

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0729

Reversed
Eligible

PROCEDURAL HISTORY: On April 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from April 2 through April 22, 2017 (decision # 94716). Claimant filed a timely request for hearing. On May 31, 2017, ALJ Snyder conducted a hearing, and on June 2, 2017 issued Hearing Decision 17-UI-84794 modifying decision # 94716 to conclude claimant was not available for work from April 2 through May 13, 2017. On June 14, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Claimant worked for 18 years performing wholesale sales and managing distribution, including routing and logistics, for a company that distributed frozen food products. Claimant worked as a high-level manager supervising 12 to 15 employees. Claimant earned \$40.00 per hour.

(2) Since 2015, claimant also owned a country store that employed a manager and about six other convenience store clerks to perform stocking and cashier work. Claimant spent 10 to 20 hours per week checking on the status of the store and doing occasional repairs and renovations to the store. Claimant paid himself \$1,000 per month for that handyman work. Claimant was capable of performing all the work performed by his employees in the store. The pay rate for the cashiers and stockers at claimant's store was \$11.00 per hour, and the manager earned \$13.00 per hour.

(3) Claimant's employment with his regular employer ended, and he filed an initial claim for unemployment insurance benefits on April 4, 2017. The Department determined his claim to be valid. During the weeks at issue, claimant sought work in outside sales and distribution, and high-level sales management. Claimant continued to work ten hours per week as a handyman at his country store for \$1,000 per month. The demands of the business did not require claimant work more than ten hours per week making minor repairs and improvements. Claimant would have to discharge employees before the business could afford to employ claimant as a convenience store clerk or manager.

(4) Claimant claimed, and the Department initially denied, benefits for the weeks from April 2 through May 13, 2017 (weeks 14-17 through 19-17). These are the weeks at issue.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant was available for work during weeks 14-17 through 19-17.

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). An individual must meet certain minimum requirements to be considered “available for work” for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3). Among those requirements are that the individual be willing to work and capable of reporting to full time, part time and temporary work opportunities throughout the individual’s labor market. *Id.*

In Hearing Decision 17-UI-84794, the ALJ concluded that claimant was not available for work during the weeks at issue, reasoning that claimant was unwilling to work at his convenience store, and that “because Claimant owns a business at which he could work and be paid, he must be willing to work at his business in order to be considered available for work under ORS 657.155.” We disagree.

Claimant did continue to work at his convenience store, as he had during the prior two years, as a handyman for ten hours per week, earning about \$23 per hour. There is no dispute that claimant could have also discharged some of his employees and performed their work in his store as a cashier, stocker or low-level manager for \$11 to \$13 per hour, and that he was capable of performing such work. The Department asserted that claimant was not available for work during the weeks at issue because it required claimant to “work his business” and he did not perform all the work he could have performed at his convenience store during the weeks at issue. Audio Record at 10:11 to 10:21. Thus, the issues the ALJ failed to address are if claimant could have worked additional hours as a handyman, and if the work as a cashier, stocker or low-level manager was suitable work.

The record shows that the country store did not provide the opportunity to perform more than ten hours per week of work as a handyman, and that the work paid approximately \$23 per hour during the weeks at issue, as it had in the past. Claimant showed he was available to perform all the handyman work offered by his business.

With regard to the other types of work claimant could have performed had he discharged some of his current employees, factors to consider when determining whether work is “suitable” include, among other things, “the prior training, experience and prior earnings of the individual.” ORS 657.190. Claimant had 18 years of training and experience as a high-level wholesale sales manager for a food distribution company managing sales and distribution. The record does not show that the work at claimant’s store was similar to the work claimant had performed in his prior job of 18 years, or that claimant had ever worked as a cashier, stocker or low-level manager at his store or anywhere else. Moreover, the wages paid by claimant’s store were, at best, 67 percent less than claimant’s prior earnings of \$40 per hour. The record fails to show that the work claimant could have performed at his store had he discharged his current employees was suitable work under the factors provided by ORS 65.7190.

OAR 471-030-0036(1) provides that the Department may require the individual to seek other work which the individual is capable of performing by virtue of experience and training if an individual is unable to secure his customary type of work after contacting the potential employer's in his labor market, or if his customary work does not exist in his labor market. The record does not show that claimant was unable to secure his customary type of work after contacting the potential employers in his labor market or that such work did not exist in claimant's labor market. When asked what work claimant was seeking during the weeks at issue, the Department's witness responded that claimant sought work in sales, outside sales and sales management. Audio Record at 8:02 to 8:13. Although the Department's witness stated that the Department "would require that claimant work his business," the record does not show that the Department advised claimant to expand his work-seeking activities beyond his customary occupation. Audio Record at 9:50 to 10:03.

For the reasons stated, we conclude claimant's unwillingness to discharge employees so he could work in his store as a convenience store clerk or low-level manager did not make him unavailable for work for the purposes of receiving unemployment insurance benefits. Accordingly, claimant was available for work during weeks 14-17 through 19-17.

DECISION: Hearing Decision 17-UI-84794 is set aside, as outlined above.

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

DATE of Service: July 13, 2017

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.