

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1080

Reversed & Remanded

PROCEDURAL HISTORY: On July 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from December 21, 2014 through July 4, 2015 (decision # 151200). Claimant filed a timely request for hearing. On August 20, 2015, ALJ Vincent conducted a hearing at which the Department failed to appear, and on August 28, 2015 issued Hearing Decision 15-UI-43653, affirming the Department's decision. On September 11, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Claimant claimed benefits for the weeks from December 21, 2014 through July 24, 2015 (weeks 52-14 through 26-15), the weeks at issue. The Department paid claimant benefits for those weeks.

(2) During the weeks at issue, claimant sought work as a caregiver. In claimant's labor market, the usual hours and days of the week customary for caregiver work were all shifts, all days of the week.

CONCLUSIONS AND REASONS: Hearing Decision 15-UI-43653 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work during all of the usual hours and days of the week customary for the work being sought, capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, and not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time. OAR 471-030-0036(3) (February 23, 2014). Where, as here, the Department initially paid claimant benefits for the weeks at issue, the Department has the burden to establish by a preponderance of evidence that claimant is not eligible for benefits for those weeks. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In Hearing Decision 15-UI-43653, the ALJ concluded that claimant was not available for work during the weeks at issue because she attended school Mondays, Wednesdays and Fridays through the end of December 2014, and failed to notify the employer she was willing to work Mondays, Wednesdays and Fridays after December 2014.¹ At hearing, however, claimant testified that she “graduated” from school “in” December 2014, and was not attending school during any of the weeks at issue. Audio Record at 14:30-15:00. Claimant further testified that she told the employer she could work any day of the week, and never told the employer there were days or hours she could not work. Audio Record at 12:10-13:15, 14:00-14:20. Although the employer’s witness testified that claimant notified the employer in December 2014 that she could not work on Mondays, Wednesdays and Fridays,² we find the evidence on that issue, at best, equally balanced. Thus, as it stands, the record fails to support the ALJ’s conclusion that claimant was not available for work during the weeks at issue.

At hearing, however, the employer’s witness testified that during the weeks at issue, claimant repeatedly failed to respond to the employer’s voice messages, text messages and emails regarding available work. Audio Record at 8:15-8:45. Claimant admitted that she sometimes told the employer that she could not work because she had interviews scheduled with other employers. Audio Record at 13:15-13:40. However, the ALJ did not conduct a sufficient inquiry into the facts necessary to determine which of the weeks at issue claimant may have been unwilling to work during all of the usual hours and days of the week customary for the work she sought, incapable of accepting and reporting for any suitable work opportunities within her labor market, imposing conditions which substantially reduced her opportunities to return to work at the earliest possible time, or otherwise failing to meet the requirements set forth in OAR 471-030-0036(3). Absent such an inquiry, we cannot determine whether claimant was available for work during any week at issue.

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 the ALJ failed to develop the record necessary for a determination of whether claimant was available for work during the weeks at issue, Hearing Decision 15-UI-43653 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 15-UI-43653 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 1, 2015

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the

¹ Hearing Decision 15-UI-43653 at 1-2.

² Audio Record at 9:40-10:15.

‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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