 471-030-0036(c). Claimant did not perform five work seeking activities in any of the five weeks at issue. Because he did not perform five activities in any of the weeks at issue, he did not "actively seek work" during any of the weeks at issue, and is ineligible for benefits for each of the weeks at issue, weeks 49-17 through 1-18.

**DECISION:** Hearing Decision 18-UI-103977 is affirmed.

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

**DATE of Service:** April 4, 2018

**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](http://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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