

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0078

Reversed
Eligible

PROCEDURAL HISTORY: On November 27, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from November 10, 2019 through November 16, 2019 (decision # 173159). Claimant filed a timely request for hearing. On January 16, 2020, ALJ Shoemake conducted a hearing, and on January 23, 2020 issued Order No. 20-UI-143186, modifying decision # 173159 and concluding claimant was not available for work from November 10, 2019 through January 11, 2020. On January 27, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On October 18, 2019, claimant's prior employer laid him off work as a full-time meter reader. Claimant had been working the day shift for his prior employer for almost a year.

(2) Claimant's labor market was Redmond, Oregon and the surrounding cities. Meter reading is typically performed during the day and swing shifts, Sunday through Saturday, in claimant's labor market. Claimant was a member of a closed union and remained in contact with his union during all the weeks at issue.

(3) At all relevant times, claimant was self-employed as the proprietor of a window-tinting business. Claimant's business was mobile in nature in that he traveled to his clients using a standard passenger truck. Claimant began his business in June 2018 and had invested \$6,805 into it. Claimant had averaged five clients per month since the start of the business. Claimant believed that he would sustain \$10,000 in losses if he had to close his business. During his prior employment, claimant operated his window-tinting business during night and weekend hours and it did not interfere with the daytime shift work of his prior employment.

(4) On November 12, 2019, claimant filed an application for unemployment insurance benefits online. As part of his application, claimant completed a questionnaire and indicated that he was currently self-employed and devoted three hours to his business daily between the hours of 8 a.m. and 5 p.m. Claimant indicated that he would not drop his self-employment for full-time work; however, he was willing to

work during all the days and hours normal for his occupation. Claimant indicated that he could not begin full-time work now due to his self-employment.

(5) On November 26, 2019, a Department adjudicator contacted claimant to follow up on the answers he provided in his questionnaire. Claimant told the adjudicator that he would probably take full-time work that conflicted with his self-employment because his business was slow and he was focused on building his business; however, it would depend on the job. Claimant's preference was for part time work and he indicated he was available to work Monday through Friday from 7 a.m. to 3:30 p.m. Claimant was concerned that the Department's adjudicator was trying to tell him that he would have to forego his self-employment in order to receive benefits.

(6) The Department denied claimant benefits for each week from November 10, 2019 through January 11, 2020 (weeks 46-19 through 52-19 and 01-20 through 02-20), the weeks at issue. The Department's denial was based on claimant's lack of availability for work due to the restrictions his self-employment placed on his ability to accept full-time, part-time, or temporary work.

CONCLUSIONS AND REASONS: Claimant was available for work during the weeks at issue. Claimant is eligible to receive benefits for those weeks.

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). 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
- (b) Capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities; and
- (c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time; and
- (d) Physically present in the normal labor market area as defined by section (6) of this rule, every day of the week * * *.

* * *

OAR 471-030-0036(3) (December 8, 2019). Claimant has the burden to demonstrate that the Department should have paid him benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Order No. 20-UI-143186 concluded that claimant was not available for work during the relevant weeks because he informed the Department, both in his response to the Department's questionnaire and when later speaking to a Department representative, that he could not accept full time work due to his self-

employment. These statements, coupled with evidence indicating that claimant would sustain a substantial financial loss if he closed his business, led to the conclusion in Order No. 20-UI-143186 that claimant was imposing conditions that substantially reduced his opportunities to return to work at the earliest possible time. We disagree that the record supports the conclusions in Order No. 20-UI-143186.

At the hearing, claimant testified that for the nearly one-year long duration of his prior employment he was able to balance the responsibilities of his full-time job as a meter reader, with the responsibilities of running his window-tinting business. Audio Record at 17:35; 22:55. Claimant did this by attending to his business during night and weekend hours. Claimant also testified that since starting his window-tinting business he had averaged five clients per month and that if the Department or his union offered him full-time employment he would operate his business by working around his full-time schedule. Audio Record at 20:01; 22:55. To the extent there might be a future conflict between his full-time work schedule and a scheduled window-tinting client, claimant's prior practices suggest he would more likely than not either reschedule the client, or cancel the appointment. Claimant's testimony that he successfully balanced his prior employment as a meter reader with the running of his business was unrefuted and the preponderance of the evidence suggests that he would have been able to do it again.

While there were certainly some inconsistencies in the way that claimant answered some of the Department's questions during the initial adjudication of his claim, the preponderance of the evidence in the record supports the conclusion that claimant probably felt confusion based on the way some of the questions were worded and based on his concern that he was being asked to eliminate his self-employment. Claimant has met his burden of demonstrating that he was, more likely than not, available for work during the weeks at issue and he was, therefore, eligible to receive benefits for those weeks.

DECISION: Order No. 20-UI-143186 is set aside, as outlined above.

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

DATE of Service: March 3, 2020

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 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 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.

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.