

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0747

Modified
Eligible Weeks 41-20 through 28-21

PROCEDURAL HISTORY: On July 13, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from October 4, 2020 through July 10, 2021 (weeks 41-20 through 27-21) and was therefore not eligible to receive unemployment insurance benefits for those weeks and until the reason for the denial had ended (decision # 80146). Claimant filed a timely request for hearing. On August 25, 2021, ALJ Amesbury conducted a hearing at which the employer failed to appear, and on August 27, 2021 issued Order No. 21-UI-173545, modifying decision # 80146 and concluding that claimant was not available for work and not eligible to receive benefits from October 4, 2020 through November 28, 2020 (weeks 41-20 through 48-20), and from December 6, 2020 through July 17, 2021 (weeks 50-20 through 28-21), and that claimant was available for work and eligible to receive benefits from November 29, 2020 through December 5, 2020 (week 49-20).¹ On September 16, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On March 19, 2020, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks from October 4, 2020 through July 17, 2021 (weeks 41-20 through 28-21), the weeks at issue. The Department paid claimant benefits for weeks 41-20 through 27-21, but denied benefits for week 28-21.

(2) Claimant's labor market area was Gladstone, Oregon, and the surrounding area, including Oregon City, Milwaukie, Happy Valley, and Portland. Hairdresser work is normally performed all days, from 9:00 a.m. until 6:00 p.m. in claimant's labor market.

(3) During all of the weeks at issue, Netz NW Incorporated employed claimant as a hairdresser. Claimant normally worked less than full-time. Claimant worked part-time for the employer on Fridays and Saturdays.

¹ Order No. 21-UI-173545 misstated the claim calendar weeks that correlated to the dates of the weeks at issue.

(4) During the weeks at issue, claimant was only available for less than full-time work. Claimant was not available to work full-time because she had two children, ages one and two, and could not afford childcare for the children. Claimant's spouse was unable to provide childcare due to their work schedule. Claimant's mother watched the children for claimant two days per week so that claimant could work on those days.

CONCLUSIONS AND REASONS: Claimant was available for work during the weeks at issue.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed as defined by OAR 471-030-0036(3) (August 2, 2020 through December 26, 2020; December 8, 2019); ORS 657.155(1)(c). However, during a state of emergency declared by the Governor under ORS 401.165, the Department may waive, otherwise limit, or modify the requirements of OAR 471-030-0036. OAR 471-030-0071 (September 13, 2020 through September 25, 2021). Paragraph (5)(d) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility (March 8, 2020), <http://records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/7604239>, provides that a person will not be deemed unavailable for work because “[t]hey normally work less than full-time and are only available for less than full-time work.”

The order under review concluded that claimant was not available for work or actively seeking work during all of the weeks at issue, except for the week from November 29, 2020 through December 5, 2020 when the employer was closed because an employee had COVID-19. Order No. 21-UI-173545 at 2. The record does not contain information regarding claimant's work searches during the weeks at issue, and does not therefore support the conclusion that claimant did not actively seek work during the weeks at issue. Regarding claimant's availability for work, the order reasoned that claimant was not available for work because she had young children that required childcare, but only had childcare for two days per week, and was therefore not willing to work during all of the usual hours and days of the week customary for a hairdresser in claimant's labor market. Order No. 21-UI-173545 at 3.

Order No. 21-UI-173545 applied the incorrect law in reaching its conclusion. The order under review applied the availability rule, OAR 471-030-0036 (December 8, 2019), which is more restrictive than the correct rule applicable here.² Order No. 21-UI-173545 at 2-4. The order reasoned that OAR 471-030-0071 included the weeks at issue, but did not address a claimant's availability for work. Order No. 21-UI-173545 at 3, footnote 1. However, although OAR 471-030-0071 does not specifically address availability, it gives the Department temporary authority during all the weeks at issue to modify the

² OAR 471-030-0036(3) (December 8, 2019) provides, in relevant part, that 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

* * *

(c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time[.]

* * *

requirements of the more restrictive rule, OAR 471-030-0036, that the order applied in this case. The applicable provision here is paragraph (5)(d) of the Department's temporary rule, which provides, in relevant part, that a person will not be deemed unavailable for work because "[t]hey normally work less than full-time and are only available for less than full-time work."

According to the plain language of the temporary rule, claimant will not be deemed unavailable for work due to her unavailability to work full-time. There was no dispute that claimant normally worked less than full-time for the employer and never worked more than two days for the employer. Nor was there dispute that claimant was not available to work more than part-time due to her spouse's work schedule and her inability to afford childcare for her two young children. For these reasons, claimant was available to work from October 4, 2020 through July 17, 2021 (weeks 41-20 through 28-21), and is eligible to receive benefits for those weeks if otherwise eligible.

DECISION: Order No. 21-UI-173545 is modified, as outlined above.

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

DATE of Service: October 22, 2021

NOTE: This decision modifies 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.

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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