

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1011**

*Request to Reopen Allowed*  
*Otherwise, Reversed and Remanded*

**PROCEDURAL HISTORY:** On April 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 92955) concluding that claimant was not actively seeking work from April 9 through April 15, 2017. On May 17, 2017, the Office of Administrative Hearings (OAH) issued notice of a hearing scheduled for June 2, 2017. On June 2, 2017, ALJ Lohuis issued Hearing Decision 17-UI-84802, dismissing claimant's hearing request for failure to appear at the hearing. Claimant filed a timely request to reopen. On August 3, 2017, ALJ Shoemake conducted a hearing, and on August 15, 2017, issued Hearing Decision 17-UI-90435, granting claimant's request to reopen and affirming decision # 92955. On August 22, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion that claimant established good cause for reopening his hearing are **adopted**.

**FINDINGS OF FACT:** (1) On March 17, 2017, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed and was denied waiting week credit or benefits from April 9, 2017 through April 15, 2017 (week 15-17), the week at issue.<sup>1</sup>

(2) Claimant's labor market included Beaverton, Hillsboro, downtown Portland, North Portland, Oregon City and Tualatin, Oregon. Claimant sought work as an auto detailer, assembly worker, production worker and restaurant worker. The customary days and hours for auto detailer work was Monday through Saturday 8:00 a.m. to 5:00 p.m. For assembly and production work, the customary days and hours were Monday through Friday, all hours. For restaurant work, they were all days from 7:00 a.m. through 11:00 p.m.

<sup>1</sup> We take notice of the fact that the Department denied week 15-17, 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.

(3) During the week at issue, claimant attended English classes at Portland Community College, from Monday through Friday, from 9:00 a.m. to 1:00 p.m.

**CONCLUSIONS AND REASONS:** Hearing Decision 17-UI-90435 is reversed as to the able, available and actively seeking work issue, and this matter remanded for development of the record.

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) (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.*

An individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a). OAR 471-030-0036(5) states that the minimum requirements for an individual to be considered “actively seeking work” are five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual. Examples of work seeking activities include, but are not limited to registering for job placement services with the Department, attending job placement meetings sponsored by the Department, participating in a job club or networking group dedicated to job placement, updating a resume, reviewing the newspaper or job placement web sites without responding to a posted job opening, and making direct contact with an employer. OAR 471-030-0036(5).

The interpretive services provided in this matter appear to have substantially contributed to the lack of a clear and sufficient record regarding the facts necessary for consideration of all issues properly before the ALJ in this case. The testimony from the Department is relatively clear. However, there were portions of testimony that the interpreter appeared not to interpret for the record, and claimant’s contradictory responses call into question whether he understood the questions asked of him, and whether his responses were interpreted correctly for the record.

There were periods when claimant provided testimony that the interpreter did not or appeared not to interpret into the record. For example, after the ALJ concluded the examination of the Department’s witness, she asked claimant if he had any questions for the Department’s witness. Claimant provided 27 seconds of testimony, and the interpreter stated claimant’s testimony in two sentences and indicated that she was interpreting a “portion.” Audio Record at ~5:23. On one occasion, the interpreter began interpreting while claimant was still testifying. Audio Record at ~54:57. On another occasion, claimant testified for 28 seconds, and his interpreted testimony did not match the length of his testimony. Audio Record at ~59:55.

Elsewhere in the record, claimant’s responses were non-responsive or inconsistent. Such testimony could result in a credibility determination regarding his testimony. However, where, as here, the hearing was interpreted, the inconsistencies in the record suggest a problem with the interpretative services. For example, when the ALJ asked claimant what he would do if offered work that conflicted with his school schedule, claimant first asked that the question be repeated, then responded with a non-responsive answer, stating, “After 1:00 I went and applied for jobs.” Audio Record at ~52:32. More of claimant’s

testimony was inconsistent, such as when he testified that he would go to work if offered work that conflicted with school, and that he would tell “some people” that he could not work due to school. Transcript at 12. Claimant subsequently testified that he did not say that he did not tell employers that he went to school. Transcript at 13. Claimant also testified about his work search activities after school, and that he did not look for work until the week after he completed school. Transcript at 12, 13, 14. The ALJ did not ask claimant about these inconsistencies to clarify the record.

Oregon law requires that, “to secure the constitutional rights and other rights of persons who are unable to readily understand or communicate in the English language because of a non-English-speaking cultural background . . . , and who as a result cannot be fully protected in administrative proceedings . . . unless qualified interpreters are available to provide assistance,” such persons “shall” be provided with an interpreter. *See* ORS 45.273, ORS 45.275(1)(a); OAR 471-040-0007. Although the ALJ appointed a Vietnamese interpreter to interpret the proceedings in this case, it appears from the record that the interpreter lacked the skills or experience to effectively do so. It appears to us that the interpretive services provided in this matter contributed to the lack of a clear and sufficient record. Due process and state law require that this matter be remanded for another hearing, with a different interpreter who is capable of performing an exact interpretation of the entire proceeding.

**NOTE:** The failure of any party to appear at the hearings on remand will not reinstate the hearing decision 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-90435, as to the reopen issue, is affirmed. Hearing Decision 17-UI-90435, as to the available for work issue, is set aside, and this matter remanded for further proceedings consistent with this orders.

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

**DATE of Service: September 21, 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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