

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1395**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On October 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 124406) concluding that claimant was not available for work from September 20 through October 17, 2015 (weeks 38-15 through 41-15). Claimant filed a timely request for hearing. On November 19, 2015, ALJ Logan conducted a hearing, and on November 20, 2015, issued Hearing Decision 15-UI-48098, concluding that claimant was not available for work from September 20 through November 14, 2015 (weeks 38-15 through 45-15, the weeks at issue). On November 28, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was relevant and based on the record.

**CONCLUSION AND REASONS:** Hearing Decision 15-UI-48098 should be reversed, and this matter remanded for development of the record.

In Hearing Decision 15-UI-48098, the ALJ affirmed the Department's conclusion regarding claimant's availability for work. The ALJ noted that claimant's doctor had prohibited her from driving for six months after a March 28, 2015 seizure; at the end of the six month period, however, claimant's doctor approved her to drive only distances of up to ten miles. The ALJ found that that large portions of claimant's labor market, which was defined by the Department as Lebanon, Albany and Sweet Home, were "beyond the distance that she is allowed to drive, and the Department concluded that claimant was thus not available for work, as she could not affirm transportation from Lebanon<sup>1</sup> to Albany or Sweet Home, and so was not capable of reporting for suitable work opportunities within the labor market for which work is sought." Hearing Decision 15-UI-48098 at 3. The ALJ's conclusion regarding claimant's labor market is not supported by evidence in the record, however.

OAR 471-030-0036(6)(a) (February 23, 2014) defines a claimant's labor market as follows:

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<sup>1</sup> Claimant lives in Lebanon.

An individual's normal labor market shall be that geographic area surrounding the individual's permanent residence within which employees in similar circumstances are generally willing to commute to seek and accept the same type of work at a comparable wage. The geographic area shall be defined by employees of the adjudicating Employment Department office, based on criteria set forth in this section.

At the hearing, claimant testified that the Department had changed her labor market several times since she May 6, 2015, the date on which she filed her initial claim. The Department representative who testified at the hearing insisted that she was unaware of any changes, that in August 2015 she told claimant her labor market was Sweet Home, Albany and Lebanon, and that she never changed this definition of claimant's labor market. Audio Recording at 36:52. In regard to claimant's assertion that Department representatives gave her varying definitions of her labor market, the Department representative insisted that she had "no clue what she is talking about," and never checked Department records to see if claimant's statements could be substantiated. Audio Recording at 37:35.

Under OAR 471-041-0090(3), we take official notice of Department notes recording two conversations Department representatives had with claimant. Notes of a May 11, 2015 conversation indicate that a Department representative told claimant that her labor market was Lebanon. Notes of a June 23, 2015 conversation indicate that a Department representative talked with claimant about her labor market, but do not record what the representative told claimant about her labor market.<sup>2</sup> The evidence therefore shows that the Department changed its definition of claimant's labor market at least once: in May 2015, a representative told claimant it was Lebanon, and in August 2015, a representative told her it was Lebanon, Sweet Home and Albany. The record is devoid of any evidence regarding how the Department made these decisions regarding claimant's labor market, and we therefore cannot determine if the decisions were based on the criteria in OAR 471-030-0036(6)(a).

On remand, the ALJ must ask the Department representative how it initially defined claimant's labor market, when and how many times it changed this definition, and how it applied the criteria in OAR 471-030-0036(6)(a) to make its initial definition and any subsequent changes in this definition. If the ALJ finds that the Department's definition of claimant's labor market was arbitrary because it was not based on the criteria in OAR 471-030-0036(6)(a), then the ALJ must reverse the conclusion in decision # 124406 that claimant was not available for work during the weeks at issue. If, on remand, the ALJ finds that that the Department's definition of claimant's labor market was appropriately based on the criteria in OAR 471-030-0037(6)(a), then the ALJ must determine claimant's availability for work during the weeks 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 to determine whether claimant was capable of reporting

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<sup>2</sup> Screen shots of the Department notes of these conversations are marked as EAB Exhibit 1. A copy of EAB Exhibit 1 is included with this decision. Any party that objects to the admission of EAB 1 must submit its objections to this office in writing, setting forth the basis of the objection, within ten days of the date on which the decision is mailed. Unless such an objection is received, EAB Exhibit 1 will remain part of the record.

for any work in her labor market, Hearing Decision 15-UI-48098 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 15-UI-48098 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell

**DATE of Service: December 7, 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](http://courts.oregon.gov). Once on the website, use the ‘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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