

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0715**

*Late Request for Hearing Allowed ~ Petición Tardía Para Audiencia Permitida)*  
*Reversed & Remanded ~ Revocada y Remitida para Otra Audiencia*

**PROCEDURAL HISTORY:** On April 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work from November 5, 2017 through April 7, 2018 (decision # 82956). On May 3, 2018, decision # 82956 became final without claimant having filed a timely request for hearing. On May 29, 2018, claimant filed a late request for hearing on decision # 82956. On May 31, 2018, ALJ Kangas issued Order No. 18-UI-110418, dismissing claimant's late request for hearing subject to his right to renew the request by responding to an appellant questionnaire by June 14, 2018. On June 13, 2018, claimant responded to the questionnaire. On June 19, 2018, the Office of Administrative Hearings (OAH) sent the parties notice of a hearing on July 3, 2018. On July 3, 2018, ALJ Snyder conducted a hearing on claimant's late request for hearing and claimant's ability to work. On July 11, 2018, the ALJ issued Order No. 18-UI-112959, allowing claimant's late request for hearing on decision # 82956 and affirming that decision, concluding that claimant was not able to work from November 5, 2017 through April 7, 2018. On July 18, 2018, claimant filed an application for review of Order No. 18-UI-112959 with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the ALJ's findings and conclusions with respect to the late request for hearing issue as set forth in Order No. 18-UI-112959 are **adopted**. With respect to claimant's ability to work during the weeks at issue, this matter is set aside and remanded for further proceedings with a different interpreter certified or qualified to interpret Spanish.

The Department denied claimant benefits from November 5, 2017 through April 7, 2018 (weeks 45-17 through 14-18). 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 is considered able to work in a particular week for purposes of ORS 657.155(1)(c) only if physically and mentally capable of performing the work the individual is actually seeking during all of the week. OAR 471-030-0036(2) (February 23, 2014). An individual occasionally and temporarily disabled for less than half of the week is not considered unable to work for that week. OAR 471-0300036(2)(a). An individual prevented from working full time or during particular shifts due to a permanent or long-term "physical

or mental impairment” as defined at 29 CFR §1630.2(h) shall not be deemed unable to work solely on that basis so long as the individual remains available for some work. OAR 471-030-0036(2)(b). The Department initially paid claimant benefits for the period from November 7, 2017 through March 31, 2018, and subsequently denied those benefits with decision # 82956. Where the Department has paid benefits to a claimant and seeks to recover them, the Department has the burden to prove that benefits should not have been paid. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By extension of that principle, where the Department has initially denied benefits to a claimant, the claimant has the burden to prove that benefits should have been paid. The Department denied the week of April 1 through 7, 2018. Claimant therefore has the burden to show that he was eligible for benefits during the last week at issue.

Claimant suffered two herniated discs in his back from a work-related injury in June 2017. In Order No. 18-UI-112959, the ALJ concluded, without asking claimant what work he was seeking during the weeks at issue, that he was seeking field labor and harvesting work.<sup>1</sup> The ALJ concluded that claimant was not able to work during each week at issue because his work restrictions resulting from his back injury made him unable to perform work as a field laborer and harvester.<sup>2</sup> We disagree that the record supports the ALJ’s conclusion and conclude that additional evidence is required.

The question in this case is whether claimant was physically capable of performing the work he was actually seeking during each week at issue. On remand, the ALJ should ask claimant what jobs he sought and for what type of employers during each week at issue, including cabinetry work and light duty field work. The jobs may have changed throughout the weeks at issue. The ALJ should ask claimant if he consulted with a doctor about the types of work he could or should seek or perform in consideration of his health issues. On remand, the ALJ should ask claimant specifically what his physical limitations were during the weeks at issue, bearing in mind that his limitations may have changed over the course of the 22 weeks he claimed benefits. The ALJ should ask claimant why he thought he was physically capable of performing the work he sought, given his restrictions. The ALJ should ask claimant whether there were any accommodations he could have used to perform the work he sought. The ALJ should ask questions to discern if the limitations could have been accommodated by part time work. In other words, the ALJ should ask questions to determine if claimant could have performed each type of work he sought if he had limited his work time to part time. The ALJ should ask claimant what the minimum qualifications were for the work he sought and whether each job involved lifting or other activities he was restricted from performing. The ALJ should also ask whether, in claimant’s experience, employers customarily offered light duty or modified work for the type of work he sought. The ALJ should ask claimant if he ever worked modified work after he was injured, and if so, what work he performed. Claimant allegedly stated to the Department that he “won [his] disability claim.” Transcript at 11. The ALJ should ask claimant questions to determine if claimant applied for Social Security disability benefits, and if yes, if he qualified for benefits and when that occurred.

Some of these questions were asked by the ALJ at hearing, but the interpreter did not interpret claimant’s responses in a true and understandable manner. EAB therefore requests that further proceedings be conducted with a different interpreter.

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<sup>1</sup> *Id.*

<sup>2</sup> *Id.*

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 was able to work during the weeks at issue, Order No. 18-UI-112959 is reversed, and this matter is remanded for development of the record.

**DECISION:** Order No. 18-UI-112959 is affirmed in part, allowing claimant's late request for hearing, and remanded for further proceedings consistent with this order regarding claimant's ability to work during the weeks at issue. *La Orden de la Audiencia 18-UI-112959 esta afirmada en parte para permitir la petición tardía del reclamante para una audiencia, y la otra parte se remite para otros procedimientos constantes con esta orden sobre la cuestión si el reclamante era capaz de trabajar.*

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

**DATE of Service: August 15, 2018**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-112959 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

**NOTA:** La falta de cualquier parte de comparecer en la audiencia sobre la remisión no reinstalará la Orden 18-UI-112959 ni devolverá esta orden a la EAB. Solamente una aplicación oportuna para revisión de la orden subsiguiente de la nueva audiencia volverá este asunto a la EAB.

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