

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0637

Reversed & Remanded

PROCEDURAL HISTORY: On May 17, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from April 7, 2019 to April 27, 2019 (decision # 90623). Claimant filed a timely request for hearing. On June 14, 2019, ALJ S. Lee conducted a hearing interpreted by a Vietnamese interpreter, and on June 21, 2019 issued Order No. 19-UI-132125, affirming the Department's decision. On July 9, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based upon the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Siltronic Corporation employed claimant as a technical operator from November 1994 through the weeks at issue. Prior to 2019, claimant had consistently worked forty hours per week for the employer. However, in 2019, there were occasional material shortages which caused the employer to "slow down" and sometimes limit claimant's work hours to less than 40. Transcript at 11. Each week claimant was told he would work "40" but sometimes might not due to materials shortages. Transcript at 11.

(2) On February 1, 2019, claimant filed an initial claim for unemployment insurance benefits by telephone. Although claimant's preferred language is Vietnamese, an English speaking claims-taker assisted claimant with the claims filing process. The Department established that claimant's weekly benefit amount was \$624.

(3) Claimant did not claim benefits for the week including March 17 through March 23, 2019 (week 12-19). On April 1, 2019, claimant restarted his claim through the online system, which has only English and Spanish language alternatives, by filing a claim for benefits for the week including March 24 through March 30, 2019 (week 13-19). When filing his claim for that week, claimant checked a box that indicated that he was on temporary layoff, that he had last worked on March 30, 2019, that he expected to return to full-time work on April 9, 2019, and that he had maintained contact with his employer.

(4) Claimant claimed and was paid benefits for the weeks including April 7 through April 27, 2019 (weeks 15-19 through 17-19), the weeks at issue.

(5) When filing his claim for the week including April 7 through April 13, 2019 (week 15-19) claimant did not report 40 hours of work or earnings greater than his weekly benefit amount. For that reason, the Department sent claimant a letter requesting information concerning what he was told when he was laid off during week 13-19. Claimant contacted the Department about the letter and due to his difficulty with the English language, was transferred to a Vietnamese translator. When he spoke with the translator, he indicated that he did not understand his work search requirements.

(6) When filing his claim for each of the weeks including April 14 through April 27, 2019 (weeks 16-19 and 17-19) claimant did not report 40 hours of work or earnings greater than his weekly benefit amount but indicated that he had maintained contact with his employer.

(7) While filing his claim for the week including April 28 through May 4, 2019 (week 18-19) claimant reported earnings greater than his weekly benefit amount and was not paid benefits.¹

CONCLUSIONS AND REASONS: Order No. 19-UI-132125 is reversed, and this matter is remanded to the Office of Administrative Hearings (OAH) for additional proceedings.

To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c). For purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a) (April 1, 2018). With limited exceptions, individuals are "required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual." *Id.*

However, an individual who is "temporarily unemployed" under OAR 471-030-0036(5)(b) is considered to be actively seeking work by remaining in contact with and capable of accepting and reporting for suitable work with their regular employer if: (1) there is a reasonable expectation that they will be returning to full time work, or work that equals or exceeds their weekly benefit amount, for their regular employer; (2) the individual is temporarily unemployed due to a lack of work; and (3) the individual is temporarily unemployed for no greater than four weeks between the week the individual became temporarily unemployed and the week the individual returns to work. OAR 471-030-0036(5)(b).

Order No. 19-UI-132125 concluded that claimant did not actively seek work during the weeks at issue. Order No. 19-UI-132125 at 4. The order reasoned that "claimant did not meet the definition of being temporarily laid-off" because "there was no reasonable expectation that he would return to full-time work within four weeks" and for that reason, claimant was required to conduct a minimum of five work seeking activities each week as a condition of benefit eligibility. *Id.* The order went on to conclude that because claimant did not conduct five work seeking activities each week, he was not eligible for benefits

¹ We take notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so 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(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

the weeks at issue. However, the record shows that there was insufficient inquiry at hearing to support those conclusions.

Both the Department's evidence and the inquiry at hearing focused what claimant was "told" by employer concerning when he would return to full-time work when he began working less than 40 hours per week. However, under OAR 471-030-0036(5)(b), the issue is whether claimant had a "reasonable expectation" that he would return to full time work "or work that equal[ed] or exceed[ed] [his] weekly benefit amount" work after a period "no greater than four weeks." Transcript at 7, 10-11. While what the employer told claimant is relevant to a determination about what claimant expected, and whether the expectation was reasonable, claimants must also be asked questions about when they expected to return to work, and why they held that expectation. Here, the record shows that claimant was never asked whether he "expected" to return to full time work or less than full-time work which produced earnings greater than his weekly benefit amount², by week 18-19, the deadline for claimant under the rule, and if so, what the basis for his expectation was. On remand, such inquiries need to be made.

Also at hearing, claimant was never asked about his work search activities during the weeks at issue. Even if the record shows that claimant may have believed that he only needed to remain in contact and available for work with their regular employer, he might have engaged in other search activities that he did not report when filing his claims because he did not think he had to. Without a sufficient inquiry to claimant regarding claimant's actual work search activities during each of the weeks at issue, if claimant was not "temporarily unemployed" during those weeks, it cannot be determined whether or not claimant actively sought work sufficient to be eligible for benefits.

The intent of this decision is not to constrain the inquiry on remand. In addition to the suggested lines of inquiry, any additional inquiry that is necessary or relevant to claimant's expectation regarding when he would return to full time work or work at least 27 hours per week and thereby earn more than his weekly benefit amount also should be made. On remand, the parties should also be allowed to provide any additional relevant and material information or testimony about the issues discussed, and to cross-examine each other as necessary.

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 for a determination of whether claimant was temporarily unemployed during the weeks in issue, and if not, whether he engaged in the required number of work search activities to be eligible for benefits, Order No. 19-UI-132125 is reversed, and this matter is remanded.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-132125 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

² The record shows that for each of the weeks at issue claimant reported 23 hours of work and \$540.00 in earnings, showing that his hourly wage was approximately \$23.47 ($540/23 = 23.478$). Transcript at 6. Because claimant's weekly benefit amount was \$624, claimant only needed to expect to work approximately 27 hours per week to earn more than his weekly benefit amount. ($\$624/23.47$ per hour = 26.58 hours).

DECISION: Order No. 19-UI-132125 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: August 14, 2019

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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 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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