

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0260**

*Hearing Decision 18-UI-104915 Affirmed in Part, Reversed and Remanded in Part*  
*Available for Work During All Weeks at Issue ~ Affirmed*  
*Actively Sought Work Weeks 50-17, 52-17, 2-18 ~ Affirmed*  
*Work Search Weeks 40-17 to 43-17, 47-17, 51-17, 3-18, 4-18, 6-18, 7-18 ~ Reversed and Remanded*

**PROCEDURAL HISTORY:** On November 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from October 1, 2017 to October 21, 2017 due to his self-employment activities (decision # 85941). Claimant filed a timely request for hearing. On March 1, 2018, ALJ Murdock conducted a hearing, during which she took jurisdiction over additional weeks. On March 9, 2018, the ALJ issued Hearing Decision 18-UI-104915, concluding that claimant was available for work at all relevant times, and actively sought work during weeks 50-17, 52-17 and 2-18. The ALJ also concluded that claimant did not actively seek work during weeks 40-17 to 43-17, 51-17, 3-18, 4-18, 6-18, and 7-18. On March 12, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

**CONCLUSIONS 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 with respect to the conclusion that claimant was available for work during all the weeks at issue and actively sought work during weeks 50-17, 52-17 and 2-18 are **adopted**. With respect to the ALJ's conclusion that claimant did not actively seek work during the remaining weeks at issue, however, this matter must be reversed and remanded for additional evidence.

To be eligible to receive benefits, unemployed individuals must 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 few 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.* "Direct contact" means "making contact with an employer . . . 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).

The ALJ found as fact that "[c]laimant's work search activities for the weeks at issue consisted of research of job postings on recruiting websites and newspapers and work he performed or solicited for his own business." Hearing Decision 18-UI-104915 at 2. The ALJ reasoned that those activities did not constitute an active work search for purposes of OAR 471-030-0036(5) because the two direct contacts required by that rule "must be direct to employers that might hire him for employment," and the "contacts with companies with which he had contracts for his own business, or for which he solicited for [*sic*] contracts, does not meet that requirement." Hearing Decision 18-UI-104915 at 4.

We do not agree that the record shows claimant's work search activities were limited to contact with recruiting websites and newspapers and work he performed or solicited for his own business. Exhibit 2 shows, for example, that during week 43-17, claimant had direct contact with two potential employers to discuss full time employment. During the week preceding week 3-18 claimant received several emails from "unemployment job center" connecting him to "several job openings." During the week preceding week 6-18, claimant received a job notification from WorkSource Oregon. During week 6-18, claimant had contact with the U. S. Postal Service about his candidacy for employment. During the hearing, claimant testified that he used Indeed.com and Snagajob.com searching for employment during weeks he reported his self-employment activities, but did not report them to the Department. Transcript at 12, 21. He also testified, for example, that he had direct contacts with employers via Springboard.com and snagajob.com during weeks 3-18 and 4-18 and was sent links to employers or introductions to a company. Transcript at 22-23.

We cannot determine from the record which, if any, of claimant's work seeking activities during the weeks at issue constituted direct contacts or activities. Although claimant confirmed that he did not "apply for any employers during" weeks 3-18 and 4-18, OAR 471-030-0036(5) does not require that a person apply for a job to make a direct contact, they can also make a direct contact by just inquiring about a job opening. There was some confusion during the hearing when differentiating between claimant's work seeking activities during weeks 5-18, 6-18 and 7-18; some weeks were identified during questioning as "one last week and that was I do believe last week." *See* Transcript at 23, 28-29. This matter is therefore remanded for a week-by-week inquiry into claimant's work seeking activities. For each week that is still at issue, the ALJ should ask claimant to list all of his direct contacts and work seeking activities and identify for each activity whether the activity was in furtherance of direct employment or a self-employment contract. For each contact claimant had with a recruiting company like Indeed.com, snagajob.com or springboard.com, the ALJ should ask claimant what the nature of the contact was, whether it was to search job listings, or whether he had any actual direct contact with an employer that had posted a job opening on the website, for example, applying for a job or inquiring about a job opening. The ALJ should ask claimant to differentiate between the date(s) on which he had contact with a recruiting company, and the date(s) upon which he had contact with business(es) that posted job announcements on that company's website. For each contact claimant lists that duplicates a previous contact, the ALJ should inquire with claimant why he made the duplicate contact and do a

sufficient inquiry about the reason for the contact to allow for a conclusion about whether making a duplicate contact was “doing what an ordinary and reasonable person would do to return to work at the earliest opportunity.” The ALJ should also give the Department a chance to respond to claimant’s testimony and produce additional evidence about claimant’s work seeking activities.

We also disagree that the record supports the ALJ’s conclusion that claimant’s contacts with businesses seeking contract work do not meet the “direct contact” requirement set forth at OAR 471-030-0036(5). The rule merely states that an individual’s activities must be “doing what an ordinary and reasonable person would do to return to *work* at the earliest opportunity,” not that they be doing what such a person would do to return to subject “employment.” There is nothing in this record suggesting that claimant was told or given written materials prior to October 25, 2017 that instructed him that he was not to include his contract work efforts on his work search materials; it was not until October 25, 2017 that claimant was “told [by a Department employee] that no, you can’t do the self-employment.” See Exhibit 1; Transcript at 14. On remand, the ALJ should inquire with the parties about what, if anything, claimant was given or told that would reasonably have informed him whether or not he should include his contract work efforts when reporting his work search to the Department prior to October 25, 2017.

Finally, claimant also testified he was told by WorkSource Oregon employees that “I could actually use my self-employment activities as the requirements, and I have – they gave me paperwork for that.” Transcript at 10. The Department’s witness testified that “the WorkSource Office cannot tell them what they need to be doing to qualify for employment” and “they are to tell them [claimants] to call us to find out what’s going on.” Transcript at 35-36. However, WorkSource Oregon sent claimant a letter that stated, “You filed an application for Unemployment Insurance benefits. In order to get benefits you must . . . Meet with WorkSource Oregon staff at your local WorkSource Oregon center” as part of his “eligibility requirements” and to “avoid a denial of benefits,” suggesting that WorkSource Oregon employees are, in fact, telling claimants what to do to qualify for unemployment. Exhibit 1. The Department’s witness speculated that “might have been a confusion on his [claimant’s] end because if they are approved for SEA then that is correct . . . doing work searches for your business is considered adequate for the SEA program.” Transcript at 30. On remand, the ALJ must ask claimant about the “paperwork” he received about using his self-employment activities as the requirements, and develop the record about whether claimant was told he could use his self-employment activities only if he was in the SEA program, or could use them even if he was not he was in the SEA program.

If claimant alleges on remand that he was told he could use his self-employment activities as work search activities even though he was not in the SEA program, estoppel might apply. The doctrine of equitable estoppel “requires proof of a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it.” *Keppinger v. Hanson Crushing, Inc.*, 161 Or App 424, 428, 983 P2d 1084 (1999) (citation omitted). In addition, to establish estoppel against a state agency, a party “must have relied on the agency’s representations and the party’s reliance must have been reasonable.” *State ex rel SOSOC v. Dennis*, 173 Or App 604, 611, 25 P3d 341, rev den, 332 Or 448 (2001) (citing *Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995)). On remand, if claimant alleges that a false representation occurred, the ALJ must develop a record sufficient to determine whether estoppel applies to this situation.

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 or not claimant adequately sought work during each of the weeks that are still at issue, Hearing Decision 18-UI-104915 is reversed as to that issue, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 18-UI-104915 is modified as follows: Hearing Decision 18-UI-104915 is affirmed as to claimant's availability for work during all weeks at issue and his active work search during weeks 50-17, 52-17, and 2-18; regarding the actively seeking work issue for weeks 40-17 to 43-17, 47-17, 51-17, 3-18, 4-18, 6-18, and 7-18, Hearing Decision 18-UI-104915 is set aside and this matter remanded to the Office of Administrative Hearings for further proceedings, as outlined above.

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

**DATE of Service: March 29, 2018**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate the set aside and remanded portion of Hearing Decision 18-UI-104915 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](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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