

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1624**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On November 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was able, available and actively seeking work between October 5, 2014 and November 1, 2014 (decision # 124635). The employer filed a timely request for hearing. On December 22, 2014, ALJ Lohr conducted a hearing, and on December 23, 2014 issued Hearing Decision 14-UI-30803, concluding claimant was able, available and actively seeking work from October 5, 2014 through December 13, 2014. On January 2, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 14-UI-30803 should be reversed and this matter remanded for additional proceedings.

This matter comes before EAB to determine whether claimant was eligible for benefits between October 5, 2014 and December 13, 2014. To be eligible to receive benefits, unemployed individuals must be able to work, available for work and actively seek work during each week claimed. ORS 657.155(1)(c). There is no dispute that claimant was physically capable of working during the weeks at issue, nor that he performed work search activities that were consistent with the Department's rules. *See* Audio Recording at ~10:30, 16:15, 20:00. We therefore confine our review to the issue of whether claimant was also available for work during the relevant time frame. To be considered "available for work," the individual must, among other things, refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. OAR 471-030-0036(3) (February 23, 2014).

At all relevant times, claimant was attached to an employer, Bendtakeout.com Inc. He last worked for the employer on August 11, 2014, after which he took a medical leave of absence while he was suffering from acute effects of an illness. At the time he began medical leave, claimant and the employer agreed that claimant would return to work when he felt better. Audio Recording at ~19:25. The record shows that claimant felt sufficiently healthy to resume work by approximately October 6, 2014. However, claimant did not resume working for the employer at that time.

While there is nothing in the laws and rules applicable to unemployment insurance benefits eligibility requiring individuals to work for any particular employer, the laws and rules do require that individuals refrain from imposing conditions that limit their opportunities to return to work at the earliest possible time. Accordingly, if the employer had work available for claimant, and claimant's failure to resume working there was attributable to his failure to contact his employer to report that he was ready to resume working, then, notwithstanding claimant's willingness to seek work elsewhere, claimant's failure to contact the employer could be construed as imposing a condition that limited his opportunities to return to work at the earliest possible time, making him ineligible for benefits for some period of time. Thus, the outcome of this case depends on two determinations. First, whether the employer had available work for claimant throughout the weeks at issue and was, at all times, willing to allow claimant to resume working for the employer once claimant asked to return, and, second, whether claimant notified the employer he was healthy enough to return to work during the weeks at issue.

According to the Department's witness at the hearing, claimant felt ready to resume working on October 6, 2014. Audio Recording at ~13:30. However, claimant did not contact the employer until ten days later on October 16, 2014 when he called Angela Bob, a dispatcher. Audio Recording at ~14:40. The record fails to show, and the ALJ did not ask, what attempts, if any, claimant made prior to October 16<sup>th</sup> to notify the employer that he was ready to resume working.

According to the witnesses, claimant called Bob on October 16<sup>th</sup>, and called the employer's president on November 11<sup>th</sup>. Audio Recording at ~20:06. The record fails to show, and the ALJ did not ask, whether claimant made any additional attempts to resume working for the employer, how many times, or when those attempts occurred.

The employer's president testified that claimant did not make any personal contact with him until November 11<sup>th</sup>. The record fails to show, and the ALJ did not ask, whether claimant and the president had agreed at the beginning of claimant's leave what method claimant would use to notify the employer he was ready to resume working, whether Bob told the president about claimant's October 16<sup>th</sup> call, whether the president asked Bob or other employees if claimant had ever called them, whether Bob denied the call had occurred, or whether the president was aware of any attempts by claimant to contact anyone with the employer's business about returning to work prior to the November 11<sup>th</sup> call claimant made to the president.

Finally, the weeks at issue in this case span October 5<sup>th</sup> through December 13<sup>th</sup>. According to the employer's president, claimant called him on November 11<sup>th</sup>. However, the record fails to show, and the ALJ did not ask, what was said during that call or whether claimant asked to return to work for the employer. Nor did the ALJ ask how the president responded to any such request on November 11<sup>th</sup>, or, for that matter, to specify whether the employer had work available to claimant at all times between October 5<sup>th</sup> and December 13<sup>th</sup>, and, if the employer did not have work for claimant, on what date the employer became unwilling to have claimant resume working.

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's failure to return to work for the employer imposed a condition that reduced his opportunities to return to work at the earliest possible time, Hearing Decision 14-UI-30803 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 14-UI-30803 is set aside, and this matter remanded for further proceedings consistent with this order.

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 14-UI-30803 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.

**DATE of Service:** January 9, 2015

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

**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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