

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0766

Affirmed ~ Ineligible Weeks 12-20 through 26-20 and 31-20 through 44-20
Affirmed ~ Overpayment and Penalties Assessed

PROCEDURAL HISTORY: On August 14, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during each of the weeks including March 15, 2020 through August 8, 2020 because he was absent from his labor market and outside of the United States and was ineligible for benefits for those weeks and until the reason for the denial had ended (decision # 113910). Claimant filed a timely request for hearing. On September 1, 2020, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for September 11, 2020 at 10:45 a.m., at which time claimant failed to appear. On September 14, 2020, ALJ Murdock issued Order No. 20-UI-153927, dismissing claimant's hearing request for failure to appear. On September 25, 2020, claimant filed a timely request to reopen the September 11, 2020 hearing.

On September 29, 2020, the Department served notice of another administrative decision, based in part on decision # 113910, concluding claimant willfully made misrepresentations and failed to report material facts to obtain benefits, and assessing an overpayment of \$11,016 in regular benefits and \$9,600 in Federal Pandemic Unemployment Compensation (FPUC) benefits, a \$3,304.80 monetary penalty, and a 52-week penalty disqualification from future benefits.

On October 6, 2020, OAH mailed notice of a hearing scheduled for October 15, 2020 at 1:30 p.m. to consider claimant's request to reopen the September 11, 2020 hearing, and if granted, the merits of decision # 113910. On October 15, 2020, claimant failed to appear for the hearing and ALJ Murdock issued Order No. 20-UI-155316 dismissing claimant's request to reopen for failure to appear. On October 16, 2020, claimant filed a timely request for hearing on the September 29, 2020 overpayment and penalties decision. On October 23, 2020, claimant filed a timely request to reopen the October 15, 2020 hearing.

On October 28, 2020, OAH mailed notice of a consolidated hearing scheduled for November 10, 2020 at 2:30 p.m. to consider claimant's request to reopen the October 15, 2020 hearing, and if granted, claimant's request to reopen the September 11, 2020 hearing, and if granted, the merits of decisions # 113910 and the September 29, 2020 overpayment and penalties decision. On November 10, 2020, ALJ

Murdock conducted the consolidated hearing, which was continued on November 19, 2020. On November 20, 2020, ALJ Murdock issued Order No. 20-UI-156753, granting claimant's requests to reopen both the September 11, 2020 and the October 15, 2020 hearings, cancelling Orders No. 20-UI-153927 and 20-UI-155316, and modifying decision # 113910 by concluding that claimant was not eligible to receive unemployment insurance benefits for the periods of March 15, 2020 through June 27, 2020 and July 26, 2020 through October 31, 2020 (weeks 12-20 through 26-20 and 31-20 through 44-20). On November 24, 2020, ALJ Murdock issued Order No. 20-UI-156880, modifying the September 29, 2020 overpayment and penalties decision by concluding that claimant was liable for an overpayment of \$9,072 in regular benefits and \$7,800 in FPUC benefits, a \$2,721.60 monetary penalty, and a 52-week penalty disqualification from future benefits.

On December 8, 2020, claimant filed an application for review of Orders No. 20-UI-156753 and 20-UI-156880 with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 20-UI-156753 and 20-UI-156880. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2020-EAB-0766 and 2020-EAB-0767).

WRITTEN ARGUMENT: EAB considered claimant's written argument to the extent it was based on the hearing record. In that argument, claimant asserted that the Department should have deemed him eligible for unemployment insurance benefits because of the "unusual life events" caused by the COVID-19 pandemic. Written Argument at 1.

To be eligible to receive unemployment insurance benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. An individual is not considered "available for work" in any week in which the individual spent the major portion of the week outside of the United States unless the individual spent the major portion of the week: (1) in Canada and was authorized to work in Canada, or (2) in a country included in the Compact of Free Association with the United States of America.¹ OAR 471-030-0036(3)(i) (August 2, 2020 through December 26, 2020). Order No. 20-UI-156753 concluded, correctly, that claimant was not available for work and therefore not eligible for benefits during the periods of March 15, 2020 through June 27, 2020 and July 26, 2020 through October 31, 2020 because claimant was outside of the United States in Turkey. Order No. 20-UI-156753 at 5-6.

While it is true that due to the unique situations arising under COVID-19, temporary unemployment insurance provisions exist that can modify the above "available for work" analysis, these temporary COVID-19 "available for work" provisions do not apply to claimant's situation. Because the relevant time period are the weeks of March 15, 2020 through October 31, 2020, there are two temporary COVID-19 "available for work" provisions to consider: (1) temporary rule OAR 471-030-0070(5)(a) (effective March 8, 2020 through September 12, 2020) and, (2) paragraph (5)(a) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility, <https://www.oregon.gov/employ/Documents/Temporary%20Rule-2.pdf> (effective beginning September 13, 2020). The provisions are identical and provide as follows:

¹ The countries included in the Compact of Free Association with the United States of America are the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau. See 48 U.S.C. §§ 1901-1973.

Available for work – ORS 657.155(1)(c) and federal law require a person to be available for work in order to receive unemployment insurance benefits. A person will not be deemed unavailable for work because:

(a) They are staying in their home, or are quarantined, due to risk of exposure to, or spread of, the novel coronavirus at the advice of a health care provider or by advice issued by public health officials or by directive of a government official, even if their employer had work for them they could otherwise have performed[.]

The temporary COVID-19 “available for work” provisions do not apply to claimant’s situation because claimant was not available for work under ORS 657.155(2) and OAR 471-030-0036(3)(d) and (i), which together provide that an individual who leaves the individual’s normal labor market for the major portion of any week is presumed to be unavailable for work unless certain conditions are met, which claimant failed to show. The temporary COVID-19 “available for work” provisions by their language applied only to ORS 657.155(1)(c) and not to ORS 657.155(2). The Department’s witness stated at hearing that the temporary COVID-19 “available for work” provisions were not intended to apply to claimant’s claims for benefits because he was outside of his labor market due to being outside of the United States. November 10, 2020 Transcript at 37. We defer to the Department’s reasonable interpretation of its own rule and conclude that the temporary COVID-19 “available for work” provisions do not exempt individuals in claimant’s circumstances from the requirements of ORS 657.155(2) and OAR 471-030-0036(3)(i). *See Isayeva v. Employment Department*, 266 Or. App. 806, 340 P.3d 82, 85 (2014), *citing Callaway v. Employment Department*, 225 Or. App. 650, 654-55 (2009) (The Oregon Court of Appeals will “defer to an agency’s interpretation of its own rule unless it is inconsistent with the rule’s text, context or other source of law.”).

The remainder of claimant’s argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant’s reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the orders under review are **adopted**.

DECISION: Order No. 20-UI-156753² and Order No. 20-UI-156880 are affirmed.

S. Alba and D. P. Hettle.

² This decision denies payment of your Unemployment Insurance (UI) benefits. However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits for the period you are not eligible for other benefits as long as you are unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA is a new unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic.

Visit <https://unemployment.oregon.gov> for more information, to apply for PUA, or to contact the Oregon Employment Department using the “Contact Us” form. You can also apply for PUA by calling 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.

DATE of Service: January 14, 2021

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 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.

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