

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0448

Reversed & Remanded

PROCEDURAL HISTORY: On April 6, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work and ineligible to receive unemployment insurance benefits from October 18, 2020 to February 20, 2021 (decision # 84547). Claimant filed a timely request for hearing. On May 19, 2021, ALJ S. Lee conducted a hearing, and on May 21, 2021 issued Order No. 21-UI-167277, affirming decision # 84547. On June 6, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On May 6, 2019, claimant suffered a work-related knee injury, which led to a workers' compensation claim.

(2) On October 21, 2020, claimant filed an initial claim for unemployment insurance benefits. As of that time, claimant's workers' compensation doctor had released claimant to return to work in "full capacity," and claimant's injury did not prevent him from engaging in full time work. Claimant claimed benefits for the weeks from October 18, 2020 through February 20, 2021 (weeks 43-20 through 07-21). Claimant's weekly benefit amount was \$205.00. Claimant was paid for weeks 43-20 through 45-20, 47-20, and 49-20 through 06-21. Claimant was not paid benefits for weeks 46-20, 48-20, and 07-21.

(3) During weeks 43-20 through 07-21, claimant sought warehouse or manufacturing work, or work as a receiving clerk, and his labor market was Oregon City, Clackamas, Gladstone, Lake Oswego, Milwaukie, Portland, and West Linn, Oregon. The customary hours and days for the type of work claimant sought in his labor market were 8:00 a.m. to 6:00 p.m., Sunday through Saturday.

(4) From November 9, 2020 through November 20, 2020, claimant was not available to work full time because he began a two-week regimen of physical therapy treatment. The physical therapy treatment constituted claimant's "final phase of [his] Workman's Comp" process. Transcript at 14. Claimant discussed his unavailability for work during these two weeks with a Department adjudicator.

(5) During the time that claimant claimed benefits, claimant completed two job applications per week. On the applications, claimant indicated that he was available to work Monday through Friday, 6:00 a.m.

to 5:00 p.m. On Saturdays and Sundays, claimant regularly engaged in “church activities,” which included volunteer work on Saturdays and church attendance on Sundays. Transcript at 14.

CONCLUSIONS AND REASONS: Order No. 21-UI-167277 is reversed and this matter is remanded for further development of the record.

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; August 2, 2020 through December 26, 2020). Factors governing whether work may be considered “suitable” include the “degree of risk involved to the health, safety and morals of the individual.” ORS 657.190. Where the Department has paid benefits, it has the burden to prove benefits should not have been paid; by logical extension of that principle, where benefits have not been paid, claimant has the burden to prove that the Department should have paid benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Order No. 21-UI-167277 concluded that claimant was not available to work and ineligible to receive benefits during weeks 43-20 through 07-21 because in seeking employment during this period, claimant had informed potential employers that he would not be available to work on Saturdays and Sundays due to his “sincerely held religious beliefs,” which included performing church-related volunteer work on Saturdays and attending church services on Sundays. Order No. 21-UI-167277 at 4. By so doing, Order No. 21-UI-167277 concluded that claimant was unavailable for work during the customary hours and days required for the work he sought in his labor market, which included all day on Saturdays and Sundays. Order No. 21-UI-167277 at 4. The order concluded that the schedule claimant put on the job applications imposed an impermissible restriction on his ability to return to work at the earliest possible opportunity. Order No. 21-UI-167277 at 4.

The record shows that claimant was not available to work during weeks 46-20 through 47-20 due to physical therapy requirements of his then-pending workers’ compensation matter. However, the record requires further development to determine whether claimant was unavailable during weeks 43-20 through 45-20, and 48-20 through 7-21.

Although claimant stated on his job applications that he was available Monday through Friday, the record fails to demonstrate whether claimant would have been willing to work on weekends if an employer had required him to do so in order to extend him an offer of work. Such a line of inquiry is necessary to determine whether claimant's weekend, church-related activities were a restriction on claimant's availability to work, or if those activities merely reflected claimant's preferred schedule. If claimant was willing to accept work that required him to work on weekends, further inquiry should be directed at whether claimant's statement to prospective employers that he was available to work on Saturdays and Sundays substantially reduced claimant's opportunities to return to work at the earliest possible time.

Conversely, if it is determined on remand that claimant was unwilling to work on weekends due to his Saturday and Sunday church-related activities, further inquiry should be directed to whether claimant's unwillingness to do so was based on sincerely held religious beliefs, such that the work claimant was seeking presented an unacceptable degree of risk to his personal morals, making it unsuitable under ORS 657.190.¹ Any such inquiry should go beyond only asking claimant what his weekend church-related activities were, and should address, among other issues, whether Saturday volunteer activities and Sunday church services were offered at different times, such that they might accommodate a weekend work schedule. In the event they were offered at different times, further inquiry should address whether claimant was willing to modify his weekend schedule to balance any potential weekend work requirements with non-conflicting church-related weekend activities.

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 available to work during weeks 43-20 through 45-20, and weeks 48-20 through 7-21, Order No. 21-UI-167277 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-167277 is set aside, and this matter remanded for further proceedings consistent with this order.

D.P. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: July 14, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-167277 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

¹ ORS 657.190 provides: "In determining whether any work is suitable for an individual, the . . . Department shall consider, among other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual."

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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.

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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