

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0876

Reversed & Remanded

PROCEDURAL HISTORY: On July 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from May 7, 2017 to May 20, 2017 (decision # 101055). Claimant filed a timely request for hearing. On July 5, 2017, ALJ Meerdink conducted a hearing, and on July 6, 2017 issued Hearing Decision 17-UI-87290, concluding claimant was not available for work from May 7, 2017 to June 24, 2017. On July 24, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-87290 should be reversed, and this matter remanded for additional proceedings.

As a preliminary matter, although the administrative decision was an open-ended denial of benefits, the only weeks listed in the administrative decision were May 7, 2017 to May 20, 2017. However, the ALJ took jurisdiction over additional weeks, May 21, 2017 to June 24, 2017 without asking if claimant was willing to waive her right to notice that those weeks would be included in the hearing. *See* Audio recording at ~5:10 (the Department's witness identified additional weeks as being at issue without the ALJ questioning either him or claimant about taking jurisdiction over the additional weeks); Hearing Decision 17-UI-87290 at 2 (the "Order" includes a determination of claimant's eligibility for weeks not covered by the administrative decision). Because the ALJ did not have claimant's knowing consent to adjudicate the weeks of May 21, 2017 to June 24, 2017, principles of due process requires that this matter be remanded to give claimant notice that the ALJ intends to take jurisdiction over those additional weeks and the opportunity to consent or object to his doing so.

To be eligible to receive benefits, unemployed individuals must be available for 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) (February 23, 2014). 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 labor market, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.*

The ALJ found as fact that claimant would have to walk five miles to catch a bus if offered work on a Saturday, and concluded that because “her limited transportation options interfere with her ability to accept and report for all suitable work opportunities in the labor market,” she was not available for work during the weeks at issue. Hearing Decision 17-UI-87290 at 1-2. The record does not support the ALJ’s conclusion.

Claimant testified that her usual bus, located only half a mile from her residence, did not run on Saturdays, so to get transportation to work on a Saturday she would either have to walk five miles to the Springfield Transit Center or take a taxi to work, at a cost of approximately \$50. Although the ALJ concluded that those circumstances rendered claimant unavailable for work, the ALJ ignored claimant’s testimony that she was available for work because, although she did not like walking that far at that time of morning to get to work, and did not see the sense in paying \$50 to take a cab to work her housekeeping shift, she has walked to the transit center and taken a taxi in the past, and was willing to do it again if needed. Audio recording at ~ 9:10, ~ 10:50, ~ 11:45.

The ALJ must inquire further as to whether or not claimant was or was not available for work because of her limited transportation. On remand, the ALJ should ask claimant additional questions about walking to the transit center and taking taxis in order to determine if claimant was, in fact, willing to use those methods of transportation to get to work. When claimant walked to the transit center in the past, was it so she could get to work or for another reason? When claimant took a taxi in the past, was it so she could get to work or for another reason? Why would claimant be willing to walk to the transit center or take a taxi to get to work given the distance and cost involved? Did claimant have family or friends that could give her a ride to work on a Saturday morning? Has claimant ever asked a family member or friend for a ride for that reason? In addition to those questions, the ALJ should also ask claimant any follow-up questions necessary to develop a full record.

Claimant has had a job with a single employer for a number of years. The ALJ should ask whether claimant’s limited transportation was an issue for her when she was seeking that job. Did she request a work schedule that did not include working on Saturdays? Has she ever refused the employer’s request to work on Saturday, or to work a shift that included a Saturday, because she lacked transportation? Has she ever missed work or called in absent from work because she lacked transportation to work on a weekend? Has claimant ever missed a regular shift of work on a holiday because she lacked transportation to work? In addition, the ALJ should ask claimant any follow-up questions that he deems necessary to ensure development of a full record.

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 consented to extend the weeks at issue to include the week ending June 24, 2017, and whether she was available for work during all the weeks at issue, Hearing Decision 17-UI-87290 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-87290 is set aside, and this matter remanded for further proceedings consistent with this order.¹

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

DATE of Service: August 15, 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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¹ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-87290 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.