

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0373

Reversed & Remanded

PROCEDURAL HISTORY: On March 19, 2019, the Oregon Employment Department (the Department) served notice of two administrative decisions: one concluded claimant was ineligible for benefits from February 24 through March 9, 2019 because he was not available for work (decision # 162846), and one concluded claimant was ineligible for benefits from March 10 through March 16, 2019 because he was not available for work (decision # 161925). Claimant filed a timely request for hearing on both decisions. On April 8, 2019, ALJ M. Davis conducted a consolidated hearing, and on April 9, 2019, issued Order No. 19-UI-127866, affirming decision # 162846, and Order No. 19-UI-127872, modifying decision # 161925, and concluding claimant was not available for work from March 10 through March 30, 2019. On April 12, 2019, claimant filed applications for review of both orders with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 19-UI-127866 and 19-UI-127872. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-0373 and 2019-EAB-00374).

Claimant submitted written argument to EAB. 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 claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision. However, because the cases shall be remanded to the Office of Administrative Hearings (OAH) for further information, claimant may offer the new information contained in his written argument at the hearing on remand. Claimant must comply with the procedures set forth by OAH in the notice of hearing if he wishes to have any new documentary evidence included in the record at the remand hearing, and should contact OAH directly if he needs help understanding those procedures. During the remand hearing, the ALJ will decide if claimant's additional information is relevant to the issues on remand and should be admitted into evidence, and the Department would have the opportunity to respond to the information.

FINDINGS OF FACT: (1) On February 26, 2019, claimant filed an initial claim for unemployment insurance benefits.

(2) Claimant claimed benefits for the weeks from February 24, 2019 through March 30, 2019 (weeks 9-19 through 13-19), the weeks at issue. The Department did not pay claimant benefits for those weeks.

(3) During the weeks at issue, claimant sought work as a wild land firefighter.

(4) Claimant attended a class each Tuesday and Thursday from 6:00 p.m. to 9:00 p.m. during the weeks at issue.

CONCLUSIONS AND REASONS: Order Nos. 19-UI-127866 and 19-UI-127872 are reversed, and are remanded to OAH for further proceedings.

To be eligible to receive benefits, an unemployed individual must be available for 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) (April 1, 2018). Among those requirements are that the individual be willing to work during all of the usual hours and days of the week customary for the work being sought, capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, and not imposing conditions which substantially reduce the individual’s opportunities to return to work at the earliest possible time. OAR 471-030-0036(3). 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 he was eligible to receive benefits for those weeks.

The Orders under review found as fact that the customary days and hours for firefighter work in claimant’s labor market were all days and all hours and that claimant told potential employers that he attended a class on Tuesday and Thursday nights during the weeks at issue.¹ Based in part on these findings, the Orders concluded that claimant was not available for work during the weeks at issue because “by providing this information to potential employers, [claimant] limited his availability for work.”²

The evidence in the record does not support that conclusion, nor does it support a denial of benefits in this case. The record does not contain information from claimant regarding all the types of work he sought during the weeks at issue, and the customary days and hours for those types of work in claimant’s labor market. In particular, the Department witness testified that, “the customary hours . . . for wild land firefighters, *when they’re in season*, is all days of the week and . . . all hours of the day . . . *depending on the time of the year*. . . . [T]he wild land firefighting season is - is not typically active during the - the periods at issue - the period claimed here.” Transcript at 11, emphasis added. The record must be developed as to the customary days and hours for wild land firefighter work during the off-season, including for prescribed burns. The ALJ did not ask claimant what prospective employers told him about hiring people to work controlled burns in the off-season. Additionally, the Department witness testified that claimant sought work as a station apprentice, doing habitat management, painting, and doing grounds maintenance at a school. The ALJ did not confirm with claimant if he sought these

¹ Order No. 19-UI-127866 at 1; Order No. 19-UI-127872 at 1.

² Order No. 19-UI-127866 at 3; Order No. 19-UI-127872 at 3.

types of work during the weeks at issue, or what were the customary days and hours for these types of work in claimant's labor market.

Additionally, the record does not contain sufficient information about whether claimant was willing to work while attending school. The record does not show if claimant spoke with his teachers about continuing school if he was offered work that conflicted with school. The record shows that claimant told some prospective employers about his classes, but does not show what he told employers or whether he notified prospective employers of his school schedule because he was unwilling to work conflicting hours, merely to state his scheduling preferences, or for another reason. The record does not show whether the employers he told about his classes refused to hire him because he restricted his schedule. The ALJ should ask claimant whether he agrees with what the Department representative testified to regarding claimant's responses on the student eligibility questionnaire, and to explain any discrepancies between what claimant told the Department and his testimony at the hearing.

Finally, OAR 471-030-0036(3) requires that an unemployed individual refrain from imposing conditions that *substantially* reduce the individual's opportunities to return to work at the earliest possible time. Emphasis added. The ALJ should develop the record as to the extent of off-season wild land firefighting opportunities in claimant's labor market during the weeks at issue, and to what extent, if any, disclosing his school schedule might have reduced claimant's opportunities to return to work. The ALJ should inquire of the parties whether claimant's ability to return to work was substantially affected by his class schedule, or if it was the unavailability of work during the wild land firefighter season that reduced claimant's opportunities to return to work during the weeks at issue.

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 the ALJ failed to develop the record necessary for a determination of whether claimant was available for work during the weeks at issue, Order No. 19-UI-127866 and Order No. 19-UI-127872 are reversed, and this matter is remanded for development of the record.

DECISION: Order No. 19-UI-127866 and Order No. 19-UI-127872 are set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: May 20, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-127866 or Order No. 19-UI-127872 or return this matter to EAB. Only a timely application for review of the subsequent Order(s) 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 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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.

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