

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0117

Affirmed
Ineligible Weeks 39-18 through 2-19

PROCEDURAL HISTORY: On December 4, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from September 23 until December 1, 2018 (decision # 70416). Claimant filed a timely request for hearing. On January 16, 2019, ALJ Frank conducted a hearing, and on January 18, 2019, issued Order No. 19-UI-123061, concluding claimant was not available for work from September 23, 2018 through January 12, 2019. On February 4, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer submitted documents to EAB that were already part of the record at Exhibit 1. EAB considered the entire hearing record, including the parties' Exhibits 1 and 2, in reaching this decision.

FINDINGS OF FACT: (1) On June 23, 2014, Standard Appliance, Inc. hired claimant to do sales consulting work. Exhibit 1 at 2. On November 16, 2017, claimant was injured while working for the employer. Exhibit 1 at 2. Sometime after he was injured, claimant began a leave of absence from work due to the injury.

(2) On May 31, 2018, claimant was still on a leave of absence from work. Claimant's doctor released him to perform modified work. On June 6, 2018, the employer offered claimant modified, light duty work that met the physical restrictions outlined by claimant's doctor. *See* Exhibit 1 at 9-10, 11. The work was as a sales support person, which was work that claimant had performed for the employer in the past.

(3) On August 9, 2018, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for each week from September 23, 2018 through January 12, 2019, the weeks at issue for this case. The Department denied benefits for the week of September 23 through 29, 2018 (week 39-18), but paid claimant for the weeks of September 30 through November 24, 2018 (weeks 40-18 through 47-18). The Department denied benefits for the weeks of November 25, 2018 through January 12, 2019 (weeks 48-18 through 02-19).

(4) During the weeks at issue, claimant sought work as a sales consultant, real estate agent, loan officer, and finance manager. Claimant's labor market area was Lake Oswego, Oregon and the surrounding area, including the Portland metropolitan area. The customary days and hours for sales consulting work were Monday through Friday, from 8:00 a.m. to 6:00 p.m. For real estate agent, loan officer, and finance manager work, the customary days and hours were Monday through Saturday, from 8:00 a.m. to 6:00 p.m.

(5) During all the weeks at issue, claimant's vehicle was not safe or reliable to drive from Lake Oswego to Portland, in part because the brakes were not functioning properly.

(6) The offer of work the employer made to claimant on June 6, 2018 was still available for claimant from September 23 through November 27, 2018. The work was at the employer's store in Southeast Portland, which was within claimant's labor market area. Claimant did not accept the offer of work because he was not able to sit or walk for the time necessary to travel on public transportation to the employer's Southeast Portland location.

(7) On November 28, 2018, claimant's doctor modified claimant's work restrictions. Claimant's doctor advised claimant that he should not use more than one form of public transportation to travel each direction for work because the excessive standing and walking required for multiple transfers would aggravate his injury. The employer revised the sales support work it offered claimant at its Southeast Portland location to meet the revised restrictions.

(8) On December 10, 2018, claimant refused the employer's November 28, 2018 offer of work because claimant's doctor recommended that he take only one form of public transportation each direction to and from work and claimant would have to use both a bus and a train to commute each direction to work at the employer's Southeast Portland location. Exhibit 1 at 22. Claimant did not notify the employer before January 13, 2019 that he was willing to accept work offered by the employer.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was not available for work from September 23, 2018 through January 12, 2019.

To be eligible to receive benefits, unemployed individuals must be able to work, 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) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to full time, part time and temporary work opportunities throughout the labor market, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.* For purposes of ORS 657.155(1)(c), an individual is not available for work if he had an opportunity to perform suitable work during the week and failed to accept or report for work due to illness, injury or other temporary physical or mental incapacity. OAR 471-30-0036(3)(f). The Department initially paid claimant benefits for weeks 40-18 through 47-18. Therefore, the Department has the burden to establish that benefits should not have been paid for those weeks. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By extension of that principle, because the Department initially denied benefits for weeks 39-18, and 48-18 through 02-19, claimant has the burden to establish that benefits should have been paid for those weeks. *Id.*

During the weeks at issue, claimant refused an offer of work and was not willing to work for the employer at its Southeast Portland location. The record shows that the offered work met his modified job restrictions. Claimant did not accept the work because he did not have a reliable means of transportation and his injury prevented him from safely using public transportation to travel to the Southeast Portland job location. It is undisputed that the work the employer offered claimant was within his labor market area. By confining his availability to work to areas that were accessible by using one form of public transportation for each direction of his commute, claimant imposed a condition that substantially reduced his work opportunities and demonstrated that he was not capable of accepting or reporting for work throughout his labor market. Because the offer of work was open during all the weeks at issue, and claimant did not accept or report to work during that time, we conclude that claimant was not available for work during all the weeks at issue.

Claimant asserted at hearing that he was available for work because his unwillingness to work at the employer's Southeast Portland location was based on his health and his doctor's orders regarding public transportation, and he was willing to work at the employer's closer Beaverton location. Transcript at 17. OAR 471-030-0036(2)(b) and (3)(e) provide that an individual prevented from working full time or during particular shifts due to a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h) shall not be deemed unable to work or unavailable for work solely on that basis so long as the individual remains available for some work. Claimant was injured in November 2017. Assuming claimant's injury was a long-term "physical impairment" as defined at 29 CFR §1630.2(h), OAR 471-030-0036(2)(b) and (3)(e) are not applicable to the issue of claimant's availability for work during the weeks at issue here because claimant had not been deemed ineligible for benefits because he limited his availability to part time work. Nor did he limit his availability to "particular shifts" due to his injury. There is no exception applicable regarding claimant's availability for work that would allow claimant to limit his availability for work to only those opportunities within a commuting distance that would require only one form of public transportation, without transfers.

For the reasons explained, claimant was not available for work from September 23, 2018 through January 12, 2019, weeks 39-18 through 02-19. Claimant is therefore ineligible to receive unemployment insurance benefits for that period.

DECISION: Order No. 19-UI-123061 is affirmed.

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

DATE of Service: March 6, 2019

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 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.

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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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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

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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