

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0108

Affirmed
Overpayment Assessed

PROCEDURAL HISTORY: On December 5, 2019, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding claimant was not available for work for the weeks including September 1, 2019 through November 30, 2019, and was therefore ineligible for benefits for those weeks and until the reason for the denial had ended (decision # 175036), and the other assessing a \$165 overpayment (decision # 194545). Claimant filed timely requests for hearing.

On January 16, 2020, ALJ Monroe conducted a consolidated hearing on decisions # 175036 and # 194545. On January 21, 2020, ALJ Monroe issued Order No. 20-UI-143052, modifying¹ decision #175036 to uphold the denial of benefits for September 1, 2019 through October 19, 2019, but also to deny benefits for the weeks of November 10, 2019 through January 11, 2020. On January 21, 2020, ALJ Monroe issued Order No. 20-UI-143040, affirming decision # 194545. On February 1, 2020, claimant filed timely applications for review of Order Nos. 20-UI-143052 and 20-UI-143040 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 20-UI-143052 and 20-UI-143040. For case tracking purposes, this decision is being issued in duplicate (EAB Decisions 2020-EAB-0105 and 2020-EAB-0108, respectively).

FINDINGS OF FACT: (1) On August 11, 2019, claimant filed an initial claim for unemployment insurance benefits. Claimant filed a weekly claim for benefits for the weeks of September 1, 2019 to October 19, 2019 (weeks 36-19 to 42-19) and from November 10, 2019 to January 11, 2020 (weeks 46-19 to 2-20), the weeks at issue. The Department paid claimant benefits for the weeks of September 8, 2019 through October 12, 2019 (weeks 37-19 to 41-19).

¹ Order No. 20-UI143052 incorrectly reflects that ALJ Monroe affirmed decision #175036, when she actually modified decision #175036 in order to assume jurisdiction over weeks December 1, 2019 through January 11, 2020.

(2) Claimant sought work as a retail clerk; however, claimant indicated in her initial claim application that she was not willing to work all days and hours customary for a retail clerk due to childcare limitations. Subsequently, claimant informed the Department that she no longer had availability issues because she was receiving assistance from the Department of Human Services (DHS) with daycare services for her child.

(3) Claimant's labor market was Eugene, Springfield, and surrounding areas. In claimant's labor market, retail clerk work was customarily performed day shift and swing shift, including: Monday through Friday, 6 a.m. to 10 p.m.; Saturday, 7 a.m. to 9 p.m.; and Sunday, 9 a.m. to 7 p.m.

(4) Claimant was a single parent with a four-year old son who had developmental delays and other health concerns. Claimant's son attended preschool in Eugene, Monday through Thursday, 9 a.m. to 12:30 p.m. Claimant's son then rode a bus to a Eugene daycare center where he typically remained for three to three and a half hours depending on whether claimant was working or looking for work. On some days, claimant "worked until 5:30, and [she] got [to the daycare center] just before 6:00 p.m. to pick him up." Transcript at 18. DHS fully funded claimant's daycare needs, with the facility operating on Monday through Friday, 6 a.m. to 6 p.m. Claimant had no immediate family to assist with childcare, and she did not share custody of her child.

(5) From September 30, 2019 to October 29, 2019, claimant was employed at Dari-Mart in Creswell. The city of Creswell was not in claimant's labor market. Although claimant informed the employer on her application that she had open availability, to include open availability on weekends, claimant was unable to report to work for the 5:30 a.m. shift in Creswell because her son's daycare facility in Eugene did not open until 6 a.m. Claimant also could not work on weekends because she did not have weekend childcare. On October 29, 2019, claimant voluntarily quit her employment with Dari-Mart. Upon learning that the reason for claimant's decision to voluntarily leave Dari-Mart was claimant's childcare limitation, the Department retroactively denied claimant benefits from the beginning of her initial claim.

(6) Claimant made contact with a Facebook friend who offered babysitting services on Saturdays for \$4 per hour. Claimant utilized her friend's babysitting services prior to September 1, 2019; however, she could not utilize them during the time she worked at Dari-Mart because her friend "lives way on the other end of Eugene" and she did not "have anyone in the Creswell area." Transcript at 36.

(7) On December 3, 2019, claimant had a discussion with a longtime friend who indicated that she could babysit for claimant's son on Sundays for no charge.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was not available for work during the weeks at issue.

Available for work. 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 * * *.

* * *

OAR 471-030-0036(3) (December 8, 2019). Where an individual is the parent of a child under 13 years of age or of a child with special needs under the age of 18 who requires a level of care over and above the norm for his or her age, and is not willing to or capable of working a particular shift because of a lack of acceptable child care, the individual shall be considered available for work if: (a) the work the individual is seeking is customarily performed during other shifts in the individual's normal labor market area and (b) the individual is willing to and capable of working during such shifts. OAR 471-30-0036(4).

Where the Department has paid benefits to a claimant and seeks to recover them, the Department has the burden to prove that benefits should not have been paid. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By extension of that principle, where the Department has initially denied benefits to claimant, the claimant has the burden to prove that benefits should have been paid. In this case, the Department initially paid claimant benefits then retroactively denied them; for those weeks, including weeks 37-19 to 41-19, the Department had the burden to prove that benefits should not have been paid. Once the Department ceased paying claimant benefits, claimant has the burden to show that she was eligible for benefits during the remainder of the weeks at issue, which include weeks 36-19, 42-19, and weeks 46-19 to 2-20.

Claimant was not available for work during any of the weeks at issue. While claimant was generally able to arrange for childcare beginning at 6 a.m. and extending to 6 p.m., on Monday through Friday, the preponderance of the evidence demonstrates that she could not ensure her availability for full morning or swing shift work within her labor market during the weeks at issue because of her inability to make herself available for the start of a morning shift and her inability to cover an entire swing shift. As a result the record does not show that claimant was available for work during the weeks at issue. Claimant therefore was not entitled to benefits under OAR 471-030-0036(3) and (4).

Overpayment. 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 overpaid and must repay the Department \$165 in benefits she erroneously received for weeks 40-19 and 41-19 is **adopted**.

However, because this decision has concluded that claimant was not available for work during week 40-19, she would not be eligible for any benefits for that week and was likely overpaid her full benefit amount. Claimant was also likely overpaid for the remainder of the weeks during which the Department had initially paid and then retroactively denied benefits.

DECISION: Orders No. 20-UI-143040 and 20-UI-143052 are affirmed.

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

DATE of Service: March 10, 2020

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.

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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 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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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