

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0729

Affirmed
Ineligible Weeks 23-21 through 33-21

PROCEDURAL HISTORY: On July 30, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work from June 6, 2021 through July 24, 2021 (weeks 23-21 through 29-21) and therefore was ineligible for unemployment insurance benefits for those weeks and until the reason for denial had ended (decision # 112747). Claimant filed a timely request for hearing. On August 24, 2021, ALJ S. Lee conducted a hearing, and on September 2, 2021 issued Order No. 21-UI-173841, modifying decision # 112747 by concluding that claimant was not able to work, and therefore ineligible for benefits, from June 6, 2021 through August 21, 2021 (weeks 23-21 through 33-21). On September 7, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: 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 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 August 12, 2020, claimant filed an initial claim for benefits.

(2) Beginning on May 30, 2021, claimant worked as a host at IHOP 3607. As a host, claimant's job required her to move around on her feet while seating customers and bussing tables. Claimant worked three to four hours per week.

(3) On June 6, 2021, claimant was in a car accident and broke her ankle. Due to her injury, claimant was placed in a cast and required crutches to stand. Claimant informed the employer of her injury, and the employer told claimant she would not be able to return to work until she was cleared by a doctor.

(4) Claimant claimed benefits for the weeks from June 6, 2021 through August 21, 2021 (weeks 23-21 through 33-21), the weeks at issue. Claimant sought work in food service and retail. The Department paid benefits to claimant only for week 23-21, denying payment for the remaining weeks.

CONCLUSIONS AND REASONS: Claimant was not able to work during weeks 23-21 through 33-21, and is ineligible to receive unemployment insurance 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). An individual is considered able to work for purposes of ORS 657.155(1)(c) only if physically and mentally capable of performing the work the individual is actually seeking during all of the week. OAR 471-030-0036(2) (August 2, 2020 through December 26, 2020).

With the exception of week 23-21 where the Department paid claimant benefits, claimant had the burden to prove that she should have been paid benefits for the weeks at issue. *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 preponderance of the evidence shows that claimant was not able to work during weeks 23-21 through 33-21 and therefore was not eligible to receive benefits for any of the weeks at issue. Claimant's host work for the employer generally required her to move around on her feet while seating customers and bussing tables. When claimant broke her ankle, a cast was required to treat the injury and claimant was required to use crutches to stand. The employer reasonably concluded that in light of claimant's broken ankle, claimant was physically incapable of performing her host duties and she would need to be fully cleared before she could return to work.

The record shows that during the weeks at issue, claimant sought work in food service and retail, but did not pursue work in a field that might be more accommodating to her broken ankle, such as office work, because she "didn't really think about it." Transcript at 23. Although claimant believed that despite her cast and crutches she "would have figured . . . out" how to perform any food service or retail work if offered a job, the preponderance of the evidence shows that claimant was not physically capable of performing food service or retail work during the weeks at issue due to the limitations her broken ankle would have placed on her ability to perform *all* aspects of the work required in either field. Transcript at 23. Likewise, to the extent claimant believed that even with her ankle injury there were still some things she could do if offered a job in food service or retail, claimant would still not be able to work for purposes of OAR 471-030-0036(2). The rule requires claimant to be able to perform *all* of the duties of the work she was seeking, and the preponderance of the evidence shows that claimant could not meet this requirement.

For these reasons, claimant was not able to work during the weeks at issue and therefore was ineligible to receive benefits for those weeks.

DECISION: Order No. 21-UI-173841 is affirmed.

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

DATE of Service: October 13, 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 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

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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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