

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0699

Reversed & Remanded

PROCEDURAL HISTORY: On June 19, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was ineligible for benefits for the weeks including November 25, 2018 through April 20, 2019 (weeks 48-18 through 16-19) because he was not available for work or did not actively seek work during each of those weeks (decision # 82234). Claimant filed a timely request for hearing. On July 19, 2019, ALJ Shoemake conducted a hearing, and on July 24, 2019 issued Order No. 19-UI-133930, concluding that claimant was ineligible for benefits for the weeks including November 25, 2018 through April 20, 2019 because he was not unemployed during those weeks. On July 29, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision. However, because this case shall be remanded to the Office of Administrative Hearings (OAH) for further information, claimant may offer the new information contained in his written argument or any other new information claimant considers relevant and material at the hearing on remand. Claimant must comply with the procedures set forth by OAH in the notice of hearing if he wishes to have any new documentary evidence included in the record at the remand hearing, and should contact OAH directly if he needs help understanding those procedures. During the remand hearing, the ALJ will decide if claimant's additional information is relevant to the issues on remand and should be admitted into evidence, and the Department would have the opportunity to respond to the new information, if admitted.

FINDINGS OF FACT: (1) Muir Painting, Inc. employed claimant as a painting estimator from approximately 2014 through April 2019. Claimant also was the owner and president of the employer.

(2) The employer's busy season typically extended from late April to Thanksgiving during which the employer paid claimant a weekly salary of \$2000. The employer's slow season extended from late

November through mid-April during which claimant typically filed weekly claims for benefits reporting few if any hours and earnings.

(3) On November 27, 2018, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant had a valid claim and that his weekly benefit amount was \$624. Claimant claimed and was paid his weekly benefit amount for each of the weeks including November 25, 2018 through April 20, 2019 (weeks 48-18 through 16-19), the weeks at issue.

(4) During the weeks at issue, claimant sought work as a painting estimator. Claimant's labor market area included Portland, Gresham, Happy Valley, Oregon City, Gladstone, Milwaukie, and Vancouver, WA. In claimant's labor market, the customary days and hours for work as a painting estimator were Monday through Sunday, 5:00 a.m. through 7:00 p.m. When claimant contacted a potential employer, he typically inquired if the potential employer was interested in hiring him as a painting estimator but that his customary salary was \$2000 per week. Transcript at 32-33.

(5) The Department conducted a tax audit of the employer's business from the fourth quarter of 2016 through the first quarter of 2018. It learned that claimant had claimed benefits as an employee during the fourth quarter of 2016 into the first quarter of 2017 and during the fourth quarter of 2017 into the first quarter of 2018. It eventually concluded that claimant had worked at least 520 hours per quarter and had paid himself wages during those periods. After completing the audits, and contacting some of the contacts claimant listed in his weekly work searches the Department denied claimant's claims for benefits for each of the weeks at issue after concluding that he had not been unemployed, available for work and had not actively sought work during those weeks.

CONCLUSIONS AND REASONS: Order No. 19-UI-133930 is reversed, and this matter is remanded to the Office of Administrative Hearings (OAH) for additional proceedings.

Only "unemployed" individuals are eligible for benefits. ORS 657.150(1). An individual is deemed "unemployed" in any week during which the individual performs no services and with respect to which no remuneration for services performed is paid or payable to the individual, or in any week of less than full-time work if the remuneration paid or payable to the individual for services performed during the week is less than the individual's weekly benefit amount. ORS 657.100(1). For the purposes of ORS 657.155 (1), an individual who performs full-time services in any week for an employing unit is not unemployed even though remuneration is neither paid nor payable to the individual for the services performed. ORS 657.100(2).

To be eligible to receive benefits, unemployed individuals must be 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) (April 1, 2018). Among those requirements are that the individual be willing to work during all of the usual hours and days of the week customary for the work being sought, capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, and not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time. For purposes of ORS 657.155(1)(c), 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). With few exceptions, none of which apply here, individuals are

"required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual." *Id.* "Direct contact" means "making contact with an employer . . . to inquire about a job opening or applying for job openings in the manner required by the hiring employer." OAR 471-030-0036(5)(a)(B).

Order No. 19-UI-133930 concluded that claimant was ineligible to receive benefits for the weeks at issue because he was not "unemployed" during those weeks. Order No. 19-UI-133930 at 2. The order based its conclusion on Department records it created after the tax audit which showed that claimant earned \$14,000 in wages during the fourth quarter of 2018 and \$21,000 in wages during the first quarter of 2019, which, the order reasoned, when divided by the 13 weeks in each quarter, yielded a weekly wage that exceeded claimant's weekly benefit amount of \$624, which made him "unemployed" during each week and ineligible for benefits under ORS 657.100(1). However, the record shows that there was insufficient inquiry at hearing to support those conclusions or determine whether claimant was available for work and actively sought work during each of the weeks at issue.

The Department asserted at hearing that it determined that claimant had been paid wages during the weeks at issue after concluding that the revenue the employer received during the quarters in question, which the employer had designated as "rental income," was more properly considered claimant's wages resulting from his work as an employee rather than a corporate officer during those quarters. Transcript at 17, 53. Claimant attempted to explain that the revenue in question was not wages but "rental income" generated by rentals of painting equipment during the employer's slow season. Transcript at 17-22. However, the record shows that claimant was not allowed to sufficiently testify on that issue, upon which the order eventually was based, after being told the issue was not "material" to the outcome of the case and that the only material issues were whether claimant met the eligibility requirements for benefits for each week claimed. Transcript at 40-41. On remand, claimant should be given a sufficient opportunity to explain why the "rental income" during weeks at issue was not wages and the Department should be asked to explain how it determined that claimant had been paid wages that exceeded his weekly benefit amount on a week by week basis. The Department should also be asked if it considered as part of its analysis the provisions of ORS 657.044, which excludes services performed for a corporation by corporate officers or by owners of a corporation if the corporation has elected to not provide coverage for an officer or owner.

Also at hearing, neither the Department nor claimant was asked about claimant's availability for work and work search activities during *each* of the weeks at issue. Nor was the Department asked whether claimant's wage demand of \$2000 per week for work as an estimator during the slow season was reasonable under the Oregon Labor Market Information System (OLMIS) or imposed a condition that substantially limited claimant's opportunities to return to work at the earliest possible time. Without a sufficient inquiry in these regards, it cannot be determined whether or not claimant was available for work and actively sought work sufficient to be eligible for benefits for the particular week at issue.

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 further development of the record is necessary for a determination of whether claimant was

“unemployed,” available for work and actively sought work during each of the weeks in issue, Order No. 19-UI-133930 is reversed, and this matter is remanded.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-133930 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

DECISION: Order No. 19-UI-133930 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: September 5, 2019

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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 desisyong ito.

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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

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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.

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