

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0801

Reversed & Remanded

PROCEDURAL HISTORY: On July 3, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from June 3, 2018 through June 16, 2018 and was overpaid \$604 (decision # 123552). Claimant filed a timely request for hearing. On July 24, 2018, ALJ Murdock conducted a hearing, and on July 27, 2018 issued Order No. 18-UI-113975, affirming decision # 123552. On August 16, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that included information that he did not present at the hearing. Claimant explained that he received notice of the July 24, 2018 hearing on July 20, 2018, and because he worked 12-hour days on July 20, 21 and 22, he did not have time to gather all his evidence for the hearing. The evidence consisted of employer contacts and work search activities for June 4 through June 16, 2018, an offer of work from Siltronic Corporation to begin work on June 18, 2018, and a work schedule showing his schedule during the days preceding the July 24 hearing.

EAB may consider new information that is not part of the record if the information is relevant and material to EAB's determination and the party offering the information demonstrates that circumstances beyond the party's reasonable control prevented it from offering the information at the hearing. OAR 471-040-0090 (October 29, 2006). The information is relevant to EAB's determination. However, we conclude that the short notice for the hearing and claimant's work schedule did not reasonably prevent claimant from preparing his case before the hearing where claimant knew when he appealed the administrative decision that he would need to prepare for the hearing and he did not show that his own work search information was unavailable to him or difficult to obtain from his personal records before the hearing. Moreover, claimant's work search information was information he could have reasonably foreseen would be necessary to offer at hearing where the administrative decision stated he was denied benefits because he did not actively seek work.

Claimant did not show that circumstances beyond its reasonable control precluded him from offering his new information during the hearing. For those reasons, EAB did not consider the information that claimant sought to present by way of its written argument when reaching this decision. EAB considered only the portions of claimant's argument that did not contain or rely upon new information not presented

at hearing. However, because the case is remanded to the Office of Administrative Hearings for further information, claimant may offer the new information that he sought to present by way of his written argument at the hearing on remand. At that time, the ALJ will decide if that information is relevant to the issues on remand and should be admitted into evidence, and if so, the Department would have the opportunity to respond to the information. Claimant must provide the information to the ALJ and the parties before the hearing on remand.

CONCLUSIONS AND REASONS: Order No. 18-UI-113975 is reversed, and this matter is remanded to the Office of Administrative Hearings (OAH) for additional proceedings.

Actively Seeking Work. To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c). The Department defines “actively seeking work” as “doing what an ordinary and reasonable person would do to return to work at the earliest opportunity,” specifically, conducting “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.” OAR 471-030-0036(5)(a) (February 23, 2014). The Department further defines “work seeking activities” to include things like registering for job placement services with the Employment Department, attending job placement meetings sponsored by the Employment 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). The Department defines “direct contact” as “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 Order No. 18-UI-113975, the ALJ concluded that claimant was not temporarily laid off work from his employer, GCL Solar Materials, and was therefore not exempt from the requirement that he engage in at least five work search activities, with at least two being contact with employers that might hire him, during each week he claimed benefits. Based on this record, we agree that claimant had to comply with OAR 471-030-0036(5)(a) because he was not given a date to return to full time work with the same employer, GCL Solar Materials.¹

However, the ALJ found that claimant “did not make any direct employer contacts with other employers in the weeks at issue,” and concluded that he did not actively seeking work.² However, to determine whether claimant actively sought work during each of the weeks in issue, the ALJ needed to conduct a full and fair inquiry into the claimant’s work seeking activities during each week. The ALJ did not do so.

Based on testimony from the Department witness, the work search activities claimant provided on his weekly claim responses showed that claimant engaged in no work seeking activities during the weeks at

¹ OAR 471-030-0036(5)(b)(A) provides that for an individual on a temporary layoff of four weeks or less with the individual’s regular employer, if the individual had, as of the layoff date, been given a date to return to full time work with the same employer, such individual is actively seeking 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 temporary layoff occurred.

² Order No. 18-UI-113975 at 2, 3.

issue. Claimant testified as well that although he read job listings, he did not accept interviews from employers who contacted him during the weeks at issue because he had already accepted a job with Siltronic Corporation that was to begin on June 18. However, the record shows claimant had at least one direct employer contact during the first week at issue (week 23-18), because he worked on June 4, 2018, which can be considered a direct employer contact. Moreover, the ALJ did not ask claimant if he engaged in activities to secure the work with Siltronic Corporation during the weeks at issue. There are no provisions in Oregon law or the Department's administrative rules requiring that every direct employer contact be with a different employer. *See generally* ORS chapter 657, OAR chapter 471. Nor are there such requirements in the Department's Claimant Handbook.³ Rather, the law and Handbook provide that any work seeking activities, including direct contacts, must be what an ordinary and reasonable person would do to return to work at the earliest opportunity and "must reflect a genuine desire to obtain employment immediately."⁴ If claimant engaged in activities during the weeks at issue to secure the work with Siltronic Corporation, those activities would tend to reflect a desire to begin working immediately.

The ALJ did not ask claimant if he engaged in such activities and should make those inquiries on remand. For example, the ALJ should ask claimant if he had contact with Siltronic Corporation during the weeks at issue, whether it was in person, by phone, mail, or electronically, and what the content and purpose of those contacts were. The ALJ should ask claimant if he had to attend any orientations or other pre-employment appointments with Siltronic Corporation during the weeks at issue. The ALJ should ask claimant if, during the weeks at issue, claimant had to complete a skills or placement test, background check, or drug test and, if so, the details of such contacts. The ALJ should ask claimant if he had to complete and/or return paperwork to Siltronic Corporation and if he engaged in any other work search activities that would tend to secure his future employment with Siltronic Corporation during the weeks at issue. Without this information, EAB is not able to determine if claimant actively sought work during the weeks at issue.

Overpayment. Based entirely on the conclusion that claimant did not actively seek work during the weeks at issue, the ALJ determined in Order No. 18-UI-113975 that claimant is liable to repay the \$604 in benefits he received during the second week he claimed, week 24-18.⁵ Because the record shows that further inquiry is necessary regarding claimant's work search activities before concluding whether claimant was eligible for benefits or waiting week credit during the weeks at issue, we conclude that there is an insufficient basis upon which to conclude at this time that claimant was overpaid 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

³ We take notice of this fact, which is contained in Employment Department records. See http://www.oregon.gov/EMPLOY/Unemployment/Claimant_Handbook/Pages/Section-3-Maintaining-Eligibility.aspx. 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.

⁴ *Id.*

⁵ Order No. 18-UI-113975 at 3.

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 benefits, Order No. 18-UI-113975 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-113975 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: September 21, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-113975 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.

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