

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1453**

*Reversed and Remanded*

**PROCEDURAL HISTORY:** On September 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from August 16 through 22, 2015 (decision # 124021). Claimant filed a timely request for hearing. On November 17, 2015, ALJ Wipperman conducted a hearing, and on November 18, 2015 issued Hearing Decision 15-UI-47856, reversing the Department's decision. On December 8, 2015, the Department filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the Department's written argument.

**CONCLUSIONS AND REASONS:** Hearing Decision 15-UI-47856 is reversed, and this matter remanded for another hearing and hearing decision on whether claimant was available for work from August 16 through 22, 2015 (week 33-15), the week at issue.

ORS 657.155(1)(c) provides that to be eligible to receive benefits, unemployed individuals must be available for work and actively seek work during each week claimed. For purposes of ORS 657.155(1)(c), an individual shall be considered available for work if, at a minimum, he or she is willing to work full time, part time, and accept temporary work opportunities, 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; not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time; and physically present in the normal labor market area as defined by OAR 471-030-0036(6), for the majority of the week, unless he individual is actively seeking work outside his or her normal labor market area. OAR 471-030-0036(3) (February 23, 2014).

Where, as here, the Department initially pays a claimant benefits, the Department typically has the burden to establish that claimant is not eligible for those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). However, ORS 657.155(2) provides that where an individual who

leaves her normal labor market for the major portion of any week is presumed to be unavailable for work. That presumption may be overcome if the individual establishes that she has conducted a bona fide search for work and has been reasonably accessible to suitable work in the labor market area in which she spent the major portion of the week to which the presumption applies. *Id.*

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. OAR 471-030-0036(6)(a). The geographic area shall be defined by employees of the Department, based on that criteria. *Id.*

ORS 657.190 provides that in determining whether any work is suitable for an individual, Department shall consider, among other factors, the prior training and experience of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual, and the distance of the available work from the residence of the individual. In considering suitable work factors under ORS 657.190 and for purposes of determining eligibility under 657.155(1)(c), the Department may require an individual to actively seek the type of work the individual is most capable of performing due to prior job experience and training, except that if an individual is unable to secure the individual's customary type of work after contacting the potential employers in the labor market where benefits are being claimed, the Department may require the individual to seek less desirable but similar work or work of another type which the individual is capable of performing by virtue of experience and training. OAR 471-030-0036(1)(a). If the type of work an individual is most capable of performing does not exist in the labor market where the individual is claiming benefits, the Department may require the individual to seek any work that exists in the labor market for which the individual is suited by virtue of experience and training. OAR 471-030-0036(1)(b). After the individual has contacted the potential employers in the labor market where benefits are being claimed and is still unable to obtain work as described in OAR 471-030-0036(1)(a) and (b), the Department may require the individual to further expand work-seeking activities.

An individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a). With few exceptions, none of which apply here, individuals are "required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual." *Id.* 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)(B). "Direct contact" means "making contact with an employer . . . to inquire about a job opening or applying for job openings in the manner required by the hiring employer." OAR 471-030-0036(5)(a)(C).

In Hearing Decision 15-UI-47856, the ALJ found that claimant customarily worked as an adjunct instructor for online university and sociology courses, contracted with a number of universities in California and the Pacific Northwest, and typically worked from her home office, conducting online lessons and discussion.<sup>1</sup> The ALJ further found that claimant spent the majority of the week at issue in

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<sup>1</sup> Hearing Decision 15-UI-47856 at 1.

the State of Washington, where she applied for a position as an adjunct online instructor with an employer located in California, and that claimant could have performed the work at her location in Washington.<sup>2</sup> The ALJ deferred to the Department's definition of claimant's normal labor market area as Ashland, Medford, Phoenix and Talent, Oregon, and therefore determined that claimant spent the majority of the week at issue outside her labor market.<sup>3</sup> The ALJ also deferred to the Department's interpretation of ORS 657.155(2) as requiring an individual who leaves her normal labor market for the major portion of any week to establish that she has conducted a bona fide search for work in the labor market area in which she spent the major portion of the week, noting that "the Department interprets statutory language within its expertise and its interpretation is neither unreasonable nor inconsistent with other law."<sup>4</sup> However, the ALJ then concluded that claimant conducted a bona fide search for work in Washington because, although she did not search for work for employers located in Washington, she searched for work that she could have completed and would have performed there.<sup>5</sup> The ALJ then concluded that claimant had overcome the presumption that she was not available for work during the week at issue, and that the Department had failed to establish otherwise.<sup>6</sup>

The ALJ did not specifically address whether claimant established that she was reasonably accessible to suitable work in Washington. In its written argument, the Department asserts that claimant was not reasonably accessible for work in Washington because, as claimant testified at the hearing, she was not qualified to perform the type of work she was seeking for employers located there. The Department further asserts that because it determined that "teaching (anthropology/sociology) in line with the individuals credentials is suitable work for the claimant," she failed to overcome the presumption that she was not available for work during the week at issue, and therefore is ineligible for benefits for that week. Employer's Written Argument.

We first address the ALJ's interpretation of ORS 657.155(2) as not requiring an individual who leaves her normal labor market for the major portion of any week to establish that she has conducted a bona fide search for work for employers located in the labor market area in which she spent the major portion of the week. The ALJ did not ask the Department for its interpretation of ORS 657.155(2) on that issue, or whether the Department interprets ORS 657.155(2) as requiring such an individual to establish that she has been reasonably accessible to suitable work for employers located in that labor market area. Assuming the Department interprets ORS 657.155(2) as requiring such an individual to establish that she has conducted a bona fide search for work, and has been reasonably accessible to suitable work, for employers located in the labor market area in which she spent the major portion of the week, further inquiry into the Department's basis for that interpretation is necessary.

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

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2-3.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

As part of that inquiry, the ALJ should ask the Department why it defined claimant's normal labor market as Ashland, Medford, Phoenix and Talent, Oregon, given that as an online instructor, claimant regularly searched for work, and worked, for employers located in California and other states. The ALJ also should ask the Department whether it interprets ORS 657.155(1)(c) and OAR 471-030-0036(5) as requiring an individual to actively seek work for employers located in her labor market and, if not, why it interprets ORS 657.155(2) differently. The ALJ also should ask the Department whether it required claimant to actively search for work for employers located in her normal labor market area during weeks she remained in that area and, if not, why it required her to search for work for employers located in Washington during the week at issue. Absent such inquiries, we cannot determine whether the Department's interpretation of ORS 657.155(2) is not arbitrary, unreasonable or inconsistent with other law, and otherwise entitled to deference.

We next address the ALJ's conclusion that the Department otherwise failed to establish that claimant was not available for work during the week at issue. The ALJ failed to conduct an inquiry into the facts necessary to determine whether claimant was willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work she sought; capable of accepting and reporting for any suitable work opportunities within the labor market in which work was being sought; not imposing conditions which substantially reduce her opportunities to return to work at the earliest possible time; and was actively seeking work in Washington. OAR 471-030-0036(3) (February 23, 2014). Absent such inquiries we cannot determine whether claimant was available for work during the 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 week at issue, Hearing Decision 15-UI-47856 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 15-UI-47856 is set aside, and this matter remanded for further proceedings consistent with this order.<sup>7</sup>

Susan Rossiter and J. S. Cromwell.

**DATE of Service: January 8, 2016**

**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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<sup>7</sup> **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-47856 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

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