

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0457

Reversed & Remanded

PROCEDURAL HISTORY: On January 17, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant failed to actively seek work from December 11, 2022 through January 7, 2023 (weeks 50-22 through 01-23) and therefore was not eligible for benefits for those weeks and until the reason for the denial had ended (decision # 82008). Claimant filed a timely request for hearing. On March 20, 2023, ALJ Micheletti conducted a hearing at which the employer failed to appear, and on March 27, 2023 issued Order No. 23-UI-220130, modifying decision # 82008 by concluding that claimant failed to actively seek work from December 11, 2022 through February 25, 2023 (weeks 50-22 through 08-23) and was not eligible for benefits for those weeks. On April 17, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) On numerous occasions beginning at least as early as 2021, the employer, Laborworks, Inc., which was a temporary staffing agency, employed claimant on work assignments for one of their clients, Auto Warehouse Company (AWC). On March 6, 2022, claimant filed an initial claim for benefits. Thereafter, claimant claimed some weeks and then stopped doing so.

(2) At some point on or before December 5, 2022, the employer employed claimant on a work assignment for AWC. During the week of December 4, 2022 through December 10, 2022, claimant worked on the work assignment. At some point during that week, the work assignment ended.

(3) Thereafter, claimant restarted his initial claim. Based on information contained in Department correspondence he had received, claimant believed he was a temporarily unemployed individual and could be considered actively seeking work if he remained in contact with the employer.

(4) Claimant claimed benefits for the week of December 11 through 17, 2022 (week 50-22). During that week, claimant contacted the employer multiple times for any work assignment for AWC.

(5) Claimant claimed benefits for the week of December 18 through 24, 2022 (week 51-22). During that week, claimant contacted the employer multiple times for any work assignment for AWC. Claimant also drafted a cover letter to use in applying for jobs.

(6) Claimant claimed benefits for the week of December 25 through 31, 2022 (week 52-22). During that week, claimant contacted the employer multiple times for any work assignment for AWC. Claimant also searched the website Craigslist for potential jobs.

(7) Claimant claimed benefits for the week of January 1 through 7, 2023 (week 01-23). During that week, claimant contacted the employer multiple times for any work assignment for AWC. Claimant also updated his resume.

(8) On January 9, 2023, the employer employed claimant on another work assignment for AWC. Claimant did not claim benefits for the week of January 8 through 14, 2023 (week 02-23) or the week of January 15 through 21, 2023 (week 03-23).¹ At some point during week 03-23, the work assignment ended.

(9) Claimant claimed benefits for the week of January 22 through 28, 2022 (week 04-23). During that week, claimant contacted the employer multiple times for any work assignment for AWC, inquired with a gas station about a gas station attendant job, and inquired with an auto repair shop about a job.

(10) Claimant claimed benefits for the week of January 29 through February 4, 2023 (week 05-23). During that week, claimant contacted the employer multiple times for any work assignment for AWC and inquired directly about jobs at two different auto repair shops.

(11) Claimant claimed benefits for the week of February 5 through 11, 2023 (week 06-23). During that week, claimant contacted the employer multiple times for any work assignment for AWC. Claimant also inquired with a tire shop and with another potential employer about jobs.

(12) Claimant claimed benefits for the week of February 12 through 18, 2023 (week 07-23). During that week, claimant contacted the employer multiple times for any work assignment for AWC and inquired about jobs with two different auto repair shops.

(13) Claimant claimed benefits for the week of February 19 through 25, 2023 (week 08-23). During that week, claimant contacted the employer multiple times for any work assignment for AWC and inquired about jobs with two different auto repair shops.

¹ EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information 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(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

(14) All told, Claimant claimed benefits for weeks 50-22 through 01-23 and 04-23 through 08-23. These are the weeks at issue. The Department paid claimant benefits for weeks 50-22 through 01-23. The Department did not pay claimant benefits for weeks 04-23 through 08-23.

CONCLUSIONS AND REASONS: Order No. 23-UI-220130 is reversed, and this matter remanded for further proceedings consistent with this order.

To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c). Typically, to be actively seeking work, an individual “must conduct at least five work-seeking activities per week,” with two of the five work-seeking activities being a direct contact with an employer who might hire the individual. OAR 471-030-0036(5)(a) (March 25, 2022). “Work seeking activities include but are not limited to 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).

However, these work search requirements do not apply if “the individual is temporarily unemployed as described in section (b)” of the administrative rule. OAR 471-030-0036(5)(a). For an individual who is temporarily unemployed, OAR 471-030-0036(5)(b) (March 25, 2022) defines “actively seeking work” as follows:

- (A) They are considered to be actively seeking work when they remain in contact with their regular employer and are capable of accepting and reporting for any suitable work with that employer;
- (B) There is a reasonable expectation that they will be returning to work for their regular employer. The work the individual is returning to must be full time or pay an amount that equals or exceeds their weekly benefit amount;
- (C) The department will not consider the individual to be temporarily unemployed if they were separated from their employer for reasons other than a lack of work, the work the individual is returning to is not with their most recent employer, or the length the individual is unemployed is longer than the period described in subsection (D) of this section; and
- (D) The department will consider that the period for which an individual is temporarily unemployed:
 - (i) Begins the last date the individual performed services for the employer. In the case of an individual still working for the employer, it is the last date worked during the week in which the individual had earnings less than their weekly benefit amount; and

- (ii) (ii) Cannot be greater than four weeks between the week the individual became temporarily unemployed and the week the individual returns to work as described in subsection (B) of this section.

The order under review concluded that claimant did not actively seek work during the weeks at issue because he was not a temporarily unemployed individual per OAR 471-030-0036(5)(b) due to not receiving a return to work date from the employer, and the fact he remained in contact with the employer during each week at issue therefore was not sufficient to be considered actively seeking work. Order No. 23-UI-220130 at 3. The order further concluded that claimant did not actively seek work during the weeks at issue under the general rule per OAR 471-030-0036(5)(a) because he did not make at least five work-seeking activities per week with two of the five being a direct contact with an employer who might hire him. The record as developed does not support these conclusions.

As an initial matter, although decision # 82008 related to weeks 50-22 through 01-23, the ALJ assumed jurisdiction over those weeks plus the additional weeks of 02-23 through 08-23, but did so without offering the parties notice or an opportunity to object as to the additional weeks. *See* Order No. 23-UI-220130 at 1. On remand, the ALJ should notify the parties and offer an opportunity to object regarding taking jurisdiction over additional weeks of eligibility. The ALJ also should ask questions to clarify the weeks claimant actually claimed benefits. At hearing, the witness for the Department testified, “The entire time period appears to be, um, claim calendar weeks 50-22 through 08-23.” Audio Record at 3:48. That contradicts Department records, however, which show that claimant did not claim weeks 02-23 or 03-23.² The information contained in Department records on this issue is authoritative and this decision bases its findings regarding whether weeks 02-23 and 03-23 were claimed on that information. Even so, on remand, the ALJ should ask questions to verify the weeks claimed.

In assessing whether claimant was a temporarily unemployed individual and therefore can be regarded as having actively sought work merely by remaining in contact with his regular employer, the first issue to address, under subpart (5)(b)(B), is whether claimant had a reasonable expectation that he would be returning to work for the employer. At hearing, the witness for the Department described the requirement as requiring claimant “to have a firm return-to-work date given to [him] at the time of . . . layoff.” Transcript at 20. However, the language of the administrative rule is less exacting than that. OAR 471-030-0036(5)(b)(B) speaks merely of there being “a reasonable expectation that [claimant] will be returning to work for their regular employer.” Therefore, the focus of the analysis is whether claimant had an expectation to return to work for the employer that was reasonable, a standard that is possible to meet without evidence of a firm return-to-work-date. When read together with the remainder of subpart (5)(b)(B) and the four-week time period described in subpart (5)(b)((D)(ii), the rule requires a reasonable expectation that, within four weeks, the individual will be returning to full time work for their regular employer, or work that pays an amount that equals or exceeds their weekly benefit amount.

At hearing, the ALJ asked claimant, “[W]hen they lay you off or they don’t have work for you, do they tell you – do you know when you’re gonna work again or is it unknown?” To which claimant answered, “They don’t - nobody tells anybody whether there’s work I guess.” Transcript at 17. While this testimony may suggest the absence of an expectation of returning to work, additional inquiry is required. On remand, the ALJ should ask questions to develop why claimant’s two relevant work assignments—

² Likewise, claimant testified that he did not claim week 03-23. Transcript at 10-11.

one preceding week 50-22 and the other preceding week 04-23—ended. The ALJ should then inquire whether those circumstances, coupled with claimant’s history of frequent placement in work assignments for the employer, would give rise to a reasonable expectation that, within four weeks, claimant would be returning to full time work for the employer, or work that pays an amount that equaled or exceeded his weekly benefit amount.

Further inquiry also is required regarding whether claimant met the standard, per OAR 471-030-0036(5)(b)(C), that an individual may only be considered temporarily unemployed if they were separated from their employer for a lack of work. To this end, as mentioned above, the ALJ should inquire as to why and how claimant’s work assignments preceding week 50-22 and week 04-23 ended. Note that per OAR 471-030-0038(1)(a) (September 22, 2020), in the case of individuals working for temporary agencies and employee leasing companies, the employment relationship “shall be deemed severed at the time that a work assignment ends.” OAR 471-030-0038(1)(a) (September 22, 2020). This suggests that the end of each of claimant’s work assignments for AWC may have marked a severing of the employment relationship with the employer, and therefore, a work separation from the employer. If so, the focus of the inquiry on remand should be why each of the two work assignments ended, such as if they ended naturally because AWC had no further work for claimant, or if, instead, claimant quit or was discharged.

However, it’s possible that under ORS 657.155(1)(c) and OAR 471-030-0036(5)(b), the Department does not view a claimant to have separated due to a lack of work where the claimant’s work assignment ends because one client has no further work for the claimant, *but* the employer has work assignments available to give the individual for other clients. On remand, the ALJ should inquire whether that is the view of the Department. If so, the ALJ should inquire whether each of the two work assignments ended naturally because AWC had no further work for claimant. Then, the ALJ should inquire whether the employer had any work assignments available to give claimant for clients other than AWC at the time claimant’s work assignments preceding week 50-22 and week 04-23 ended.

Finally, even if claimant did not constitute a temporarily unemployed individual, further inquiry is needed to determine whether he actively sought work during the weeks at issue under the general rule set forth by OAR 471-030-0036(5)(a). Under that rule, claimant would be considered to have actively sought work if he conducted at least five work-seeking activities per week, with two of the five being a direct contact with an employer who might hire him. The record shows that for all the weeks at issue claimant made multiple contacts per week with the employer, Laborworks. The Department’s witness explained at hearing that, because the Department did not consider claimant to be a temporarily unemployed individual, these multiple weekly contacts with the employer would count as only one work search contact per week. Transcript at 6. Nevertheless, the record as developed also shows claimant made two direct employer contacts to other potential employers who might hire him during each of weeks 04-23 through 08-23. Further, in each of weeks 51-22 through 01-23, claimant engaged in non-direct employer contact work seeking activities like updating his resume and reviewing a job placement website. Although some inquiry was made at hearing to develop the record as to these matters, on remand the ALJ should ask questions on a week-by-week basis for each of the weeks at issue focused on developing each direct employer contact claimant made and each non-direct employer contact work seeking activity claimant conducted.

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 further development of the record is necessary for a determination of whether claimant actively sought work during the weeks at issue, Order No. 23-UI-220130 is reversed, and this matter is remanded.

DECISION: Order No. 23-UI-220130 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Serres and D. Hettle;
A. Steger-Bentz, not participating.

DATE of Service: May 25, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-220130 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

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Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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