

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0909

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 19, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant failed without good cause to accept suitable work when offered (decision #85116). Claimant filed a timely request for hearing. On April 10 and April 29, 2014, ALJ Triana conducted hearings, and on May 7, 2014 issued Hearing Decision 14-UI-16994, affirming the Department's decision. On May 15, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

In his application for review, claimant requested reopening of the hearing because he did not attend the second hearing on April 29, 2014. However, claimant did appear and testify at the first hearing, on April 10, 2014. The Office of Administrative Hearings (OAH) set a second hearing in this matter because it failed to provide the employer with notice of the first hearing. The employer did not appear at either hearing. No new information was provided during the April 29, 2014 hearing, and OAH combined the hearing records from both hearings into one record. OAR 471-040-0040 (February 10, 2012) provides, in relevant part, that a party may request the reopening of a hearing if the party failed to appear at the hearing. Because claimant appeared at the first hearing, claimant did not "fail to appear" for the purposes of OAR 471-040-0040. Accordingly, claimant's request to reopen is denied.

EAB also considers claimant's request as a request for EAB to consider new information. OAR 471-041-0090 (October 29, 2006) allows EAB to consider new information not received into evidence at hearing upon a showing that the new information is relevant and material to EAB's determination and that factors or circumstances beyond the offering party's reasonable control prevented the party from offering the information at hearing. Claimant offered no new information under OAR 471-041-0090. Thus, in the absence of new information offered by claimant, we based our decision on the record before the ALJ.

FINDINGS OF FACT: (1) Claimant was a travel member of Local 290, which belongs to the United Association of Plumbers and Pipefitters. The union referred its members to pipefitting, welding and plumbing jobs offered by contractors that were signatories to the union's labor agreement. Claimant had worked as a welder for approximately 35 years. His labor market was the area within the union's jurisdiction, which included Tualatin and Hillsboro, Oregon. The median rate of pay for welding work in claimant's area was \$18.90 per hour.

(2) On January 17, 2014, at approximately 4:32 p.m., a union representative called claimant and offered him employment with McKinstry (the employer) as a welder. The work was to begin with a welding test on January 20, 2014 at the union hall in Tualatin, Oregon when the union hall opened at 8:00 a.m. The employer did not have the facilities to administer a welding test, so the employer paid the union a fee to use its facilities for testing. The employer would pay claimant \$39.71 per hour for a minimum of two hours, or as many hours as claimant spent completing the test. If claimant passed the test, the employer would continue his employment at a rate of \$39.71 per hour at a job site in Hillsboro, Oregon.

(3) Claimant accepted the offer of work.

(4) After claimant spoke with the union representative, he realized January 20, 2014 was Martin Luther King Jr. Day. Claimant was a local member of the 290 Local in Sacramento, California. His union card for that local specified that Martin Luther King Jr. Day was a union holiday. Claimant assumed the union hall in Tualatin, Oregon would be closed that day. Claimant called the union hall after he spoke with the union representative on January 17, 2014, but the union hall closed at 4:30 p.m., and did not answer his call.

(5) On January 20, 2014, claimant did not report to the union hall for work. The union representative called claimant, and claimant stated that it was a holiday and that he thought the union representative "might have misspoke the start date to him." Transcript at 31. Claimant told the union representative he could go to the union hall that morning. The union representative told the employer representative that claimant did not report to work because he thought it was a holiday, and asked him if claimant should report to work the next day. The employer's representative stated that the employer did not want claimant to report to work at a different time.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ, and conclude that claimant did not fail without good cause to accept suitable work when offered.

ORS 657.176(2)(e) requires a disqualification from unemployment benefits if the claimant failed without good cause to accept suitable work when offered. The employer has the burden to establish that it offered claimant work, and that he refused the offer. *Alaska Tanker Company v. Employment Department*, 185 Or App 687 (2003). There is no dispute in this case that claimant received an offer of work, or that the offer was for suitable work. The issue is whether or not claimant "refused" the employer's offer of work. The Department's witness testified at hearing that claimant was offered the job and that claimant accepted it, but also testified that, "Later, [claimant] realized it was a holiday and refused [the offer]." Transcript at 5. The Department's implicit argument is that claimant showed he was unwilling to accept the offer of work when he failed to report to work. In Hearing Decision 14-UI-16994, the ALJ found as fact that claimant accepted the offer of work, but then concluded that claimant

did not show good cause for his failure to accept work because he “refused the job by not showing up for the test on Monday, because he assumed it was a holiday.”¹

However, the record shows, and the ALJ agreed, that claimant did not report to work because he assumed the union hall was closed on January 20, 2014. The record does not show that claimant failed to report to work because he was unwilling to accept the offer of work. The record does not show claimant told the union or the employer that he refused the offer of work after he accepted it. When the union representative called claimant after he failed to report to work, claimant explained he believed the union hall would be closed and confirmed his acceptance of the offer of work by offering to report to work at that time. The record fails to show that claimant ever refused or otherwise expressed an unwillingness to accept the employer’s offer of work.

Therefore, claimant is not disqualified from receiving unemployment insurance benefits under ORS 657.176(2)(e) for refusing an offer of work on January 17, 2014.

DECISION: Hearing Decision 14-UI-16994 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: June 20, 2014

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 website at court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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¹ Hearing Decision 14-UI-16994 at 2, 4.