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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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MC 010.05

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0476

Order No. 19-UI-129218 Reversed – Not Ineligible Weeks 49-18 to 10-19
Order No. 19-UI-129219 Modified – No Overpayment, No Penalties

PROCEDURAL HISTORY: On March 29, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from December 2, 2018 to March 9, 2019 (decision # 162045). On April 4, 2019, the Department served notice of another administrative decision, based on decision # 162045, assessing a $5,578 overpayment, $1,673.40 monetary penalty, and 36 penalty weeks (decision # 194045). Claimant filed a timely request for hearing on both decisions. On April 24, 2019, ALJ Seideman conducted two hearings, and on May 2, 2019 issued Order No. 19-UI-129218, affirming decision # 162045, and Order No. 19-UI-129219, affirming the Department's assessment of an overpayment but concluding that claimant was not liable for a monetary penalty or penalty weeks. On May 18, 2019, claimant filed applications for review of both decisions with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On November 19, 2018, claimant filed an initial claim for unemployment insurance benefits. Claimant filed weekly claims for benefits from December 2, 2018 to March 9, 2019 (weeks 49-18 to 10-19), the weeks at issue. The Department paid claimant $5,578 in unemployment insurance benefits during the weeks at issue based in part based upon claimant's weekly reports to the Department that he was available for work.

(2) At all relevant times, claimant was employed as a plant operator by Harney Rock & Paving Co. During the summer season, claimant often worked 60-70 hours per week. During the winter, the employer's business slowed. By November 2018, claimant had performed several weeks of maintenance tasks and he was struggling to find things to do.

(3) In November 2018, claimant approached the employer's manager and said there was not a lot of work for him to do at that point, that if the employer needed to send him home he would understand, and that it might be beneficial to both of them. Claimant did not request that the employer lay him off work or reduce his hours.

(4) The employer did not have any work for claimant to do at that point. There was not enough of a workload for claimant to do his regular duties. The employer could not send home other employees

because they had specialized qualifications necessary to do available work, while claimant lacked those qualifications. In late November or early December, the employer reduced claimant's schedule to 30 hours per week.

(5) The employer decided to reduce claimant's hours primarily because they lacked work to keep him employed at his regular schedule and because of the weather. The employer also reduced other employees' hours on an as-needed basis during the same period of time. The employer called claimant to work additional hours when more work was available.

CONCLUSIONS AND REASONS: Claimant was available for work during the weeks at issue. Claimant was not overpaid and is not liable for penalties.

Available for work. To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be:

> (a) Willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and * * *
> (c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time * * *

OAR 471-030-0036(3) (April 1, 2018).

Order No. 19-UI-129218 concluded that claimant was not available for work during the weeks at issue because "[c]laimant suggestion that he work only part-time in his position resulted in his working only part-time . . ." and that the employer "had not explored that action until claimant brought it up." Order No. 19-UI-129218 at 3. The record does not support that conclusion.

The employer's witness established that claimant did not suggest or request that his hours be reduced. Although the employer's witness indicated that claimant's lack of objection to having his hours reduced was a factor, he also established that it is more likely than not that the primary causes of the employer's decision to reduce claimant's hours were the weather and the lack of work available for claimant to perform. Had the employer had more work suitable for claimant's qualifications, it is unlikely that the employer would have reduced claimant's hours regardless of claimant's wishes or preferences. In fact, the employer's witness also established that while the employer had reduced claimant's hours, the employer called claimant back to work additional hours whenever business needs required. On this record, claimant was not responsible for the employer's decision to reduce his hours, and his lack of objection to having his hours reduced did not suggest an unwillingness on his part to work available hours, or that he was imposing a condition that reduced his opportunities to work. Claimant therefore was available for work during the weeks at issue.

Overpayment. ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657.

The Department and ALJ concluded that claimant was overpaid benefits in the amount of $5,578 because he restricted his availability to working only part-time for his employer during a period of time when he was claiming benefits, and reporting that he was available for work without restrictions. *See* Decision # 194045, Order No. 19-UI-129219 at 3. As noted herein, however, claimant was in fact available for work during the weeks at issue. He therefore was eligible to receive benefits, not overpaid benefits, and not liable to repay any of the benefits he received based upon his availability for work between December 2, 2018 and March 9, 2019 (weeks 49-18 to 10-19).

Misrepresentation penalties. 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 concluding that claimant was not liable for penalties is **adopted.**

DECISION: Order No. 19-UI-129218 is set aside, as outlined above. Order No. 19-UI-129219 is modified, as outlined above.

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

DATE of Service: June 21, 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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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