

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1022

Reversed & Remanded
Se revoca la decisión y se la remite

PROCEDURAL HISTORY: On June 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was disqualified from receiving unemployment insurance benefits because he refused an offer of work without good cause (decision # 125224). Claimant filed a timely request for hearing. On August 17, 2016, ALJ Triana conducted a hearing, and on August 18, 2016 issued Hearing Decision 16-UI-65911, affirming the Department's decision. On September 6, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument when reaching this decision.

CONCLUSIONS AND REASONS: This hearing decision under review should be reversed, and this matter remanded.

ORS 657.176(2)(e) requires a disqualification from unemployment insurance benefits if claimant "[f]ailed without good cause to accept suitable work when offered." ORS 657.190; ORS 657.195. There is no real dispute in this record that work with the employer was suitable for claimant, nor is good cause for the refusal in dispute, given that claimant denied refusing it. The dispositive issue in this case is, therefore, whether or not the employer extended claimant a job offer on May 19, 2016.

The ALJ concluded that the employer made an offer of work to claimant.¹ The ALJ found as fact that the employer's human resources administrative assistant called claimant on May 19, 2016 and offered

¹ See Hearing Decision 16-UI-65911 at 3.

him work that was expected to last through August 2016.² The ALJ's decision acknowledged that claimant asserted he received no offer and the record showed that claimant's wife received an offer from the employer the same day and refused it because she *did* have a cannery job. The ALJ, however, believed the employer's evidence over claimant's because "[t]he employer provided first-hand testimony regarding the conversation with claimant" and "would have no other way to know this information unless claimant told them." The ALJ also determined that claimant lacked credibility because he was evasive and denied ever having spoken with the employer's witness, even though he knew her position in the company and the witness claimed she had "at least one prior interaction" with claimant.³

We disagree that sufficient evidence is in the record to support a conclusion in this case. While we agree with the ALJ that it appeared claimant lacked credibility at the hearing, particularly with respect to his claim that he never spoke with the employer's HR administrative assistant "never . . . even [to] say hello to her," the ALJ did not ask claimant who he thought he spoke with when he submitted an application and received a personnel manual in September 2015 if not the employer's witness, or any other questions intended to ensure that claimant actually knew who the employer's witness was when he denied ever having spoken with her.⁴ Nor did the ALJ ask claimant to explain in general what kind of interaction he had with any of the employer's office staff during his workdays while employed by the employer.

We also disagree with the ALJ that the employer's first-hand evidence was especially reliable as compared to claimant's and that the employer would have had no way to know details about claimant's job refusal unless he had told the employer in a conversation. Both parties offered first-hand evidence, and, like claimant's evidence, there were inconsistencies in the information the employer reported to the Department and testified about at the hearing. For instance, the employer's witness testified that the position offered to claimant was expected to last "through August," but the employer reported to the Department that the work was to last through November.⁵ The employer's witness testified that the work offered to claimant would pay \$9.25 per hour through July 1, 2016, but the employer reported to the Department that the offered work would have paid \$9.38 per hour.⁶ When asked if claimant had worked for the employer before, the employer's witness responded, "Yes, in 2010."⁷ Claimant testified, however, that he had worked seasonally for the employer for five years, last in March 2016.⁸ Given the inconsistencies in the record with respect to all the parties, additional inquiry is necessary before we can assess the reliability of the parties' evidence.

Claimant claimed at the hearing and in his written argument that the employer did not make an offer of work to him. Claimant argued that he would not have refused an offer of work from the employer, the employer agreed claimant had never before refused an offer of work, and, in fact, claimant did not apply for or receive his job at the cannery until approximately two weeks after the alleged job refusal at issue.⁹ Considered together, those factors make it seem unlikely that claimant would have refused an offer of

² See Hearing Decision 16-UI-65911 at 2.

³ See Hearing Decision 16-UI-65911 at 3.

⁴ Transcript at 17-18.

⁵ Compare Transcript at 6, 10.

⁶ *Id.*

⁷ Transcript at 10.

⁸ Transcript at 14, 15.

⁹ Transcript at 12, 16-17, 19.

work from the employer and told the HR person that he had refused the job because he had a job at a cannery. In support of his claim, claimant suggested that during his five years of seasonal work with the employer he had obtained work by going to the business and speaking with Raul, not by receiving calls from HR, and his wife agreed that she had previously been hired for seasonal work with the employer because "people tell other people" when work is available and she "went there."¹⁰ We require additional evidence to decide whether or not the employer called claimant on May 19, 2016 to offer him a job. The ALJ should ask both parties how claimant sought and obtained job offers from the employer during his five years of seasonal work, whether he contacted the employer or received calls from the employer when work was available, how seasonal workers were hired in previous years, and who, specifically, had hired claimant and other seasonal workers.

Claimant also suggested that the employer might have confused its call to claimant's wife (and her refusal because she had a job at a cannery) with its call to claimant. In September 2015, claimant provided the employer with a phone number ending in 1610, which the employer alleges it called to offer him a job on May 19, 2016.¹¹ The Department's witness testified that claimant's phone number ended in 0344.¹² The ALJ should ask claimant what his phone number(s) were on May 19, 2016, and, if his phone numbers did not end in 1610, the ALJ should ask claimant when his phone number(s) changed. The ALJ should ask the employer's witness what she did to confirm the identity of the person who answered the phone when she allegedly called claimant at the 1610 number to offer him a job.

The employer's witness testified about information she shared and received during calls with claimant and with his wife on May 19, 2016. The employer's representative began to offer information about how the employer documents calls to workers, but, because he was offering the information for the first time in his closing argument, the ALJ would not allow the information.¹³ The ALJ should ask the employer if calls were documented, whether employees took notes about the calls, and what kind of details employees recorded. The ALJ should ask the employer's witness when she made the alleged call to claimant, how many calls to claimant and others she made on May 19th, whether she documented the contents of each call, and whether any notes she took were made during the calls or after, and, if after, how long after the calls she made them. The ALJ should also ask the employer's witness whether the information she provided during the hearing about her calls to claimant and his wife was based on notes or her independent recollection of the calls. Finally, although the ALJ asked claimant if he could explain why the employer's witness was reporting that she made job offers to claimant and his wife and received identical reasons for their refusals, the ALJ did not ask the employer's witness if she could explain the similarities, or describe the reason for her certainty that she made separate calls to claimant and his wife on May 19th. The ALJ should ask the employer's witness that question on remand, and any follow-up questions the ALJ deems necessary.

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 offered

¹⁰ Transcript at 17, 18, 26, 27.

¹¹ Transcript at 30.

¹² Transcript at 33.

¹³ Transcript at 38.

work, Hearing Decision 16-UI-65911 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 16-UI-65911 is set aside, and this matter remanded for further proceedings consistent with this order. *Decisión de la Audiencia 16-UI-65911 se pone a un lado, y esta materia se remite para otros procedimientos constantes con esta orden.*¹⁴

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: October 5, 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. 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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.

¹⁴ NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-65911 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. NOTE: *La falta de cualquier partido de aparecer en la audiencia en la remisión no reinstalará el 16-UI-65911 de la decisión de la audiencia ni volverá esta materia a EAB. Solamente un uso oportuno para la revisión de la decisión subsecuente de la audiencia hará esta materia volver a EAB.*