

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0256

Affirmed
Ineligible - Weeks 03-19 through 08-19

PROCEDURAL HISTORY: On February 6, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was ineligible for benefits because she was not available for work for the weeks of January 13 through February 2, 2019 (decision # 82927). Claimant filed a timely request for hearing. On March 1, 2019, ALJ Shoemake conducted a hearing, and on March 8, 2019, issued Order No. 19-UI-126043, concluding claimant was ineligible for benefits for the weeks of January 13 through February 23, 2019 because she was not unemployed during those weeks. On March 11, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument. However, claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For that reason, claimant's new information was not considered when reaching this decision. Even if it had been considered, the outcome would have remained the same for the reasons stated below.

FINDINGS OF FACT: (1) On January 10, 2019, claimant filed an initial claim for unemployment insurance benefits. She filed claims for benefits for each of the weeks including January 13, 2019 through February 23, 2019 (weeks 03-19 through 08-19), the weeks at issue. The Department did not pay claimant benefits for any of those weeks.

(2) During the weeks at issue, claimant sought warehouse work. Her labor market area was Dallas, Salem, and Monmouth, Oregon. In claimant's labor market, the customary days and hours for warehouse work were all days, all shifts.

(3) During each of the weeks at issue, claimant also was employed full time as a commission-only real estate agent for Berkshire Hathaway (BH), a real estate brokerage firm. On January 28, 2019, a Department adjudicator interviewed claimant and asked her how many hours she was working for BH at that point. Claimant responded, "Full time" and when asked to clarify how many hours per week,

claimant stated, “40 hours right now since I lost the other job...I am constantly following up on leads or seeking other leads.” Audio Record ~ 18:45 to 20:00.

CONCLUSIONS AND REASONS: Claimant was not unemployed during each of the weeks at issue and for that reason was ineligible for benefits.

Only “unemployed” individuals are eligible for benefits. ORS 657.150(1). For the purposes of ORS 657.155 (1), an individual who performs full-time services in any week for an employing unit is not unemployed even though remuneration is neither paid nor payable to the individual for the services performed. ORS 657.100(2). By logical extension of the holding in *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976), where, as here, claimant was not paid benefits or given waiting week credit for the weeks at issue, claimant has the burden to show by a preponderance of the evidence that she was eligible to receive benefits for those weeks.

Although the Department’s administrative decision concluded claimant was ineligible for benefits because she was not available for work, the Department’s witness testified that the dispositive issue was whether claimant was “unemployed” during the weeks at issue. If she was *not* unemployed, as the Department eventually concluded, she was ineligible for benefits for those weeks. Audio Record ~ 7:30 to 8:30. In support of its position, the Department’s witness asserted that the question of whether an employer-employer relationship existed between claimant and BH during the weeks at issue was referred to the Department’s tax division, which concluded that there was such a relationship. Audio Record ~ 6:00 to 6:45. She also asserted that on January 28, 2019, claimant reported to a Department adjudicator that during the weeks at issue she worked 40 hours per week for BH, and for that reason the Department determined that she worked full-time. Audio Record ~ 7:15 to 8:20.

At hearing, claimant disputed that she worked full time for BH during the weeks at issue. At one point, claimant asserted that during those weeks she worked for BH no more than 10 hours per week. Audio Record ~ 16:45 to 18:00. However, she had testified earlier in the hearing, “I’m available 24/7 because I work as much as I can...but that’s just trying to find work but that doesn’t mean that I have work happening. I’m constantly seeking it.” Audio Record ~ 12:00 to 12:30. Because claimant’s hearing testimony on that issue was internally inconsistent, we find the Department’s hearsay evidence of the January 28, 2019 conversation between claimant and its adjudicator, based on contemporaneous notes taken of their conversation, more persuasive, and therefore found facts in accordance with the Department’s evidence.

Viewing the record as a whole, claimant failed to meet her burden to show that she was in fact unemployed, i.e. that she did not perform full-time services for BH while also seeking warehouse work during the weeks at issue. Accordingly, under ORS 657.100(2), claimant was ineligible for benefits for the weeks including weeks including January 13 through February 23, 2019.

DECISION: Order No. 19-UI-126043 is affirmed.

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

DATE of Service: April 12, 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.

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 الاستئناف 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.