

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0903

Reversed
Eligible Weeks 42-16 and 48-16

PROCEDURAL HISTORY: On March 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from October 16, 2016 to October 22, 2016 and November 27, 2016 to December 3, 2016 (decision # 113143). Claimant filed a timely request for hearing. On July 6, 2017, ALJ Meerdink conducted a hearing, and on July 7, 2017 issued Hearing Decision 17-UI-87420, affirming the Department's decision. On July 27, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On September 29, 2016, claimant filed an initial claim for unemployment insurance benefits. He filed weekly claims for the weeks of October 16, 2016 to October 22, 2016 (week 42-16) and November 27, 2016 to December 3, 2016 (week 48-16).

(2) During the weeks at issue, claimant worked for Porter Remodeling, Inc. as a laborer. His customary profession was as a software engineer. Porter did not hire claimant for full time or permanent employment. He was, rather, just working part time on an as-needed basis for a relative while he was unemployed from his regular profession. He usually worked between 15 and 30 hours each week.

(3) On October 19, 2016, claimant planned to attend a talent match tech fair with the goal of finding employment opportunities in his customary profession. On November 28, 2016, claimant scheduled a job interview for work within his customary profession. Claimant discussed the events and dates with Porter's owner beforehand, and the owner told claimant he did not need claimant to work either day. The owner did not schedule claimant to work either day.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ and conclude that claimant was available to work during weeks 42-16 and 48-16 because he did not miss an opportunity to work during either week.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). An individual who misses an opportunity to perform work in any week is

not considered available for work. *See generally* OAR 471-030-0036(3) (February 23, 2014). According to Department records, the Department paid claimant benefits during both of the weeks at issue.¹ Where the Department has paid claimant benefits, the Department has the burden to prove by a preponderance of the evidence that benefits should not have been paid. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

The ALJ found as fact that the reason claimant did not work during weeks 42-16 and 48-16 was that he “conversed with the employer to ensure he would not be working.” Hearing Decision 17-UI-87420 at 1. The ALJ reasoned that claimant therefore “had the opportunity to work” during both weeks “but chose to attend a trade show and an interview” instead, and concluded that because he missed work opportunities during the weeks at issue, he was not available for work. *Id.* at 2. However, OAR 471-030-0036(3) only requires that individuals be available for *suitable* work.² Putting aside whether or not part-time laborer work on an as-needed basis was “suitable” for claimant given that his customary profession was as a software engineer, we still disagree with the ALJ on the basis that the record fails to show claimant actually missed work opportunities during either of the weeks at issue.

The Department’s witness alleged that claimant missed opportunities to work for Porter on October 19th and November 28th by, in essence, asking for days off work that he ordinarily would have worked. However, the Department’s witness was not the individual who investigated claimant’s eligibility for benefits; rather, the Department’s witness’s testimony appears to have been based upon the notes of another Department employee based on that employee’s conversations with claimant and the employer. *See e.g.* Audio recording at ~ 9:50-12:45. The Department’s evidence that claimant missed work opportunities was, therefore, based entirely on hearsay, twice removed. Claimant testified with personal knowledge of the events in question. His testimony was that he did not work full time for the employer and would not regularly have been scheduled to work on either October 19th or November 28th because he only worked part time and on an “as-needed” basis. Audio recording at ~18:25. The Department did not specifically rebut that testimony. Claimant further testified that, while he did speak with Porter’s owner about whether he would be needed to work on the days in question, Porter’s owner told claimant “he didn’t need me those days” and “he didn’t schedule me” to work on those days. Audio recording at ~19:00. Because claimant did not have regularly scheduled workdays and instead worked on an as-needed basis, and because the owner told claimant he was not needed at work on October 19th or November 28th, we cannot conclude that claimant actually had opportunities to work on those days, much less that he missed those opportunities to work. We therefore conclude that claimant was “available for work” during weeks 42-16 and 48-16, and was eligible for benefits during both weeks.

¹ We take notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

² ORS 657.190 states, “In determining whether any work is suitable for an individual, the Director of the Employment Department shall consider, among other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual.” Suitable work for claimant based upon his prior training, experience, earnings, etc. would, likely, be software engineer work, not laborer work, and the record was not developed sufficiently to support a conclusion that laborer work was in fact suitable under the applicable law.

DECISION: Hearing Decision 17-UI-87420 is set aside, as outlined above.³

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

DATE of Service: August 22, 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 This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.