

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0868

Hearing Decision 17-UI-87435 Affirmed
Ineligible Week 11-17

Hearing Decision 17-UI-17-UI-87449 Reversed and Remanded

PROCEDURAL HISTORY: On April 6, 2017, the Oregon Employment Department (the Department) served notice of two administrative decisions, one concluding claimant did not actively seek work during the week including March 12, 2017 through March 18, 2017 (decision # 123308), and the other concluding claimant was not available for work during the weeks including March 12, 2017 through April 1, 2017 (decision # 121935). Claimant filed timely requests for hearing on the decisions. On July 7, 2017, ALJ Meerdink conducted a consolidated hearing and issued Hearing Decision 17-UI-87435 affirming decision # 123308, and Hearing Decision 17-UI-87449 concluding claimant was not available for work during the weeks including March 12 through April 22, 2017.

On July 17, 2017, claimant filed timely applications for review of Hearing Decisions 17-UI-87435 and 17-UI-87449 with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-87435 and 17-UI-87449. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0867 and 2017-EAB-0868, respectively).

FINDINGS OF FACT: (1) Claimant filed an initial claim for unemployment insurance benefits on March 16, 2017. Claimant claimed and was denied benefits for the weeks including March 12 through April 22, 2017 (weeks 11-17 through 16-17), the weeks at issue.

(2) During the weeks at issue, claimant sought work as a construction laborer. Claimant's labor market was Bend and Redmond, Oregon. In claimant's labor market, the customary days and hours for work as a construction laborer were Monday through Saturday, 7:00 a.m. to 6:00 p.m. Claimant was a resident of Redmond, Oregon.

(3) Claimant was in California from prior to March 12 through March 17, 2017, when he returned. While in California, claimant did not seek, and would not have been able to report for, work in Oregon.

(4) From March 19 through April 8, 2017, claimant did not have transportation to seek or report for work in Bend.

CONCLUSIONS AND REASONS: We agree with the ALJ, in part. Claimant was not available for work during the weeks including March 12 through April 8, 2017 (weeks 11-17 through 14-17). However, Hearing Decision 17-UI-87449, which concluded that claimant was not available for work during the weeks including March 19 through April 22, 2017 (weeks 12-17 through 16-17) is reversed, in part, and that matter remanded to OAH for additional proceedings.

Available for Work. To be eligible for 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) (January 8, 2006). Among those requirements are that the individual must be willing to accept and capable of reporting for full time, part time and temporary work opportunities within the labor market in which work is being sought, and must be physically present in the individual’s normal labor market area every day of the week, unless the individual is “actively seeking work” outside the individual’s normal labor market area. OAR 471-030-0036(3). To be considered “actively seeking work,” an individual must do what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a). An individual who leaves the individual’s normal labor market area for the major portion of any week is presumed to be unavailable for work. ORS 657.155(2). This presumption may be overcome if the individual establishes that the individual has conducted a *bona fide*¹ search for work and has been reasonably accessible to suitable work in the labor market area in which the individual spent the major portion of the week. *Id.*

During most of week 11-17, claimant was in California, hundreds of miles away from his Oregon labor market, did not seek work in Oregon and would not have been able to report for work in Oregon if an Oregon employer had contacted him. Consequently, during that week, claimant did not do what an ordinary and reasonable person would do to return to work at the earliest opportunity and did not actively seek work. OAR 471-030-0036(5)(a). Also, because he was outside of his normal labor market during most of that week at issue, and failed to establish that he performed a bona fide search for work in California, he failed to overcome the presumption that by leaving Oregon, he was unavailable for work.

On April 3, 2017, claimant told a Department representative that between March 17, 2017 and that date, he lived in Redmond, could not find housing close enough to Bend to commute, did not have a driver’s license or access to public transportation to Bend, could not afford to pay someone to drive him there, and had no one available to drive him there at no cost. Audio Record ~ 8:30 to 11:00. Accordingly, during the weeks including March 19 through April 8, 2017, claimant was not capable of reporting for full time, part time and temporary work opportunities within at least part of his labor market in which work was being sought, and consequently was not available for work.

¹ A “bona fide” effort is one made in “good faith” with “sincere and wholehearted intent.” *See, Webster’s Third New International Dictionary* 250 (unabridged ed. 2002).

Claimant was not available for work during the weeks March 12 through April 8, 2017 (weeks 11-17 through 14-17), and is ineligible for unemployment insurance benefits for those weeks.

Remand. In Hearing Decision 17-UI-87449, after accepting testimony from the Department's witness, the ALJ also concluded that claimant was not available for work during the weeks including April 9 through April 22, 2017 reasoning, similarly, he lacked transportation to Bend, which was part of claimant's labor market. Hearing Decision 17-UI-87449 at 2. However, claimant testified that he worked for his former Bend employer during the week including April 23 through April 29, 2017 (week 17-17). From that information we infer that claimant solved his transportation problem sometime between April 3 and April 23, 2017. However, the ALJ did not ask and the record does not show when and how claimant may have solved his transportation problem to that part of his labor market. Absent such an inquiry, we cannot determine whether claimant was available for work during weeks 15-17 and 16-17, or therefore eligible for benefits for those weeks.

An ALJ must give all parties a reasonable opportunity for a full hearing. *See* ORS 657.270(3). That requirement necessitates that the ALJ ensure that the record developed at the hearing demonstrates a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ. ORS 657.270(5). The duty to inquire fully into the matters at issue is a requirement that relevant evidence is not excluded because of a party's ignorance or inexperience. *See Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to inquire into the facts necessary to determine whether claimant is eligible for benefits for weeks 15-17 and 16-17, he failed to develop the hearing record in Hearing Decision 17-UI-87449 as required. Hearing Decision 17-UI-87449 is reversed, in part, and this matter remanded pursuant to ORS 657.275(1) for a new hearing and hearing decision based upon the record of the proceedings before OAH.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-87449 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.

DECISION: Hearing Decision 17-UI-87435 is affirmed. Hearing Decision 17-UI-87449 is set aside, in part, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: August 14, 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.

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.