

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0393

Modified
Request to Reopen Granted
Request for Hearing Allowed
Valid Claim

PROCEDURAL HISTORY: On November 17, 2017, the Oregon Employment Department (the Department) served notice of a wage and potential benefit report concluding that claimant did not qualify for benefits. Claimant filed a request for hearing. On January 16, 2018, ALJ Kangas issued Order No. 100966, dismissing claimant's request for hearing as untimely subject to his right to renew the request by responding to an appellant questionnaire by January 30, 2018. On January 23, 2018, claimant filed a timely response to the appellant questionnaire. On February 6, 2018, the Office of Administrative Hearings (OAH) served notice that Order No. 100966 was canceled and vacated, and that a hearing would be scheduled to address claimant's request for hearing and, if appropriate, the merits of the Department's wage and potential benefit report.

On February 9, 2018, OAH served notice that the hearing was scheduled for March 1, 2018. On March 1, 2018, claimant failed to appear at the hearing, and ALJ Seideman issued Order No. 18-UI-104279, dismissing claimant's request for hearing due to his failure to appear. On March 6, 2018, claimant filed a timely request to reopen the hearing. On March 22, 2018, OAH served notice of a hearing scheduled for April 5, 2018 on claimant's request to reopen and, if necessary, his request for hearing and the merits of the Department's wage and potential benefit report. On April 5, 2018, ALJ Snyder conducted a hearing, and on April 13, 2018 issued Order No. 18-UI-107359, granting claimant's request to reopen and allowing his request for hearing as timely, but affirming the Department's wage and potential benefit report concluding that claimant did not qualify for benefits. On April 18, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument to the extent it was based on information received into evidence at the April 5, 2018 hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006). 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 granting claimant's request to reopen and allowing his request for hearing are **adopted**. The remainder of this decision addresses whether claimant qualified for benefits.

FINDINGS OF FACT: (1) On October 22, 2017, claimant filed an initial claim for benefits. The base year for that claimant was July 1, 2016 through June 30, 2017.

(2) Claimant did not work any hours and was not paid any wages during the first quarter of his base year, July 1 through September 30, 2016. During the last three quarters of his base year, claimant worked for one employer. Claimant worked for his base year employer on commission based on the estimated time it would take him to complete an assignment, and was not paid an hourly wage based on the hours he actually worked. Claimant's base year employer recorded that claimant worked 8 hours per day. However, claimant routinely worked between 10 and 12 hours per day.

(3) During the second quarter of claimant's base year, October 1 through December 31, 2016, claimant worked a minimum of 112 hours in 10 days, averaging 11.2 hours per day. During the third quarter of claimant's base year, January 1 through March 31, 2017, he worked a minimum of 350 hours. During the fourth quarter of claimant's base year, April 1 through June 30, 2017, he worked a minimum of 40 hours. Claimant therefore worked a minimum of 502 hours during his base year.

(4) Claimant's base year employer reported to the Department that he worked only 280 hours during the third quarter of his base year, and a total of 432 hours during his base year.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ and conclude that claimant qualified for benefits.

ORS 657.150 provides, in relevant part:

(1) An individual shall be paid benefits for weeks during the benefit year in an amount which is to be determined by taking into account the individual's work in subject employment in the base year as provided in this section.

(2)(a) To qualify for benefits an individual must have:

(A) Worked in subject employment in the base year with total base year wages of \$1,000 or more and have total base year wages equal to or in excess of one and one-half times the wages in the highest quarter of the base year; and

(B) Have earned wages in subject employment equal to six times the individual's weekly benefit amount in employment for service performed subsequent to the beginning of a preceding benefit year if benefits were paid to the individual for any week in the preceding benefit year.

(b) If the individual does not meet the requirements of paragraph (a)(A) of this subsection, the individual may qualify for benefits if the individual has worked a minimum of 500 hours in employment subject to this chapter during the base year.

In the present case, it is undisputed that claimant met the requirement set forth in ORS 657.150(2)(a)(B), but did not meet the requirement set forth in ORS 657.150(2)(a)(A). The issue is whether claimant qualified for benefits by meeting the requirement set forth in ORS 657.150(2)(b) that he had worked a minimum of 500 hours in subject employment during his base year.

In Order No. 18-UI-107359, the ALJ concluded that claimant failed to establish that he worked a minimum of 500 hours for his base year employer during his base year.¹ In support of that conclusion, the ALJ noted that although claimant testified that he worked on commission and “regularly worked 12 hour days” for his base year employer to “finish jobs,” claimant admitted that he did not keep track of the hours he worked, and he did not have a record of pay stubs or other documentation from his employer indicating the hours he worked.² The ALJ therefore asserted that although claimant testified he is certain that the wage and potential benefit report did not reflect all of the hours he worked, without evidence of how many additional hours claimant may have worked, the ALJ could not conclude that claimant is entitled to have additional hours added to his wage and potential benefit report.³

However, the Department concluded that claimant worked only 432 hours during his base year based on documents provided by claimant’s base year employer that the Department did not offer into the hearing record or explain in significant detail. *See* Audio Record at 21:15-21:30, 22:30-24:15, 28:00-30:15. The documents were the base year employer’s second report of claimant’s base year hours, which was inconsistent with its first report of those hours. Audio Record at 24:30-26:00. At hearing, the Department could not explain the inconsistencies in the two reports, and the Department did not call a representative of claimant’s base year employer to testify and explain them. Audio Record at 26:00-26:20. In addition, because claimant’s base year employer did not pay claimant an hourly wage based on the hours claimant actually worked, the accuracy of the base year employer’s reports cannot be determined by dividing claimant’s gross pay by an hourly wage.

Claimant testified that although his base year employer recorded that he worked 8 hours per day, he routinely worked 10 to 12 hours per day, and averaged 11.2 hours per day during the second quarter of his base year. Audio Record at 31:15-39:00. Absent a basis for concluding that claimant was not a credible witness, his first-hand testimony outweighs the Department’s hearsay information with respect to matters in dispute. Based on claimant’s testimony, we infer that when claimant’s base year employer reported to the Department that claimant worked 280 hours during the third quarter of his base year, it likely was reporting that claimant worked 8 hours per day for 35 days during that quarter (8 hours x 35 days = 280 hours). However, claimant’s testimony established that he more likely worked a minimum of 10 hours per day for 35 days during the third quarter of his base year, for a minimum total of 350 hours during that quarter (10 hours x 35 days = 350 hours). Thus, even if, as reported by his base year employer, claimant worked only 112 hours during the second quarter of his base year and 40 hours during the fourth quarter of his base year,⁴ he likely worked a minimum of 502 hours for his base year employer during his entire base year (112 + 350 + 40 = 502).

Claimant therefore showed that he likely worked a minimum of 500 hours in subject employment during his base year as required under ORS 657.150(2)(b). He therefore established that he qualified for benefits.

DECISION: Order No. 18-UI-107359 is modified, as outlined above.

¹ Order No. 18-UI-107359 at 3-4.

² *Id.* at 4.

³ *Id.*

⁴ Audio Record at 21:00.

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

DATE of Service: May 24, 2018

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.