

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0384

Modified
Late Request for Hearing Allowed
Request for Redetermination of Wage and Potential Benefit Report - Reversed & Remanded

PROCEDURAL HISTORY: On July 22, 2020, the Oregon Employment Department (the Department) served notice of a Wage and Potential Benefit Report (WPBR) issued July 21, 2020 that redetermined claimant's claim by adding wages earned and hours claimant worked during his base year. On August 3, 2020, the July 21, 2020 WPBR became final without claimant having filed a timely request for hearing. On November 9, 2020, claimant filed a late request for hearing on the July 21, 2020 WPBR. ALJ Kangas reviewed claimant's request, and on January 20, 2021 issued Order No. 21-UI-159379, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by February 3, 2021. On January 25, 2021, claimant filed a timely response to the appellant questionnaire.

On February 24, 2021, the Office of Administrative Hearings (OAH) mailed claimant a letter stating that Order No. 21-UI-159379 was cancelled and that a hearing would be scheduled to address whether claimant's late request for hearing should be allowed and, if appropriate, the merits of the July 21, 2021 WPBR. On April 15, 2021, OAH mailed notice of a hearing scheduled for April 30, 2021. On April 30, 2021, ALJ S. Lee conducted a hearing, and on May 10, 2021 issued Order No. 21-UI-166487, allowing claimant's request for hearing, affirming the July 21, 2020 WPBR, and concluding that claimant was not entitled to have wages added to the claim determination. On May 13, 2021, claimant filed a timely application for review of Order No. 21-UI-166487 with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of claimant's paystubs and tip receipts from January 1, 2019 through June 30, 2019 while employed in Louisiana with the Bridge Lounge, LLC during his base year. Claimant submitted the additional evidence to EAB with his May 26, 2021 written argument. The additional evidence matches the description of evidence discussed during the hearing that the Department witness indicated the Department had received and agreed to submit to OAH for inclusion in the record. Transcript at 24-26. Claimant did not object to including the additional evidence in the record, and the ALJ asserted that the evidence would be included as part of Exhibit 1. Transcript at 26. However, the record does not show that the Department submitted the

additional evidence to OAH, or that the additional evidence otherwise was included as part of Exhibit 1. For that reason, EAB has considered the additional evidence submitted by claimant with his May 26, 2021 written argument in reaching this decision.

The additional evidence has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 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(2). Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

WRITTEN ARGUMENT: Claimant submitted written arguments to EAB on May 18, 2021 and May 26, 2021. EAB considered claimant's arguments to the extent they were based on the 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 request for hearing of the July 21, 2020 WPBR is **adopted**. The remainder of this decision will address whether, claimant was entitled to have wages and hours added to his claim determination.

FINDINGS OF FACT: (1) From January 1, 2019 to approximately June 30, 2019, Bridge Lounge Bar, LLC (Bridge Lounge) employed claimant as a bartender. Bridge Lounge was located in Louisiana and was claimant's only Louisiana employer during 2019. Between January 1, 2019 and June 30, 2019, claimant received records from that employer that reportedly showed that claimant worked approximately 685 hours for that employer at a wage of \$2.13 per hour for a total of approximately \$1459 in wages. EAB Exhibit 1. Claimant also received records from that employer that reportedly showed the hours claimant worked during each shift of his employment and the share of the tips that the employer paid claimant in cash for that shift. EAB Exhibit 1. The records claimant received from the employer, and the federal tax return claimant reported that he filed for 2019 showing \$14,245 in tip income, reportedly show that claimant earned approximately \$15,704 in gross wages and tips from Bridge Lounge during the time that claimant worked for that employer. EAB Exhibit 1; Exhibit 1, Form 4137.

(2) During July, August and September 2019, claimant worked for one California employer and two Oregon employers, and earned \$5,604.19 in wages from those employers.

(3) During October, November and December 2019, claimant worked for the same two Oregon employers he worked for during July, August and September of 2019 and one other Oregon employer, and earned \$7,101.22 in wages from those three Oregon employers combined.

(4) On June 19, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department backdated that claim to the week of March 29, 2020 through April 4, 2020 (week 14-20). The Department determined that claimant's base year was January 1, 2019 through December 31, 2019. Based on the wage information available to the Department at that time, claimant did not monetarily qualify for benefits and his weekly benefit amount was determined to be "zero." Transcript at 14.

(5) After communications from claimant, the Department requested hours and earnings information from all of claimant's 2019 employers. On June 24, 2020, the Department received hours and earnings

information from Bridge Lounge indicating that during the first two quarters of 2019, claimant worked 128 hours and earned \$1,615.00 in wages. On July 17, 2020, the Department received hours and earnings information from claimant's California employer indicating that during the third quarter of 2019, claimant worked 68 hours and earned \$906.71 in wages. On July 17, 2020, the Department issued a WPBR to claimant that reflected the earnings information it had received from Bridge Lounge Bar, LLC and claimant's California employer, and determined that claimant's weekly benefit amount was \$151.00.

(6) Between July 17, 2020 and July 21, 2020, the Department received hours and earnings information from claimant's three Oregon employers indicating that during the third and fourth quarters of 2019, claimant worked a total of 919 hours and earned a total of \$11,799.20 in wages from those three employers combined. On July 21, 2020, the Department issued the re-determined WPBR under review that reflected the earnings information it had received from all of claimant's 2019 employers and determined that claimant's weekly benefit amount was \$179.00.

(7) After the July 21, 2020 WPBR was issued, claimant submitted to the Department the wage and tip records he had received from Bridge Lounge from January 1 2019 through June 30, 2019. EAB Exhibit 1.

(8) On April 27, 2021, the Department sent the state of Louisiana the wage and tip information claimant had submitted to the Department and requested that it reconsider its prior determination of the amount of claimant's hours and earnings during the first two quarters of 2019. As of the April 30, 2019 hearing, the Department had not yet received a response from the state of Louisiana regarding its request for reconsideration.

CONCLUSIONS AND REASONS: Order No 21-UI-166487 is reversed and this matter is remanded for further development of the record.

ORS 657.150(2)(a) provides that to qualify for unemployment insurance benefits an individual must have worked in subject employment in the base year and earned total base year wages of \$1,000 or more, must have total base year wages equal to or in excess of one and one-half times the wages in the highest quarter of the base year, and must have earned wages in subject employment equal to six times the individual's weekly benefit amount. ORS 657.266(1) provides that an authorized representative of the Department shall promptly examine each new claim for benefits and, on the basis of information available, determine the total amount of wages paid to the claimant during the base year and whether or not such amount is sufficient to qualify the claimant for benefits and, if so, the weekly benefit amount payable to the claimant, the maximum amount payable with respect to such benefit year and the maximum duration thereof. The initial determination under this section shall be applicable to all weeks of the benefit year respecting which the claim was filed; however, such determination may be amended with respect to any week or weeks of the benefit year. The Department shall promptly give notice of an initial determination to the claimant and to any employers that have paid wages to the claimant during the base year. ORS 657.266(2).

OAR 471-030-0048 (January 11, 2018) provides, in relevant part:

(1) An individual who receives a monetary claim determination under ORS 657.266(2) may request that the determination be amended. The Director upon receipt of such a request will examine wage records submitted to the Department by employers in an attempt to locate wages and/or hours of work alleged by the claimant to be missing. If the discrepancy involves only hours of work and the claimant has provided documentary evidence of hours sufficient to make the claim valid, the Director may issue a redetermination.

(2) If as the result of an investigation additional subject wages or hours of work are made available which either allow a non-valid claim to become valid, or increase the weekly benefit amount of a valid claim, a redetermination will be issued.

(3) If as the result of an investigation all or part of the requested wages or hours of work are not included in the claim determination, the Director will so notify the claimant. If the claimant requested an amended monetary determination as provided in section (1) of this rule within the period specified by ORS 657.266(5), such notice will be given by a determination amending or affirming the initial determination. Such notice shall be subject to appeal as provided in 657.266(5).

(4) An employer is affected by an amended determination issued under ORS 657.266(3) if it is found to have paid wages to a claimant, and is potentially affected if a claimant alleges wages were paid to him or her by that employer.

(5) If, during a hearing on an initial or amended determination issued under ORS 657.266(2) or (3), an issue arises as to whether wages at issue were actually paid to claimant by an employer that was not given notice of the initial or amended determination, that employer will become a party to that hearing. If the hearing has already commenced, it will be continued to allow reasonable time for the employer to be notified of the hearing.

At hearing, the Department witness testified that the Department may not add hours and earnings information from another state to a claimant's base year unless that state verifies to the Department that the hours and earnings information in question is accurate. Transcript at 18. Order No. 21-UI-166487 rightly rejected that assertion because the Department witness failed to provide any basis in law, rule, or Department policy to support it. Order No. 21-UI-166487 at 4.

After concluding that claimant would be allowed to show that earnings from an out of state employer should be added to his base year, provided he offered sufficient evidence, Order No. 21-UI-166487 concluded that claimant failed to meet his burden of proof with regard to his claimed earnings from Bridge Lounge. Order No. 21-UI-166487 at 4-5. The order reasoned that although claimant submitted a federal tax return that showed that he earned \$14,245 in tip income during 2019, the tax return was unpersuasive regarding that income because it included no W-2 from Bridge Lounge, and if claimant worked only 128 hours during the first two quarters of 2019 as the employer reported to the Department, then claimant was paid an improbable \$111 per hour in tips. Order No. 21-UI-166487 at 4. The order further reasoned, "Without additional evidence to establish that claimant actually earned the amounts that he testified he earned," claimant failed to meet his burden of proof. Order No. 21-UI-166487 at 4.

However, viewed objectively, claimant reasonably expected the additional evidence now included in the record as EAB Exhibit 1 would be forwarded to OAH by the Department and thereafter considered before Order No. 21-UI-166487 was issued. If that evidence had been forwarded and admitted into the record as expected, it apparently would have shown that claimant worked over 600 hours for Bridge Lounge during 2019, and that the hourly rate reflected by his reported tips would have been closer to \$24 per hour rather than \$111 per hour as the order reasoned. EAB Exhibit 1.

Because that evidence was not included in the record, Order No. 21-UI-166487 must be reversed and this matter remanded for consideration of EAB Exhibit 1 and further development of the record in connection therewith. For example, the record should be developed to verify the hours worked and tip income received by claimant from Bridge Lounge shown by the exhibit, determine why some of the “clock out” receipts included therewith appear to have the same date, and determine whether the total of the cash tip receipts shown by the exhibit equals the \$14,245.00 in tip income claimant reported on Form 4137 in Exhibit 1, and if not, why not.

The record also fails to show if claimant received a tax document from the employer regarding his tip income, or verification that claimant submitted the tax return included as Exhibit 1 to the IRS, the Louisiana state taxing authority, or both. The Department also should be allowed a sufficient opportunity to respond to EAB Exhibit 1 or support its position at hearing that the Department may not add hours and earnings information from another state to a claimant’s base year unless that state verifies to the Department that the hours and earnings information in question is accurate.

On remand, the record also must be developed to show whether the state of Louisiana ever responded to the Department’s April 27, 2021 transmission of claimant’s additional income records and request that it reconsider its prior determination of the amount of claimant’s hours and earnings during the first two quarters of 2019, and if so, what that response was. Regardless of whether the state of Louisiana responded to the Department’s request, the record also should be developed to show whether the Department issued a WPBR subsequent to July 21, 2020 in consideration of claimant’s additional evidence, and if so, the contents of that report.

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 to determine whether a redetermination of the July 21, 2020 WPBR is necessary, Order No. 21-UI-166487 is reversed, and this matter is remanded.

The parties may offer new information into evidence at the remand hearing. At that time, 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.

It also is noted that under OAR 471-030-0048(5), if, during a hearing on an initial or amended determination of a WPBR, an issue arises as to whether wages at issue were actually paid to a claimant

by an employer that was not given notice of the initial or amended determination, that employer will become a party to that hearing. Because the record fails to show that Bridge Lounge Bar, LLC was given notice of the WPBR at issue, and the record appears to show that there is an issue regarding whether the wages and tip income shown in EAB Exhibit 1 were paid to claimant, Bridge Lounge Bar, LLC should be added as a party to the hearing on remand and provided notice thereof.

DECISION: Order No. 21-UI-166487 is set aside, and this matter remanded for further proceedings consistent with this order.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating

DATE of Service: June 22, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No 21-UI-166487 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 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 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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