EO: 200
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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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AAA 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0969

Affirmed on Other Grounds
Ineligible November 25, 2018 to April 20, 2019

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). On September 5, 2019, EAB issued Employment Appeals Board Decision 2019-EAB-0699, reversing Order No. 19-UI-133930 and remanding the matter to the Office of Administrative Hearings (OAH). On September 26, 2019, ALJ Shoemake conducted the remand hearing, and on October 4, 2019 issued Order No. 19-UI-137546, adopting Order No. 19-UI-133930 without modification. On October 8, 2019, claimant filed a timely application for review of Order No. 19-UI-137546 with EAB.

EAB considered claimant's argument when reaching this decision. Claimant argued that the ALJ erred by "dismiss[ing]" the letter claimant submitted from his "CPA concerning wages VS rental income." The ALJ did not dismiss the letter, the ALJ admitted it into evidence as part of Exhibit 3. However, it also appears that the ALJ did not consider the letter to have much probative value. In the letter, the CPA reported that claimant reported receipt of $72,500 in rental income from Muir Painting, Inc. *See* Exhibit 3. The CPA's letter did not specify how much of that $72,500 in rental income was related to claimant's rental of equipment to Muir Painting, Inc., or the terms of the rental, however, and claimant testified that the figure the CPA included in the letter included rental income from many sources without differentiation. *See* Exhibit 3; September 26th hearing, Transcript at 8. None of the evidence in this record distinguished between claimant's income from performing hours of work for Muir Painting, Inc. and his income from rentals, nor did the totality of the evidence suggest which portion of income from work and income from rentals should be allocated to the weeks at issue. While the CPA's letter was, therefore, evidence that claimant's gross personal income as reported on his personal tax returns included significant income from rental sources, the letter was not persuasive evidence as to the amount

or origin of any particular amount of income, from what source, or what portion of claimant's personal income came from his rentals to Muir Painting, Inc. versus other sources during the period of November 25th through April 20th. The ALJ therefore did not err in choosing not to rely on it.

Claimant also argued that his rental income should be considered investment income, not wages. Claimant did not cite to any source in Employment Department law to support his argument. The Department's witness indicated that because claimant has never provided documentation regarding the rental equipment it was likely wages. The witness explained, "if the rent- - rental equipment is ren- - equipment that he owns and it's being rented out to his business, he's making the money off of that rental amount. He's the one making that money . . . tax determined [that the money is wages for services performed]." September 26th hearing, Transcript at 19. The evidence from the July 19th hearing also strongly suggests claimant performed other services for Muir Painting, Inc. during the weeks at issue, suggesting that at least a portion of the remuneration he received was attributable to those work efforts, in addition to whatever rental income he might have received.

Considering the totality of the evidence, and reasonable inferences drawn therefrom, and in the absence of law to the contrary, the Department's testimony that claimant's personal income from renting equipment to his own company be considered wages is supportable under the applicable law. For example, ORS 657.105(1) defines "wages" as "all remuneration for employment." ORS 657.030(1) defines "employment" as "service for an employer . . . performed for remuneration." The term "service" is not specifically defined in ORS chapter 657 or the Department's administrative rules, and does not specifically include or exclude an individual's provision of equipment in exchange for remuneration from being considered "services." It therefore was not unreasonable for the Department to infer, in the absence of evidence suggesting otherwise, that the remuneration claimant received in exchange for providing his own equipment to his own company and performing other services for his company amounted to "wages." Even if we had concluded otherwise, that claimant's rental income from Muir Painting, Inc. was not "wages," the ultimate outcome of this decision – that claimant is not eligible for benefits under ORS 657.155 and OAR 471-030-0036 – would remain the same for the reasons explained later in this decision.

Next, there was a question in this case whether claimant's employment with Muir Painting, Inc., and therefore his wages from that employment, should be considered subject employment within the meaning of ORS chapter 657. ORS 657.044 excludes "service performed for . . . [a] corporation by corporate officers," or "[a] corporation by an individual who is the sole corporate officer or director of the corporation and who has a substantial ownership interest in the corporation," if the corporation has elected not to provide coverage for those individuals. *See* ORS 657.044(1)(a) and (b); ORS 657.044(2). It appears likely that claimant could fall into one of those categories, but the record does not show whether claimant elected, through his business, not to provide coverage for himself as a corporate officer or director.

The outcome of this case appears to render that issue immaterial for two reasons. First, nothing in the Department's administrative decision # 83324 indicates that claimant's subject employment status based upon his affiliation with Muir Painting, Inc. was at issue in that decision, or that the Department had explicitly or implicitly ruled upon that issue at some prior time in order to reach decision # 83324. Second, regardless of whether claimant's services with Muir Painting, Inc. were or were not in subject employment, benefits would not be payable to claimant during the weeks at issue in this case. For

example, if Muir Painting, Inc. elected not to cover claimant, benefits could not be payable to him because his base year wages would not be from work in subject employment. If the base year work was in subject employment, benefits would still not be payable because, for the reasons that will be explained later in this decision, he did not satisfy the Department's eligibility requirements as set forth in ORS 657.155 and OAR 471-030-0036. Because a decision in claimant's favor on that issue would not affect the outcome of this case with respect to the weeks at issue, this decision will not address the subject employment issue. However, nothing in this decision should be read to resolve the issue one way or the other, or to bar the Department from investigating and adjudicating that issue if the Department deems it appropriate to do so.

The remainder of this decision will focus exclusively on the only remaining issue before EAB for consideration, which is whether or not claimant is eligible for benefits under ORS 657.155. EAB considered claimant's remaining arguments when reaching this decision, and will address them below.

FINDINGS OF FACT: (1) On November 27, 2018, claimant filed a weekly claim for unemployment insurance benefits. Claimant filed weekly claims for benefits for the weeks of November 25, 2018 to April 20, 2019, the weeks at issue.

(2) During the weeks at issue, claimant owned Muir Painting, Inc. When working as a paint estimator for his own business during the busy season for his business, claimant typically worked on commission and earned approximately $2,000 per week.

(3) During the weeks at issue, claimant sought work as a paint estimator. His labor market included Happy Valley, Portland, Gresham, Beaverton, Tigard, Milwaukie, Oregon City, Clackamas, and Gladstone.

(4) In claimant's labor market, companies that provided customers with paint estimator services typically charged customers between $150.00 to $750.00 per estimate, depending on the nature of the estimate. In claimant's labor market, businesses typically paid cost estimators a wage of $20.00-$30.00 per hour, or $800.00-$1,200.00 per week for full time work.[1]

(5) When claimant sought work as a paint estimator during the weeks at issue, he only sought work that paid at least $2,000 per week. He considered that reasonable because paint estimating is a seasonal business and, in his experience, "when things are working in painting" it was "normal" to perform 20 or 25 bids per week while working for his own business. September 26th hearing, Transcript at 15.

(6) When claimant sought work during the weeks at issue, he would call paint companies or people that owned paint companies to ask if they had any painting estimator jobs open. He thought the companies he called would probably say they were not hiring because the weeks at issue did not fall into the typical season that painting companies were busy or in need of estimators. None of the companies claimant called had job openings when he called, and at least one of the companies claimant called did not employ paint estimators at all. Claimant did not apply for any jobs during the weeks at issue.

[1] The Department's wage information system does not differentiate between paint estimating workers or other kinds of cost estimators; the $30.00 per hour figure was for a project manager estimator.

(7) After the weeks at issue, the Department reviewed the weekly work search reports claimant had made for week 48-18 and weeks 9-19 through 14-19. Claimant reported that he made direct contacts with businesses those weeks by phone, and did not apply for jobs with any of those businesses. The Department audited a sampling of claimant's work search reports by contacting the businesses claimant said he had contacted in weeks 11-19 and 12-19. None of the businesses could verify that claimant had called, one said claimant had never applied to work for them, and another said that their business was a one- or two-man company that did not have any estimator positions.

CONCLUSIONS AND REASONS: Claimant did not actively seek work during the weeks at issue, and is therefore ineligible for benefits.

Unemployed. The order under review, rather than resolving the issue set forth in decision # 83324 – which was whether claimant was "able, available, and actively seeking work" under ORS 657.155 and OAR 471-030-0036 – concluded that claimant was "not unemployed" under ORS 657.100 during the weeks at issue because he had wages that exceeded his weekly benefit amount during each of the weeks at issue. *See* Order No. 19-UI-133930 at 1-3.

There is some dispute in this case as to whether or not claimant's personal income during the weeks at issue should be considered "wages" from employment subject to ORS chapter 657, and the evidence gathered at both hearings was inadequate to conclusively resolve that issue. We need not resolve the issue to decide this case, however, because this case can be resolved on other grounds. In other words, if we concluded claimant was not "unemployed" during the weeks at issue benefits would not be payable to him for that reason. If we concluded that claimant was unemployed during the weeks at issue, benefits would not be payable to claimant for the reasons that will be explained below. Because the outcome, and effect on whether benefits are payable to claimant during the weeks at issue, is the same either way, we need not decide whether or not claimant was unemployed.

Available for work. 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). For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must, among other things, not impose "conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time." OAR 471-030-0036(3)(c) (April 1, 2018).

Claimant imposed a condition on his opportunities to return to work during the weeks at issue by being unwilling to seek or consider paint estimating work that paid less than $2,000 per week. Claimant argued at the hearing and in his written argument that the $2,000 per week condition was reflective of what he earned "when things are working in painting" and he was doing 20-25 estimations per week while working for his own company. We infer from claimant's reference to "when things are working in painting" that he was referring to the busier seasons in the paint estimating industry. Although a commissioned paint estimator might reasonably expect to earn $2,000 per week while working for his own company during the busy season, the circumstances under which claimant sought work during the weeks at issue were significantly different. First, it was not the paint industry's busy season, it was the slow season. There is nothing suggesting that it was likely that claimant – regardless where he worked – could reasonably expect to perform 20-25 estimations per week during the slow season. Claimant also was not seeking work within the company he owned, and there is nothing suggesting that he was seeking only commissioned work rather than hourly work. The fact that claimant earned $2,000 in commissions

while working for his own company in the busy season therefore does not suggest that the condition he imposed on the types of work he was willing to accept was reasonable.

Claimant also argued that the condition was reasonable because it was supported by emails from estimating companies he contacted, as demonstrated in Exhibit 3. The information provided in those emails, however, suggested how much the companies charged clients to perform paint estimations. The information did not indicate how much the companies were willing to or customarily paid employees to perform them. Nor did the emails establish that those companies even hired employees to perform paint estimating duties. The emails do not establish that claimant's expectation of $2,000 per week was reasonable.

The preponderance of the evidence suggests that cost estimators in claimant's labor market could customarily expect to be paid $800 to $1,200 per week for their work. The record does not suggest that a paint estimator working for a company he did not also own during the industry's typical slow season could reasonably expect to earn more than that. We reasonably infer that no typical paint company or paint estimating company would be willing to pay an estimator approximately double the standard wage most employees in the labor market would expect. Therefore, the wage condition that claimant imposed – that a prospective employer would have to pay claimant around double the wages typical of the cost estimation industry before claimant would consider working for them during the slow season – more likely than not amounted to a condition that substantially reduced his opportunities to return to work at the earliest possible time. Claimant not available for work, and not eligible for benefits during the weeks at issue.

We note that claimant also stated in his written argument that if the Department thought that $2,000 per week was too much to request as wages from a prospective employer, then "the director needs to send me a letter, which they never have." Claimant did not identify the source of a requirement that the director send him a letter. Assuming that he is referring to OAR 471-030-0036(1), that provision says that the Director may require an individual to "seek less desirable but similar work or work of another type," "seek any work that exists in the labor market," or "further expand work-seeking activities." Those provisions are not what is happening here. There is no evidence that the Director has required claimant to seek less desirable work, for example, work as a paint estimator's assistant, or a painter, or general laborer for paint companies. Nor is there evidence suggesting that the Director has required claimant to seek other types of work, be open to any work that exists in the labor market, or to expand his labor market. There is no law or rule that required the Department to send a letter to claimant before requiring claimant to meet the generally applicable eligibility standards to which all claimants are held.

Actively seeking work. 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).

Although claimant reported to the Department that he made two direct contacts during each of the weeks at issue, the preponderance of the evidence suggests that he did not. A "direct contact" means asking an

employer about a job opening at their business or applying for a job opening in the manner the employer requires. None of the businesses claimant contacted had any job openings. Some of the businesses claimant contacted did not even hire employees. Claimant's contact with such businesses therefore was not to ask about those businesses' job openings or to apply for jobs, which means that they were not "direct contacts. Additionally, it is notable that when the Department audited claimant's work search reports by contacting the businesses claimant claimed to have contacted during weeks 11-19 and 12-19, none of those businesses had a recollection of having interacted with claimant; one of the businesses even denied that the business employed paint estimators let alone that they had a paint estimator job opening that claimant either asked about or applied for. The record therefore fails to substantiate that claimant did in fact make the contacts he claimed to have made during the weeks at issue.

The totality of the evidence in this record suggests it is more likely than not that claimant did not fulfill the Department's requirement that he make two direct contacts during each of the weeks at issue as a condition of being eligible for benefits. Claimant therefore did not actively seek work during the weeks at issue, and he is not eligible to receive benefits.

In reaching the conclusion that claimant did not actively seek work during the weeks at issue, we considered the argument claimant made in his written argument that he should be considered to have made sufficient direct contacts because "the rules don't say how many different kinds of contacts are needed." That is not the case. OAR 471-030-0036(5)(a) states that individuals must do five work seeking activities every week, two of which must be direct contacts. The rule also defines "direct contact" as "contact with an employer in person, by phone, mail, or electronically *to inquire about a job opening* or *applying for job openings* in the manner required by the hiring employer." (Emphasis added.)

We also note the fact that claimant contacted businesses to ask about their job openings by phone instead of going to the business in person did not affect the outcome of this case. As noted above, a "direct contact" can occur "in person, by phone, mail, or electronically." Had claimant reached out to the businesses by phone to ask about the job openings they had, or to apply for one of those job openings, a phone call would likely have been sufficient to qualify the contact as a "direct contact."[2]

For the reasons explained, claimant was not available for work and did not actively seek work. For either or both of those reasons, claimant is not eligible for benefits during the weeks at issue.

DECISION: Order No. 19-UI-137546 is affirmed, on different grounds.

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

DATE of Service: <u>November 15, 2019</u>

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

[2] The Department's witness stated at the second hearing that a direct contact "means you have to go in person and directly contact an Employer to find a job," and that phone contact with a potential employer "is not a direct contact." September 26th hearing, Transcript at 35. That is not what the law says, however, and that is not the standard that EAB applied to this decision.

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.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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