

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1075

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On May 19, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant does not meet the requirements for the Department's Self Employment Assistance Program because claimant is not deemed in a self-employment venture (decision # 91039). On May 27, 2014, claimant filed a timely request for hearing on decision # 91039. Also on May 27, 2014, the Department mailed notice of an administrative decision concluding that claimant is not available for work due to self-employment (decision # 95830). On May 28, 2014, the Office of Administrative Hearings (OAH) served notice of a hearing on decision # 91039 scheduled for June 11, 2014. On June 11, 2014, ALJ S. Lee conducted a hearing on decision # 91039. On June 16, 2014, decision # 95830 became final without a request for hearing having been filed. On June 18, 2014, ALJ S. Lee issued Hearing Decision 14-UI-19931, affirming decision # 91039. On June 20, 2014, claimant filed an application for review of Hearing Decision 14-UI-19931 with the Employment Appeals Board (EAB).

In written argument, claimant asked EAB to consider new information under OAR 471-041-0090(2) (October 29, 2006), which allows EAB to consider new information when the party offering the information establishes that the new information is relevant and material to EAB's determination, and factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. However, because we reverse Hearing Decision 14-UI-19931 and remand this matter to OAH for another hearing on other grounds, and claimant will have an opportunity to offer his new information into evidence at that time, we need not, and do not, decide whether EAB is allowed to consider the information under OAR 471-041-0090(2) (October 29, 2006).

**CONCLUSIONS AND REASONS:** Hearing Decision 14-UI-19931 is reversed, and this matter remanded to OAH for further proceedings consistent with this order.

ORS 657.156(1) provides that the Department shall provide reemployment service assistance to eligible individuals who are likely to exhaust benefits payable under ORS 657.150, and who will need such assistance to make a successful transition to new employment. ORS 657.158 authorizes the Department to provide self-employment assistance (SEA) to such individuals for the purpose of enabling them to

“establish a business and become self-employed.” OAR 471-020-0020 (August 8, 2004) sets forth the procedures for the Department’s reemployment services program, and OAR 471-020-0025 (July 17, 2005) for its SEA program.

In Decision # 91039, the Department found that claimant’s “business venture is Sales representative,” that claimant “sells wine for multiple wineries,” and that he “receives a commission on the sales he makes.”<sup>1</sup> The Department then summarily concluded that claimant did not meet the requirements of the SEA program because claimant is not “deemed in a self-employment venture.”<sup>2</sup> In decision # 95830, however, the Department found that claimant is “not seeking regular employment as he would not be able to forego his self-employment at this time,” and concluded that claimant is not available for work because his “self-employment” imposes conditions that substantially reduce his opportunities to return to work at the earliest possible time.”<sup>3</sup> At the hearing on decision # 91039, the Department’s representative testified that claimant is not deemed self-employed because he does not own the wine he sells, and the wineries pay him a commission to sell their wine. Audio Record at 8:00-11:00. In Hearing Decision 14-UI-19931, the ALJ concluded that claimant is not self-employed because the wineries he works for have “too much control over the way he conducts his sales work for him to be considered an independent and separate entity.”

There is nothing in Employment Department law, rules, or the Department’s records defining “self-employed” for purposes of the self-employment assistance program. ORS 657.040(1) provides that services performed by an individual for remuneration are employment unless the individual was performing services as an independent contractor, as that term is defined in ORS 670.600. OAR 670.600(2) provides, in relevant part, that “independent contractor” means a person who provides services for remuneration and who is free from direction and control over the means and manner of providing the services subject only to the right of the person for whom the services are provided to specify the desired results, is customarily engaged in an independently established business, and is responsible for obtaining licenses or certificates necessary to provide the services. ORS 670.600(3) sets forth the requirements for a person to be considered customarily engaged in an independently established business, and OAR 471-031-0181 (February 1, 2007) for a person to be considered free from direction and control over the means and manner of providing the services. However, while one might agree as a matter of plain English that an independent contractor is self-employed, it does not follow that *only* independent contractors are self-employed. For instance, a simple retail store owner-operator might be self-employed, but not an independent contractor. Accordingly, the “independent contractor” criteria set forth in ORS 670.600 and OAR 471-031-0181 are guidance, but not dispositive, in determining whether an individual is self-employed.

Decision # 91039 did not explain the issues involved in determining whether claimant is an independent contractor, as defined under ORS 670.600, or otherwise “self-employed” under ORS 657.158. The May 28, 2014 notice of hearing did not explain the issues involved and the matters that claimant was required to either prove or disprove to be considered an independent contractor or otherwise self-employed. Nor

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<sup>1</sup> Decision # 91039 at 1.

<sup>2</sup> *Id.*

<sup>3</sup> Decision # 95830 at 1.

did the ALJ explain to claimant the issues involved and the matters that claimant was required to either prove or disprove. The ALJ did not ask the Department representative if the Department determined whether claimant is an independent contractor, or what criteria the Department uses to determine whether an individual is self-employed. Nor did the ALJ ask the Department representative to explain the apparent inconsistency between the agency's conclusion in decision # 91039 that claimant is not self-employed, and its finding in decision # 95830 that he is. In sum, the ALJ did not ensure the record developed at the hearing shows a full and fair inquiry necessary for consideration of whether claimant is an independent contractor or otherwise self-employed.

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). Where, as here, the claimant is unrepresented at the hearing, the ALJ also is required to explain the issues involved in the hearing and the matters that he is required to either prove or disprove. ORS 657.270(3)(a). Because the ALJ failed explain to claimant the issues involved in the hearing and the matters he was required to either prove or disprove, and ensure the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of whether claimant is eligible for the Department's SEA program, Hearing Decision 14-UI-19931 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 14-UI-19931 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** July 24, 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](http://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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