

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0816

Reversed & Remanded

PROCEDURAL HISTORY: On July 2, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from March 21, 2021 through June 26, 2021 (weeks 12-21 through 25-21) and therefore was not eligible to receive unemployment insurance benefits for those weeks and until the reason for the denial had ended (decision # 112737). Claimant filed a timely request for hearing. On September 27, 2021, ALJ M. Davis conducted a hearing, interpreted in Korean, and on September 28, 2021 issued Order No. 21-UI-175689, affirming decision # 112737. On October 4, 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.

The parties may offer new information, such as any information offered but not considered in this decision, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) Prior to the COVID-19 pandemic, claimant worked for the employer as a hair stylist at their shop, averaging 21 hours per week.

(2) Thereafter, the employer's shop temporarily closed due to the COVID-19 pandemic. After the employer's shop reopened, claimant returned to work, but the employer gave her an average of 11 hours of work per week. Thereafter, the employer offered claimant additional hours of work, which claimant declined.

(3) On March 22, 2021, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks of March 21, 2021 through June 26, 2021 (weeks 12-21 through 25-21), the weeks at issue. The Department did not pay claimant benefits for weeks 12-21 through 20-21, but paid claimant benefits for weeks 21-21 through 25-21.

CONCLUSIONS AND REASONS: Order No. 21-UI-175689 is set aside and this matter 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

* * *

OAR 471-030-0036(3) (August 2, 2020 through December 26, 2020). 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). Paragraph (5) 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:

* * *

(d) They normally work less than full-time and are only available for less than full-time work.

As a preliminary matter, the record shows that the Department did not pay claimant benefits for weeks 12-21 through 20-21, but paid claimant benefits for weeks 21-21 through 25-21. Accordingly, claimant has the burden to prove that the Department should have paid claimant benefits for weeks 12-21 through 20-21 and the Department has the burden to prove that benefits should not have been paid for weeks 21-21 through 25-21. *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 and therefore was not eligible for benefits for those weeks. Order No. 21-UI-175689 at 2-3. The order reasoned that because claimant was not willing to work additional hours that the employer offered to claimant after the shop’s reopening, she was not willing to accept work opportunities during all of the usual hours and days of the week customary for her work and was unavailable for work under OAR 471-030-0036(3)(a). Order No. 21-UI-175689 at 2. However, the record as developed does not support

that conclusion because the order did not consider OAR 471-030-0071 (September 13, 2020), Paragraph (5) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility (March 8, 2020), cited above.

The record shows that during the weeks at issue claimant was willing to continue to work the 11 hours of work per week that the employer had been offering her, but was unwilling to work more hours than that because she was “scared” of risks presented by the employer’s requirement that she sanitize and clean after customers and did not like her manager. Transcript at 9-10. Typically, under OAR 471-030-0036(3)(a), an individual is not considered available for work if they are not willing to accept all of the work opportunities offered during the usual and customary hours of the work sought. However, under the temporary COVID-19 “available for work” provision cited above, if claimant normally worked less than full-time and was only available for less than full-time work during the weeks at issue, then claimant would not be considered unavailable for work because of her unwillingness to work full-time or accept additional hours of work.

Accordingly, it is possible for claimant to be considered available for work and therefore eligible for benefits for the weeks at issue if she satisfies the elements of the temporary COVID-19 “available for work” provision. However, the record is insufficiently developed to make that determination and further inquiry is necessary to both clarify the factual record and determine the Department’s interpretation of the temporary COVID-19 “available for work” provision and its applicability to this case.

For example, although the record shows that prior to the employer’s closure during the COVID-19 pandemic, claimant was working an average of 21 hours per week, it fails to show whether claimant “normally” worked less than full-time. On remand, to aid in determining whether claimant “normally” worked less than full-time, the record should be developed to determine when claimant started working for the employer, whether she ever worked full-time for the employer before the period during which she averaged 21 hours per week or for any employer prior to that.

The record also fails to show how the Department has interpreted the temporary COVID-19 “available for work” provision at issue and its applicability here. On remand, the ALJ should inquire whether the Department interprets the rule to mean that claimant was not required to be available for more hours of work than she was working after the employer reopened, which was 11 hours per week, or, rather, whether she was required to be available for the average number of hours the record now shows she normally worked prior to the employer’s temporary closure, which was 21 hours per week. To the extent the Department interprets the rule to mean claimant may only benefit from it if, during the weeks at issue, she returned to working the 21 hour per week baseline that existed prior to the employer’s temporary closure, the record should be developed to determine when, if at all, 21 hours of work per week became available to claimant after the employer’s temporary closure and reopening.

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 for work during the weeks at issue, Order No. 21-UI-175689 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-175689 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: November 10, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-175689 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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