

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0779

Reversed & Remanded

PROCEDURAL HISTORY: On January 21, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision denying claimant’s request for adjustment of claim determination. On January 31, 2020, the administrative decision became final without claimant having filed a timely request for hearing. On October 13, 2020, claimant filed a late request for hearing. On October 20, 2020, ALJ Kangas issued Order No. 20-UI-155455, dismissing claimant’s late request for hearing subject to claimant’s right to renew the request by responding to an appellant questionnaire by November 3, 2020. On October 28, 2020, claimant filed a timely response to the appellant questionnaire. On October 29, 2020, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 20-UI-155455 was vacated and notice of a hearing scheduled for November 13, 2020 to consider claimant’s late request for hearing, and if granted, the merits of the January 21, 2020 claim determination decision. On November 13, 2020, ALJ Monroe conducted a hearing, and on November 20, 2020 issued Order No. 20-UI-156757, granting claimant’s late request for hearing, and concluding that claimant was entitled to have wages added to his claim determination. On December 10, 2020, the Department filed an application for review with the Employment Appeals Board (EAB).

EAB considered the Department’s written argument to the extent it was based on the hearing record.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant’s late request for hearing is **adopted**. The remainder of this decision addresses whether claimant was entitled to have wages added to his claim determination.

FINDINGS OF FACT: (1) Beginning November 2017, JH Group (“the employer”) employed claimant. From November 2017 until December 2018, the employer paid claimant approximately \$6,500 per month. Starting in January 2019 until approximately August 2019, the employer paid claimant approximately \$7,500 per month.

(2) Although the employer paid claimant a total of approximately \$6,500 per month (during the period from November 2017 until December 2018) and a total of approximately \$7,500 per month (during the period from January 2019 until approximately August 2019), claimant received each monthly total in increments. Typically, each month the employer made a direct deposit payment to claimant, and then later that month, after claimant submitted his expenses, the employer paid claimant again. The employer sent claimant W-2s that reflected the direct deposit payments and 1099s that reflected the payments for expenses. The increments claimant received that were reflected in the 1099s were substantially larger than the increments reflected in the W-2s. In this way, the employer paid claimant “a little bit by W-2, and . . . a lot in 1099s.” Transcript at 35. At least some of the payments claimant received from the employer were for consulting services. Transcript at 37. The employer’s invoice records relating to its payments made to claimant were labeled as “All Payments Issued for Hakim Consulting.” Exhibit 5 at 4-6.

(3) In October 2019, claimant stopped working for the employer. On December 19, 2019, during the fourth quarter of 2019, claimant filed an initial claim for unemployment insurance benefits. An initial claim filed during that quarter has a base year that includes the third quarter of 2018, the fourth quarter of 2018, the first quarter of 2019, and the second quarter of 2019 (July 1, 2018 through June 29, 2019).

(4) The Department used wage information for claimant that it had obtained from the employer to determine whether claimant’s claim was valid. This information reflected that claimant received no wages for the third quarter of 2018, received \$4,000 for the fourth quarter of 2018, received \$5,000 for the first quarter of 2019, and received \$6,000 for the second quarter of 2019. Using this information, the Department determined that claimant established a valid claim for benefits with a weekly benefit amount of \$187.

(5) In late December 2019 or early January 2020, the Department served notice on claimant that he had established a valid claim with a weekly benefit amount of \$187. Claimant noticed that the wage information the Department used was less than the monthly payments he had received from the employer during the base year. Claimant requested a redetermination from the Department.

CONCLUSIONS AND REASONS: Order No. 20-UI-156757 is reversed and the matter remanded for further development of the record.

ORS 657.266 requires the Department to promptly examine each new claim for benefits, determine the wages paid to claimant during the applicable base year, determine if those wages are sufficient to qualify claimant for benefits and, if so, determine the weekly benefit amount payable to claimant. ORS 657.150(1) provides that an eligible individual shall be paid benefits in an amount determined by taking into account the individual’s work in subject employment during the base year. Any base year wages received for employment that is not subject to the unemployment insurance program are excluded from the determination of an individual’s weekly benefit amount. Types of non-subject employment include, but are not limited to, services performed for remuneration by an independent contractor under ORS 657.040, and, under ORS 657.044(1)(c), “service performed for: . . . a limited liability company by a member, including members who are managers[.]”

The order under review concluded that claimant was entitled to have the monthly payments claimant received from the employer during his base year added to his claim determination. Order 20-UI-156757

at 4-5. However, the record does not show whether or what amounts of the monthly payments claimant received from the employer during his base year were for work performed in subject employment. Aspects of the record raised unresolved questions as to whether the payments claimant received may have been for work performed in non-subject employment. For example, claimant testified that at least some of his work was in the nature of consulting services and he was paid “a lot in 1099s.” Transcript at 35. The Department’s representative testified that 1099s are usually used for independent contractors or commissions. Transcript at 43. And documentary evidence included in the record suggests that the employer may have paid claimant by making payments to a business organization that bore claimant’s last name rather than to claimant in his personal capacity. Exhibit 5 at 4-6. Given this evidence, Order No. 20-UI-156757 must be reversed and remanded for a full and fair inquiry regarding what payments were for work in subject employment.

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 the payments claimant received were for services performed in subject employment, Order No. 20-UI-156757 is reversed, and this matter is remanded.

The parties may offer new information into evidence at the hearing on remand, including information regarding the consulting services performed by claimant and whether any of the payments he received were for services actually performed by a registered business entity bearing his name and of which he was a member. Claimant should be afforded an opportunity to respond to any evidence offered by the Department relating to the employer’s payments going to a business entity of which claimant is a member or manager. At the time of the hearing, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

DECISION: Order No. 20-UI-156757 is set aside, and this matter remanded for further proceedings consistent with this order.

DATE of Service: January 15, 2021

S. Alba and D. P. Hettle.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-156757 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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