

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0601

Reversed & Remanded

PROCEDURAL HISTORY: On February 5, 2017, claimant filed an initial claim for unemployment insurance benefits. On February 8, 2017, the Oregon Employment Department (the Department) served notice of a wage and potential benefit report concluding that claimant's claim for benefits was nonvalid because she had not earned sufficient base year wages. On February 21, 2017, claimant filed a timely request for hearing.¹ On March 21, 2017, claimant re-requested a hearing. On March 27, 2017, ALJ Kangas issued Hearing Decision 17-UI-79708, dismissing claimant's request for hearing as late subject to her right to renew her request by responding to an appellant questionnaire by April 10, 2017. On April 6, 2017, claimant responded to the appellant questionnaire. On April 10, 2017, the Office of Administrative Hearings (OAH) sent a letter canceling Hearing Decision 17-UI-79708. On April 19, 2017, OAH mailed notice of a hearing scheduled for May 2, 2017. On May 2, 2017, ALJ Murdock conducted a hearing, and on May 5, 2017 issued Hearing Decision 17-UI-82758, allowing claimant's request for hearing, adding \$951 to claimant's wage and potential benefit report, and concluding that claimant's claim for benefits was still nonvalid because she had insufficient base year wages. On May 17, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: This matter should be reversed and remanded to the Office of Administrative Hearings.

Claimants must monetarily qualify for benefits as a condition of being eligible to receive them. Among other things, individuals must have sufficient base-year earnings from "subject employment" that are "equal to six times the individual's weekly benefit amount in employment for service performed subsequent to the beginning of a preceding benefit year." ORS 657.150(2).² In this case, claimant's

¹ With respect to claimant's alleged late request for hearing, EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted** except as follows: February 20, 2017, the date upon which the ALJ concluded claimant filed her request for hearing in this matter, was a holiday upon which Oregon Employment Department offices were closed; any references to February 20, 2017 are modified to February 21, 2017.

² Individuals who do not qualify monetarily may still qualify if they "worked a minimum of 500 hours" in subject employment during the base year. Claimant's time sheets from Canary LLC were illegible, making it impossible to conclusively establish whether or not claimant met the alternative 500 hour requirement.

weekly benefit amount for the claim at issue was \$308; six times that amount, or the amount claimant must have earned from subject employment to qualify for benefits, was \$1,848.

The ALJ concluded that claimant earned \$951 from work in subject employment from her work with Canary LLC and that those earnings should be added to her wage and potential benefit report; there is no factual dispute about those wages. However, the ALJ also found as fact that “[t]he Department’s tax section concluded that” claimant’s earnings from Sadie Photography were not from work in subject employment “and did not qualify to satisfy what the Department calls a ‘double-dip’ requirement,” and on that basis excluded those earnings from her claim. Hearing Decision 17-UI-82758 at 2, 4. The ALJ reasoned, “The Department did not find her work for Sadie Photography to be subject employment and claimant did not present evidence for the hearing record to suggest otherwise.” Hearing Decision 17-UI-82758 at 4. We disagree that the record supports the exclusion of claimant’s wages from Sadie Photography from her claim, and additional evidence is necessary to reach a conclusion on that issue.

Where, as has occurred here, the Department has initially denied benefits to a claimant, the claimant has the initial burden to prove by a preponderance of the evidence that benefits should have been paid. *See accord Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). In order to establish that she is monetarily qualified for benefits based on the claim at issue, claimant must therefore prove that she earned \$1,848 in subject employment subsequent to her preceding benefit year, or that she worked at least 500 hours in that period.

Claimant submitted evidence establishing that she earned \$1,256.26 from Sadie Photography during the relevant time period, which, when coupled with her subject wages from Canary LLC, establish that she earned more than \$1,848 in the relevant time period. Claimant testified that she did not work for Sadie Photography as a contractor; she filled out tax documents, had time sheets, submitted her hours like all employees were required to do, had a regular work schedule for the week she was scheduled to work, and that her duties varied based on the employer’s needs; she also testified that Sadie Photography had three or four employees. *See e.g.* Audio recording at ~ 22:40, 24:30, 25:00. Having made a *prima facie* showing that she earned more than \$1,848, and that the work was in subject “employment,” the burden then shifted to the Department to produce evidence to rebut that showing.

The only evidence the Department provided on the subject employment determination was that the “tax department” determined claimant’s wages from Sadie Photography “were not subject.” Audio recording at ~ 21:30. When claimant asked why, the Department’s witness replied, “subject employment is generally employment where you’re not an independent contractor, that could be one issue, another issue could be maybe the company doesn’t have enough employees to be subject, but – I don’t – I mean I’m not a tax auditor so I’m not exactly sure this particular reason, but those are some reasons.” Audio recording at ~ 22:45. In other words, the Department provided no actual evidence that claimant’s wages were not from “employment” that was “subject” to ORS Chapter 657. Testimony that an unknown individual made a determination, without any evidentiary basis, is an inadequate reason to conclude that the \$1,256.26 claimant earned was not in subject employment, and insufficient evidence to use as the sole basis for concluding that claimant’s unemployment insurance claim was nonvalid.

Although the Department has not provided any evidence to date rebutting claimant’s evidence that her wages were in subject employment, the record is too incomplete to simply allow benefits. For instance, the record was not fully developed as to whether claimant was an independent contractor as defined at

ORS 670.600 (free from direction and control and customarily engaged in an independently established business), whether Sadie Photography was an “employer” under ORS 657.025 that “employs one or more individuals in an employment” subject to ORS Chapter 657, or whether claimant’s work for Sadie Photography all occurred during the relevant time period.³ In addition, claimant was not notified that subject employment was going to be an issue in this case as required under OAR 471-040-0015(1) (“To afford all parties a reasonable opportunity for a fair hearing, notice of hearing setting forth the . . . issue(s) . . . shall be” provided), nor did she waive her right to notice; penalizing claimant for failing to produce evidence on an issue she was not notified amounts to an impermissible denial of due process.

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 parties had notice of the issues and 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 has a valid claim for unemployment insurance benefits, Hearing Decision 17-UI-82758 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-82758 is set aside, and this matter remanded for further proceedings consistent with this order.⁴

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

DATE of Service: May 19, 2017

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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³ ORS 670.600 defines an independent contractor, in pertinent part, as an individual who is both free from direction and control over the means and manner of providing the services, who is also customarily engaged in an independently established business. An individual is customarily engaged in an independently established business if she meets three of the following five criteria: maintains a business location; bears the risk of loss; provides contracted services for two or more different persons within a 12-month period or routinely advertises for or solicits new contracts; makes a significant investment in the business; has the authority to hire and fire.

⁴ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-82758 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.