

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0207

Reversed & Remanded

PROCEDURAL HISTORY: On December 17, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding “the employer”, Weber Packaging Solutions, Inc. (Weber) discharged claimant, but not for misconduct (decision # 103238). Weber filed a timely request for hearing. On February 18, 2020, ALJ Snyder conducted a hearing, and on February 20, 2020, issued Order No. 20-UI-144851, affirming the Department’s decision. On March 9, 2020, Weber filed an application for review with the Employment Appeals Board (EAB).

EAB considered Weber’s written argument when reaching this decision.

FINDINGS OF FACT: (1) Weber, a label manufacturing and distribution business, employed claimant as a national sales manager from approximately October 1969 until April 2006.

(2) In 2006, claimant filed paperwork with the California Secretary of State forming ABSWAN Company, LLC (ABSWAN). Claimant listed himself on the paperwork as a manager of ABSWAN and ABSWAN’s business type as “Label Sales Broker.” Exhibit 1 at 000022. From April 2006 until December 2017, Weber and claimant had no relationship.

(3) At all relevant times, claimant considered ABSWAN to have been “disseminated” when he left California and moved to Oregon “three, four years ago”. Transcript at 21.

(4) On December 8, 2017, Weber and claimant entered into an “Independent Contractor Agreement” (Agreement). The Agreement referred to claimant as an “independent contractor” or a “contractor” and expressly stated, “[n]othing in this Agreement shall be deemed to constitute Contractor as a ... employee... or anything other than an independent contractor.” Exhibit 1 at 000011. Pursuant to the Agreement, claimant began selling Weber Products in Oregon and Washington and he was required to

submit a monthly invoice to receive \$1,633 for his monthly general expenses and “5% commission on the net value of label orders made to customers located in Pacific NW territory....” Exhibit 1 at 000018.

(5) The Agreement allowed claimant to provide his sales services to not only Weber but also any other person, or the general public, and it reflected an intent between the parties that claimant would “handle his own books of account, file his own income tax returns, and pay his own withholding and social security taxes.” Exhibit 1 at 000012. Weber was not responsible for providing claimant health insurance benefits under the Agreement, nor did Weber provide claimant a 401(k) plan. In performing his sales services, the Agreement provided claimant autonomy to employ his “own personal skills and methods... and [his] own professional judgment and shall not be subjected to the control or direction of any other person; provided, however, that [claimant] shall abide by all reasonable guidelines of Weber.” Exhibit 1 at 000012.

(6) Claimant fulfilled his obligations under the Agreement by working on existing accounts from his Oregon home and pursuing sales leads in the Pacific Northwest. Weber issued claimant a computer and a company phone to enable him to meet his obligations under the Agreement. Claimant was not required to wear a Weber uniform, nor was he required to report how he went about making his sales; he was only required to make weekly reports about the results of his sales efforts. Claimant could hire anyone he wished to assist him with conducting sales and he had the authority to choose how many hours he was going to work during the day or week. If claimant hired an employee, Weber would take no supervisory role over that employee and would not pay wages or benefits to any of claimant’s employees. Claimant was required to carry his own insurance, and Weber did not cover Claimant with liability insurance, performance bonds, or errors and omission insurance. In addition, if claimant had required a license to perform his sales work, claimant would have been required to obtain the license or face the risks for failing to do so.

(7) At all relevant times, claimant submitted his monthly invoices under the name “ABSWANCOMPANY”. Transcript at 10, 14-15; Exhibit 1 at 000002. Pursuant to the Agreement, Weber remitted payment to claimant for his expenses and commission via direct deposit to a Wells Fargo business bank account set up by claimant in the name of ABSWAN. Despite the fact that claimant considered ABSWAN to be “defunct” during the time he operated under the Agreement, claimant continued to use his ABSWAN business account for billing purposes because he “didn’t wanna use [his] personal bank account” and he wanted to “separate business from pleasure.” Transcript at 30, 32.

(8) In 2018 and 2019, Weber issued claimant an IRS Form 1099-MISC. Claimant filed personal income taxes in 2017 and 2018, but did not have to pay any taxes because his pay did not outweigh his expenses. ABSWAN did not file tax returns for calendar year 2017 or 2018.

(9) Claimant made investments in ABSWAN including installing a dedicated telephone line in his home and he obtained a new vehicle, “partially for business purposes.” Transcript at 17.

(10) Between December 8, 2017 and October 31, 2019, Weber and claimant renewed the agreement on more than one occasion. The last version of the Agreement, entered into by the parties in December 2018, recognized, among other things, an increase in claimant’s general expenses payment to \$1,933 and expressly recognized that claimant “is engaged in an independent business and desires to provide services as a Contractor...” and that “neither [claimant] nor any of [claimant’s] ... employees... is

entitled to, shall receive, and has no claim to, any benefits or other compensation currently paid by [Weber] to its employees ... including without limitation... unemployment insurance coverage....” Exhibit 1 at 000005. Weber also did not indemnify claimant or ABSWAN.

(11) On September 30, 2019, pursuant to the terms of the Agreement, Weber provided claimant 30-days’ notice that they were terminating the Agreement. Weber decided that it wanted to move its business in a different direction. The Agreement was terminated effective October 31, 2019. During all relevant times, claimant believed he was an employee of Weber.

(12) As of December 5, 2019, a LinkedIn profile created by claimant reflected claimant as the “[p]resent” owner of “ABSwan Company” and that he had owned ABSwan Company since June 2004. Claimant had attempted to cancel the profile in 2015, but was only successful in cancelling it after he learned it still existed on or after December 5, 2019.

CONCLUSIONS AND REASONS: Order No. 20-UI-144851 is reversed and remanded for further proceedings.

Order No. 20-UI-144851 concluded that there was no jurisdiction to address Weber’s argument that claimant was an independent contractor and, therefore, did not qualify for unemployment insurance benefits because “the Department has not provided the Employer with any appealable decision addressing the assertion that Claimant was an independent contractor.” Order No. 20-UI-144851 at 1, n. 1. The record does not support this conclusion.

“Services performed by an individual for remuneration are deemed to be employment subject to this chapter *unless and until it is shown to the satisfaction of the Director of the Employment Department that the individual is an independent contractor*, as that term is defined in ORS 670.600” ORS 657.040. (Emphasis added). Where an individual is an independent contractor, they are not covered by the unemployment insurance statutes and they are not qualified to receive benefits. OAR 471-030-0038(1)(a) (“This section does not apply where no employment relationship exists because the worker is an independent contractor ...”); *Register Guard v. Employment Dep’t*, 247 Or. App. 692, 271 P. 3d 136 (2012); *May Trucking Co. v. Employment Dep’t*, 251 Or. App. 555, 284 P.3d 553 (2012).

Contrary to the conclusion in Order No. 20-UI-144851, the Department *did* provide a decision addressing whether claimant was an employee or an independent contractor for Weber. Specifically, the Department’s December 17, 2019 decision (decision # 103238) encompassed not only a determination that claimant was “fired but not for misconduct connected with work”, but also that claimant had been “employed” by Weber and benefits to claimant were allowed. In finding that claimant was “employed” by Weber, the Department implicitly found that claimant was not an independent contractor. *See, e.g., May Trucking Co. v. Employment Dep’t*, 251 Or. App. 555, 284 P.3d 553 (2012) (“The department’s initial determination in this case indicated not only that claimant voluntarily left work for good cause – an issue clearly covered by ORS 657.176 – but it also indicated that claimant was ‘employed’ by employer on certain dates, and it concluded that ‘benefits are allowed.’ That is, the initial determination encompassed not only a determination that claimant was not ‘disqualified’ under ORS 657.176, but also that he had been ‘employed’ by employer and was ‘qualified’ to receive benefits.”). On remand, an initial determination will need to be made regarding whether claimant was qualified to receive unemployment insurance benefits as an “employee” or whether he was ineligible to receive benefits

because he was an “independent contractor.” If claimant is determined to be an “employee”, a decision will then need to be made regarding whether claimant was disqualified from receiving benefits under ORS 657.176 due to a discharge for misconduct.

In determining on remand whether claimant is an independent contractor, further development of the record to address the factors listed in ORS 670.600(2) and OAR 471-031-0181(3) for determining whether an individual is an “independent contractor” will be necessary. In particular, the record should be expanded to address whether claimant was engaged in an “independently established business” and what, if any, impact this had on his relationship with Weber. Likewise, further development of the record is necessary to determine whether claimant operated “free from direction and control over the means and manner” with which he provided services to Weber. These factors, as well as the additional factors listed in ORS 670.600(2) and OAR 471-031-0181(3) will be critical to the determination of whether claimant was an “employee” or an “independent contractor” for Weber.

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 an “employee” of Weber and, if so, whether Weber discharged claimant for misconduct, Order No. 20-UI-144851 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-144851 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: April 15, 2020

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-144851 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 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

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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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