

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0817-R**

*On Reconsideration after Withdrawal from the Court of Appeals  
Remanded for Additional Evidence*

**PROCEDURAL HISTORY:** On May 22, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from April 29 through May 19, 2018 (decision # 82240). On June 11, 2018, decision # 82240 became final without claimant having filed a timely request for hearing. On July 23, 2018, claimant filed a late request for hearing. On July 25, 2018, ALJ Kangas issued Order No. 18-UI-113755, dismissing claimant's request for hearing as untimely without a showing of good cause subject to his right to renew the request by responding to an appellant questionnaire by August 8, 2018. On July 30, 2018, claimant filed a timely response to the appellant questionnaire. On July 31, 2018, the Office of Administrative Hearings (OAH) cancelled Order No. 18-UI-113755, and on August 1, 2018 scheduled a hearing for August 16, 2018. On August 16, 2018, ALJ Logan conducted a hearing, and on August 17, 2018 issued Order No. 18-UI-115183, allowing claimant's late request for hearing on decision # 82240 and modifying that decision by concluding that claimant was not available for work from April 29, 2018 through August 11, 2018. On August 22, 2018, claimant filed an application for review of Order No. 18-UI-115183 with the Employment Appeals Board (EAB). On September 21, 2018, EAB issued Appeals Board Decision 2018-EAB-0817, affirming Order No. 18-UI-115183. On October 20, 2018, claimant filed a Petition for Judicial Review with the Oregon Court of Appeals. On April 12, 2019, claimant filed an Opening Brief with the Oregon Court of Appeals. On May 6, 2019, EAB filed a motion to withdraw EAB Decision 2018-EAB-0817 for additional evidence pursuant to ORS 183.482(5) and ORAP 4.35. On May 22, 2019, the Oregon Court of Appeals issued an order granting EAB's motion for leave to present additional evidence. Also on May 22, 2019, EAB filed a notice of withdrawal of agency order, which the court accepted.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), on reconsideration the portion of Order No. 18-UI-115183 that allowed claimant's late request for hearing remains **adopted**. The only matter that remains in dispute for purposes of this reconsideration is whether or not claimant was available for work during the weeks at issue.

**FINDINGS OF FACT:** (1) At all relevant times, claimant resided in Salem, Oregon. Prior to April 17, 2018, claimant worked in Woodburn. He commuted to work using his daughter's car. At some time around April 17<sup>th</sup>, claimant lost use of his daughter's car. He resigned from his job in Woodburn because he no longer had transportation to and from his job.

(2) On April 30, 2018, claimant filed an initial claim for unemployment insurance benefits. He filed weekly claims for the weeks including April 29, 2018 through August 11, 2018 (weeks 18-18 through 32-18), the weeks at issue.

(3) During the weeks at issue, claimant sought work as a general physical laborer. The customary days and hours for that kind of work included all days, from 6:00 a.m. to 10:00 p.m.

(4) Claimant sought work only in Salem, Oregon during the weeks at issue, because he lacked transportation outside of Salem and "because I have to take the city bus." Transcript at 23. At all relevant times, no bus service was available between Salem and Albany or Salem and Woodburn all days between 6:00 a.m. and 10:00 p.m. Claimant was not able to pursue or take a job in Albany or in Woodburn because he did not have transportation to those areas.

**CONCLUSIONS AND REASONS:** This matter must be remanded for development of a complete record.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). OAR 471-030-0036(3)(b) states that for purposes of ORS 657.155(1)(c), an individual shall be considered available for work if, at a minimum, he is "[c]apable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities \* \* \*." OAR 471-030-0036(6)(a) states, "An individual's normal labor market shall be that geographic area surrounding the individual's permanent residence within which employees in similar circumstances are generally willing to commute to seek and accept the same type of work at a comparable wage. The geographic area shall be defined by employees of the adjudicating Employment Department office, based on criteria set forth in this section \* \* \*."

At issue in this case is whether claimant was available for work when he limited his availability to work to Salem, Oregon. Because claimant's testimony indicated that he was not capable of accepting and reporting for work opportunities outside of Salem, Oregon, it appears based upon the record developed thus far that if claimant's labor market was confined to Salem, Oregon, claimant would be considered available for work under the cited statute and administrative rule. If claimant's labor market included areas beyond Salem, such as Albany and Woodburn, claimant would not be considered available for work. The question is, then, what was claimant's labor market?

In EAB Decision 2018-EAB-0817, EAB stated, “EAB has no authority to reduce the size of claimant’s labor market, as defined by the Department, to make him available for work and eligible for benefits.” EAB erred. Although OAR 471-030-0036(6)(a) specifically allocates to the Department’s adjudicating office the authority to “define” the “geographic area surrounding the individual’s permanent residence within which employees in similar circumstances are generally willing to commute to seek and accept the same type of work at a comparable wage,” EAB does in fact have the authority and responsibility to ensure that an adequately developed record supports any findings of fact EAB makes as to an individual’s labor market, or any conclusions reached based upon the application of the law to the facts found. *See* ORS 657.275. In other words, while EAB cannot “define” claimant’s labor market in the first instance, EAB can and must only uphold the Department’s labor market determination in this case if it is supported by a preponderance of the evidence in the record.

The evidence in this case is insufficient to support a finding that claimant’s labor market included Salem, Albany, and Woodburn. The only evidence in the record as to what the Department determined was claimant’s labor market was the following:

Q: \* \* \* why did the Department deny benefits to [claimant]?

A: Because the Claimant – it was found that Claimant was not available for work throughout his labor market as he did not have proper transportation. Claimant’s looking for work as a general physical laborer. His labor market is Salem, Albany, Woodburn, all days, from 6:00 a.m. to 10:00 p.m.

\* \* \*

Claimant, uh, only has transportation into – for work in the Salem area. He had indicated during the investigation that his car broke down. And he said that he was using his daughter’s car, but she needed it, and she had two other jobs she needed it for. So he, um, and he said he didn’t have any other car. And, in fact, he has to resign his position in Woodburn because he has no transportation. So that’s the basis for the denial.

Transcript at 20. The Department’s witness, when asked by the ALJ, also confirmed that “there’s no bus service to Albany or to Woodburn during some of the hours that a person looking for general labor work would be expected to be available.” Transcript at 22. The ALJ accepted the Department’s witness’s testimony as conclusive evidence of claimant’s labor market and did not examine the witness any further. The ALJ then asked claimant only two questions about his availability for work, to confirm that claimant was still confining his availability to the Salem area and could not take work in Albany or Woodburn. Transcript at 23.

The parties do not appear to dispute that claimant’s labor market should include Salem, Oregon. Claimant resided in Salem, Oregon. As a matter of common sense and as a general principle, it is more likely than not that unemployed individuals are generally willing to commute within their own cities of residence to seek and obtain work, and no party to this case has proposed otherwise. However, the record as developed at the hearing is insufficient to substantiate that claimant’s labor market should include Albany and Woodburn.

Albany's city center was located approximately 20 miles from claimant's residence. Woodburn's city center was located approximately 24 miles from claimant's residence. The breadth of a labor market that included Woodburn and Albany would be minimum of approximately 41 miles.<sup>1</sup> On remand, the record must be developed as to whether the Department considers those distances to be part of the geographic area surrounding claimant's permanent residence in which other general physical laborers would generally be willing to commute to seek and accept that type of work at a comparable wage. The record must also be developed as to why such a broad geographic area should be considered part of claimant's labor market, particularly in light of the location of claimant's residence, the type of work claimant was seeking, and how far other general physical laborers are generally willing to commute to seek that type of work, which paid what general physical laborer work paid. The record must also be developed as to whether, and to what extent, the Department considers whether an individual has personal transportation (e.g. a private car) or public transportation available when establishing an individual's labor market. If the Department does not consider the availability of personal transportation to an individual when establishing an individual's labor market, the Department should explain why and on what basis such information is not a labor market consideration.

Additionally, OAR 471-030-0036(3)(b) does not simply state that an individual must be available for work in the labor market the Department assigns to them. The rule states, rather, that an individual must be available for "*suitable* work opportunities within the labor market in which work is being sought \* \* \*." (Emphasis added.) Factors to examine when determining the "suitability" of work have been defined by the Oregon legislature to include, among other things, "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.*" ORS 657.190. Therefore, on remand, the record must be developed as to whether work in Woodburn and Albany may be considered "suitable" for claimant given the length of his unemployment during the weeks at issue, his prospects for securing "local work" in his customary occupation, and the distance of available work from his residence.

Finally, in addition to the areas of inquiry described in this decision, the ALJ has the discretion to inquire into any other facts that, within the ALJ's judgment and experience, are relevant and necessary to development of a complete record.

**DECISION:** On reconsideration after withdrawal of EAB Decision 2018-EAB-0817 from the Oregon Court of Appeals, this matter is remanded for the gathering of additional evidence as described in this decision. **This matter should be returned to EAB once those proceedings have concluded.**

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

**DATE of Service: May 23, 2019**

**NOTE:** Although the ALJ has the statutory authority to issue a new decision based on the additional and original evidence under ORS 657.275(1), EAB has not set aside or reversed the underlying order in this

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<sup>1</sup> We take notice of the distances between places, which is generally cognizable information. *See e.g.* <https://www.mapquest.com/directions/from/us/or/woodburn/to/us/or/albany>. 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.

matter and therefore will not require that a new order be issued in this case as a condition of return to EAB. In any event, this matter must be returned to EAB for additional proceedings upon the conclusion of the remand proceedings at the Office of Administrative Hearings. EAB's decision on reconsideration, and all additional evidence adduced at these proceedings, will be filed with the Oregon Court of Appeals as required by ORAP 4.35 and the Oregon Court of Appeals' May 22, 2019 order granting EAB's motion for leave to present additional evidence.



# Understanding Your Employment Appeals Board Decision

## English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

## Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

## Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

## Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

## Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

**Khmer**

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**Laotian**

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**Arabic**

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

**Farsi**

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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