

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0699

Reversed
Eligible Weeks 15-21 through 17-21

PROCEDURAL HISTORY: On June 16, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from April 11, 2021 through May 1, 2021 (weeks 15-21 through 17-21) and therefore was ineligible to receive unemployment insurance benefits for those weeks (decision # 71935). Claimant filed a timely request for hearing. On August 9, 2021, ALJ L. Lee conducted a hearing interpreted in Mandarin, and on August 17, 2021 issued Order No. 21-UI-172751, affirming decision # 71935.¹ On August 27, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's August 27, 2021 and September 17, 2021 written arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her 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 considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) On April 20, 2021, claimant filed an initial claim for unemployment insurance benefits. When filing her claim, claimant reported that her driver's license had expired in 2020. To report to any suitable work opportunities, claimant was willing to walk, get a ride from someone, utilize a ride share service, or take public transportation.

(2) Claimant claimed benefits for the weeks including April 11, 2021 through May 1, 2021 (weeks 15-21 through 17-21), the weeks at issue. During the weeks at issue, claimant sought work as a retail sales associate in her normal labor market area which was the greater Portland, Oregon area including Beaverton, Tigard, Tualatin, and Lake Oswego. In claimant's labor market, retail work is performed all

¹ The order under review stated that the hearing took place on August 2, 2021. Order No. 21-UI-172751 at 1. Because the transcript shows that the hearing took place on August 9, 2021, the date in the order is assumed to be a typographical error. Transcript at 1.

days of the week from 6:00 a.m. to 10:00 p.m. The Department did not pay claimant benefits for any of the weeks at issue.²

CONCLUSIONS AND REASONS: Claimant was available for work and eligible to receive benefits during the weeks including April 11, 2021 through May 1, 2021 (weeks 15-21 through 17-21).

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[.]

* * *

OAR 471-030-0036(3) (August 2, 2020 through December 26, 2020; December 8, 2019).

Because claimant was not paid benefits during the weeks at issue, she has the burden to show that she was available for work during those weeks. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (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).

The order under review concluded that claimant was not available for work during the weeks at issue because she lacked a readily available personal mode of transportation due to her suspended driver’s license and had failed to show that alternative means of transportation were available to her, or feasible, such that she was capable of reporting for any suitable work opportunities within the large geographic area encompassed by her labor market. Order No. 21-UI-172751 at 4-5. The record does not support these conclusions.

The preponderance of the evidence shows that claimant was capable of reporting for any suitable work opportunities within her labor market and was therefore available for work during the weeks at issue. The order under review concluded that it was not reasonable to assume that public transportation extended to and throughout all of claimant’s labor market area. However, claimant testified that there were bus routes from where she lived to the cities within her labor market, and the Department’s representative testified that although she lacked familiarity with public transportation options for Lake Oswego and Tualatin, public transportation did exist to Beaverton and Tigard. Transcript at 18, 19.

² EAB has taken notice of this fact, which is contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information 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(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

Thus, the preponderance of the evidence shows that public transportation was available for claimant to travel to and throughout her labor market and that she was willing to utilize it. In addition, claimant testified credibly to the availability of ride-share services, and to her willingness to accept rides from other individuals including her “ex.” Transcript at 17. Claimant also testified that with her previous employer she had walked to her workplace, that “walking is not a problem for [her],” and that she had experience walking distances up to “20,000 steps.” Transcript at 22, 23. While it is true that claimant was not likely to walk from her home in Portland to a job opportunity in Lake Oswego, claimant nevertheless recognized that in order to report for a suitable work opportunity, she might need to walk to and from a bus transfer station to her home or to an employer. Claimant testified that she was willing to do so. Transcript at 20. In light of the totality of this evidence, claimant was available for work during the weeks at issue and eligible to receive unemployment insurance benefits.

DECISION: Order No. 21-UI-172751 is set aside, as outlined above.

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

DATE of Service: October 4, 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.

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.

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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 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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