

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0854**

*Remanded*

**PROCEDURAL HISTORY:** On August 21, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from January 28, 2018 to May 5, 2018, May 13, 2018 to June 30, 2018, July 8, 2018 to August 4, 2018, and August 12, 2018 to August 18, 2018, and denying benefits for those weeks (decision # 103147). On September 10, 2018, decision # 103147 became final without claimant having filed a timely request for hearing.

On November 13, 2018, claimant filed a late request for hearing. On November 16, 2018, ALJ Kangas issued Order No. 18-UI-119840, dismissing claimant's late request for hearing subject to claimant's right to renew the request by responding to an appellant questionnaire by November 30, 2018. On November 27, 2018, claimant submitted a questionnaire response. On March 12, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

On March 14, 2019, EAB issued Employment Appeals Board Decision 2019-EAB-0267, dismissing claimant's application for review as late without a showing of good cause. On April 8, 2019, claimant filed a petition for judicial review with the Oregon Court of Appeals. On July 8, 2019, claimant filed an opening brief with the Oregon Court of Appeals.

On July 25, 2019, EAB filed a notice of withdrawal of order for purposes of reconsideration pursuant to ORS 183.482(6) and ORAP 4.35. On July 31, 2019, EAB issued Employment Appeals Board Decision 2019-EAB-0267-R, vacating Employment Appeals Board Decision 2019-EAB-0267, reversing Order No. 18-UI-119840, and remanding the case to the Office of Administrative Hearings (OAH) for further proceedings.

On July 31, 2019, OAH mailed notice of a hearing scheduled for August 15, 2019. On August 15, 2019, ALJ M. Davis conducted a hearing, and on August 20, 2019 issued Order No. 19-UI-135275, allowing claimant's request for hearing and affirming decision # 103147. On September 9, 2019, claimant filed an application for review of Order No. 19-UI-135275 with EAB.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing is **adopted**. The only remaining issue is whether claimant actively sought work during the weeks at issue.

**CONCLUSIONS AND REASONS:** This matter is remanded to OAH for additional proceedings.

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) (April 1, 2018). 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).

Claimant was not prepared at the hearing to offer evidence about the direct contacts he made during the weeks at issue, and the ALJ held the August 15, 2019 hearing record open after the hearing ended to allow claimant the opportunity to submit documentation of his work search into evidence as Exhibit 2. After Exhibit 2 was received and considered, Order No. 19-UI-135275 concluded that claimant did not actively seek work as required. The order was based substantially on Exhibit 2, and, regarding the evidentiary value of Exhibit 2, stated:

Claimant kept a monthly record of his work search during the period at issue. He did not keep a weekly record of his work search. Claimant's work search record indicates where he sought work, but it does not contain any information about whether that work was located, what type of position he inquired about, or the date he made each contact or performed each activity. The record only states the month that the actively [*sic*] occurred.<sup>1</sup>

\* \* \*

While claimant kept a record of his work search, the record of his work search was inadequate. He kept a monthly record of his work search and only listed where he sought work or how he performed work seeking activities. He did not list the dates that he contacted employers, what positions he applied for, or where the employers were located. The evidence is not sufficient to establish that claimant performed five work seeking activities, including making two direct employer contacts, *during each week at issue*.<sup>2</sup>

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Notably, however, claimant was not asked during the hearing to describe what kind of information he included on the records he kept each week. He was asked only whether he made note of which businesses he contacted and with whom he spoke, and answered that he had. There is therefore nothing

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<sup>1</sup> Order No. 19-UI-135275 at 2.

<sup>2</sup> *Id.* at 4-5.

in this record to suggest that the information included in Exhibit 2 was the only information claimant wrote down about his work searches. Nor, notably, is there any evidence suggesting that it was not, although claimant wrote in Exhibit 2 that he had typed the contents of Exhibit 2 “so it was easy to follow,” suggesting the possibility that he had additional work search information written down that he omitted from Exhibit 2. The totality of evidence in the record therefore does not show whether the work search records claimant kept during the period at issue were organized monthly, weekly, or in some other increment of time, nor does it show whether claimant did or did not maintain information about the dates, positions, employer locations, and what type of position he inquired about. The record only shows that the document claimant submitted into the record, marked as Exhibit 2, did not contain the described information.

The question therefore is whether claimant was asked to provide information with the level of detail described in the order under review, such that his omission of such details reasonably implies that either he did not have those details to provide, or that he should not be entitled to an additional opportunity to provide the details because he was already given a fair chance to do so. The record fails to show that he was. Claimant was only asked to provide his work search, including the companies he contacted, the individuals with whom he spoke, and what their positions were. He was not told or specifically advised what else Exhibit 2 should include, nor was he told to organize the information he submitted on a week-by-week basis. In other words, Exhibit 2 contains exactly the information he was asked to provide. While claimant arguably should have understood from context and inference that he should have provided more detailed records, and certainly should have been better prepared for the hearing;<sup>3</sup> he should not be denied benefits in this case for failing to provide information he was not asked to provide.

This matter therefore is remanded for additional proceedings to allow claimant to either provide written documentation of his work searches that includes the information specified in Order No. 19-UI-135275, or for claimant to provide comprehensive and detailed testimony about the same. Claimant should be advised that any documentation of his work search efforts must be submitted to OAH and the Department *prior to* the hearing in accordance with instructions that will be contained on the notice of hearing, or the documentation may not be considered. Any failure on claimant’s part to either attend the remand hearing or provide detailed oral or documentary information about his work search during the weeks at issue will be considered a forfeiture of his right to present that information, and this matter will be decided on the basis of the information already included in this hearing record.

**DECISION:** This matter is remanded for the gathering of additional evidence as described in this decision. **This matter should be returned to EAB once those proceedings have concluded.**

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

**DATE of Service: September 16, 2019**

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<sup>3</sup> Claimant should have known to bring his work search information to the hearing because the notice of the August 15<sup>th</sup> hearing stated in bold font on page 1, “Claimant’s work search evidence for all weeks at issue may be required at the hearing. Be prepared with that information.” Claimant arguably could have been aware that he needed to provide information on a week-by-week basis, since he originally reported work searches on a weekly basis. He arguably could also have been aware of the level of detail he should provide about his work searches, having heard the Department witness’s testimony about the details that were missing from his original reports.

**NOTE:** Although the ALJ on remand has the statutory authority to issue a new decision based on the additional and original evidence under ORS 657.275(1), please note that EAB has not set aside or reversed the underlying order in this matter and therefore will not require that a new order be issued in this case as a condition of return to EAB. In any event, this matter must be returned to EAB for additional proceedings upon the conclusion of the remand proceedings at the Office of Administrative Hearings. EAB's decision on reconsideration, and all additional evidence from all remand proceedings, will be filed with the Oregon Court of Appeals as required by ORS 183.482 and ORAP 4.35.