

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1008-R**

*Late Request for Reconsideration Dismissed*

**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.<sup>1</sup> 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, and on April 19, 2017 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). On May 19, 2017, EAB issued Appeals Board Decision 2017-EAB-0601, reversing Hearing Decision 17-UI-82758 and remanding the matter for additional evidence. On July 17, 2017, OAH mailed notice of a hearing scheduled for August 2, 2017. On August 2, 2017, ALJ Murdock conducted a hearing, and on August 8, 2017 issued Hearing Decision 17-UI-89881, concluding claimant's "claim determination reflects all of the wages or hours worked in subject employment."<sup>2</sup> On August 24, 2017, claimant filed an application for review of Hearing Decision 17-UI-89881. On August 29, 2017, EAB issued Appeals Board Decision 2017-EAB-1008, reversing Hearing Decision 17-UI-89881. On September 25, 2017, the

<sup>1</sup> See Appeals Board Decision 2017-EAB-0601, adopting the ALJ's conclusion in Hearing Decision 17-UI-82758 allowing claimant's request for hearing in this matter.

<sup>2</sup> In Hearing Decision 17-UI-82758, the ALJ ordered that wages from Canary LLC (\$951) be added to claimant's claim determination; in Hearing Decision 17-UI-98991, the ALJ ordered that no wages were to be added. We agree with the ALJ in Hearing Decision 17-UI-82758 that the Canary LLC wages were subject and should be added to claimant's claim, which is not inconsistent with our conclusion in this decision that the Department must issue an amended wage and potential benefit report that reflects claimant's post-investigatory base year wages from subject employment.

Oregon Employment Department filed a request for reconsideration. This decision is issued under ORS 657.290(3) and OAR 471-041-0145 (October 29, 2006).

**CONCLUSIONS AND REASONS:** The Department's request for reconsideration is dismissed as untimely.

ORS 657.290(3) gives EAB jurisdiction to reconsider a decision upon application of any party in interest. OAR 471-041-0145(2) provides, however, that reconsideration requests by parties are subject to dismissal unless they are "filed on or before the 20<sup>th</sup> day after the decision sought to be considered is mailed." The decision the Department has requested EAB reconsider was issued on August 29, 2017. The 20<sup>th</sup> day after August 29, 2017 was September 18, 2017; the Department's September 25<sup>th</sup> request was, therefore, 7 days late and is therefore subject to dismissal.

We note that even if the Department's request had been timely filed the outcome of our decision in this matter would remain the same. Although the Department argued in its request for reconsideration that the Department did, in fact, complete its investigation into whether or not claimant's wages were subject in March 2017, and provided new information about the subjectivity investigation and the Department's internal audit practice as it pertained to this matter, the record developed at the hearing in this matter strongly suggested otherwise, and, with limited exceptions, none of which apply here, we are bound to decide cases based upon our review of the record developed during the hearing.<sup>3</sup> Specifically, we did not erroneously infer from evidence that the Department's investigation into this matter was ongoing, because the Department's witness said as much without reference to an internal audit process.<sup>4</sup> The

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<sup>3</sup> See ORS 657.275(2); OAR 471-041-0090 (October 29, 2006).

<sup>4</sup> For example, the Department's witnesses during the hearings speculated about a variety of reasons why claimant's wages from Sadie might not be subject, including that claimant may or may not have been an independent contractor, or because Sadie may or may not have had a sufficient number of employees to be considered an employing unit, or said that the wages were in subject employment but the Department did not know enough about Sadie to determine whether or not the business was subject to taxation, testifying:

ALJ: So [Department witness], what you're saying is that the wages from Sadie cannot be – cannot appear on her – on her, um, wage and potential benefit report because it's not subject employment? Is that correct?

OED: It is subject employment, but the account is not subject because it's a new account and we don't have enough information to make it subject for it to meet the requirement under [ORS 657].025 to open the account under the subjectivity rules. \* \* \*

CL: What does that mean? So Sadie's like a new company? \* \* \*

OED: This is the first time that the Employment Department has had contact with Sadie Photography and so that's why this is a new account to the Employment Department so we are unable to make it an active account because we don't have enough information to have it meet the requirements to be a subject employer with us.

CL: Okay, I'm being penalized for this? I guess I don't understand how that would fall on me.

ALJ: So, [Department witness], um, would it be possible to go retroactive if you do find out that they are a subject employer and then retroactively they can be added to the base year? Is that how it works?

evidence in the record therefore established that, as of August 2, 2017, the Department did not yet have sufficient evidence to conclude whether or not claimant's wages from Sadie Photography were or were not subject wages; our reversal of the Department's wage and potential benefit report was, therefore, properly based upon the record evidence.

Finally, we note that in reaching our underlying decision we specifically stated,

[W]e are not holding that claimant has a monetarily valid claim for unemployment insurance benefits or should be paid benefits, nor are we holding that she does not have a monetarily valid claim. This decision is confined to the conclusion that there is not substantial evidence to support the ALJ's conclusion that the Department's wage and potential benefit report "reflects all of the wages or hours worked in subject employment."<sup>5</sup>

EAB having reversed the ALJ's finding that the Department's wage and potential benefit report reflected all of claimant's subject base year wages, without compelling a conclusion as to the subjectivity of the wages at issue, there appears to be nothing preventing the Department from issuing a

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OED: They could if we had enough information and if they would report all their employees who do not meet the statute to be an independent contractor and if we had enough information to make it active we could.

ALJ: So what you're saying is that it's dependent on the employer to get you the information you need?

OED: If we had enough information where it would meet the subjectivity requirement . . . we could open the account. However, we don't have that much information to open up the account at this time.

\* \* \*

See Audio recording at ~ 13:01-15:40.

ALJ: [Department witness] are you, um, is the Department actually looking into Sadie Photography to determine whether or not they are subject employment?

OED: Yes we are. Yes we are.

ALJ: Okay so if it turns out that you find out that this was subject employment, it can, can it go back retroactively then?

OED: Yes. We can add those wages if we found out that they were supposed to be a subject employer.  
\* \* \* I can't do anything on my side, I can just refer it out to somebody to do a further investigation of the whole company and that's the best I can do.

ALJ: And have you started that, or do you intend to do that?

OED: I have started that, and I don't know where the progress is on that. \* \* \*

See Audio recording at ~ 31:30-32:00, 34:55-35:25. The quoted testimony was provided in response to an EAB decision that remanded this case specifically for evidence about the basis of the Department's previous determination that claimant's wages from Sadie were not subject. See Appeals Board Decision 2017-EAB-0601 at 2-3.

<sup>5</sup> See Appeals Board Decision 2017-EAB-1008 at 2.

new decision if, as the Department reported, the Department's investigation into claimant's wages is complete.

**DECISION:** The request for reconsideration filed September 25, 2017 is dismissed. Appeals Board Decision 2017-EAB-1008-R remains undisturbed.

J. S. Cromwell and D. P. Hettle.

**DATE of Service: October 3, 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](http://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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