

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0871

Reversed
Eligible Weeks 25-21 through 36-21

PROCEDURAL HISTORY: On July 30, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work beginning March 28, 2021 (week 13-21) and was therefore not eligible to receive unemployment insurance benefits for that week and until the reason for the denial had ended (decision # 85355). Claimant filed a timely request for hearing. On September 14, 2021, ALJ Micheletti conducted a hearing, and on October 6, 2021 issued Amended Order No. 21-UI-176517, modifying decision # 85355 by concluding that claimant was not available for work from June 20, 2021 through September 11, 2021 (weeks 25-21 through 36-21) and was therefore not eligible to receive benefits for those weeks.¹ On October 25, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Fiber Guys LLC employed claimant as a linesman beginning May 9, 2018. On April 3, 2021, claimant stopped reporting for work for the employer because the employer stopped listing him on the employer's work schedule.

(2) Claimant was a member in good standing of a union that did not allow members to seek non-union work. In late April 2021, claimant informed his union that he believed he had been laid off. Based on the interaction with the union, claimant believed that he had been placed on the union's referral list and that the union would contact him if work became available.

(3) On June 20, 2021, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks including June 20, 2021 through September 11, 2021 (weeks 25-21 through 36-21). These are the weeks at issue. The Department paid claimant benefits for the weeks including June 20, 2021 through July 24, 2021 (weeks 25-21 through 29-21). The Department did not pay claimant benefits for the weeks including July 25, 2021 through September 11, 2021 (weeks 30-21 through 36-21).

¹ Amended Order No. 21-UI-176517 superseded Order No. 21-UI-174897, served on September 16, 2021, which contained a typographical error relating to the weeks the order concluded claimant was ineligible for benefits. See Order No. 21-UI-176517 at 1, n.1 & at 3.

(4) About once a week during each of the weeks at issue, claimant called the foreman who had supervised his work seeking linesman work from the employer. For most of this period, claimant could not reach the foreman, and the foreman did not return claimant's calls. In approximately late August 2021, claimant reached the foreman. The foreman told claimant he would call claimant back but did not do so.

(5) On or about September 1, 2021, a different foreman called claimant and offered him linesman work with the employer. Claimant accepted the work but the employer required claimant to undergo a drug evaluation assessment before he could begin working, which was not completed as of September 11, 2021.

(6) Claimant customarily worked as a linesman. Claimant's labor market area was the Portland, Oregon metropolitan area. Linesman work was customarily performed in claimant's labor market Monday through Friday, from 7:00 a.m. until 6:00 p.m.

CONCLUSIONS AND REASONS: Claimant was actively seeking work and available for work during the weeks including June 20, 2021 through September 11, 2021 (weeks 25-21 through 36-21), and is eligible 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). "For an individual who is a member in good standing of a union that does not allow members to seek non-union work, such individual is actively seeking work by remaining in contact with that union and being capable of accepting and reporting for work when dispatched by that union." OAR 471-030-0036(5)(c) (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 (4) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility (March 8, 2020), <http://records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/7604239>, provides the following:

The federal Families First Coronavirus Response Act permits states to temporarily modify their unemployment insurance laws regarding work search requirements on an emergency basis to respond to the spread of COVID-19 (Section 4102(b)). Because of the vital importance to public health and safety of mitigating the spread of COVID-19, social distancing measures must be maintained. Accordingly, effective the week ending March 28, 2020, notwithstanding OAR 471-030-0036, and unless otherwise notified in writing by the Employment Department, a person will be considered actively seeking work for purposes of ORS 657.155 if they are willing to look for work when state and local emergency declarations related to the coronavirus expire or otherwise are no longer in effect.

Further, 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; and

(d) Physically present in the normal labor market area as defined by section (6) of this rule, every day of the week * * *.

OAR 471-030-0036(3). Claimant received benefits for weeks 25-21 through 29-21 and, therefore, the Department had the burden to prove that he should not have been paid benefits for those weeks. Claimant did not receive benefits for weeks 30-21 through 36-21 and, therefore, claimant had the burden to prove that he should have been paid benefits for 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 eligible for benefits during the weeks at issue. Order No. 21-UI-176517 at 3. The order reasoned that claimant was ineligible because "claimant did not actively seek work and failed to maintain contact with his closed union" and in so doing "imposed conditions which substantially prevented him from becoming employed at the earliest opportunity." Order No. 21-UI-176517 at 3. The record does not support the conclusion of the order under review. For the reasons that follow, the record shows that claimant actively sought work and was available for work during the weeks at issue and therefore was not ineligible for benefits on either of those bases.

With respect to claimant's work search obligations, the temporary Rule for Unemployment Insurance Flexibility was in effect and applied to claimant's work search activities during the weeks at issue. Therefore, although claimant was a member in good standing of a union that did not allow members to seek non-union work during the weeks at issue, claimant's work search obligations were governed by the temporary rule, not OAR 471-030-0036(5)(c) or any other subpart of OAR 471-030-0036. Therefore, given that there is no evidence that the Department otherwise notified claimant in writing, to be considered to have actively sought work claimant need only to have been willing during the weeks at issue to look for work when state and local emergency declarations relating to the coronavirus expire. The record supports a reasonable inference that, during the weeks at issue, claimant was willing to look for work when state and local emergency declarations related to the coronavirus expired. This is because the record shows that claimant made numerous attempts to obtain work during the weeks at issue by contacting the foreman who had supervised his work for the employer, and because when a different foreman for the employer offered claimant work on or about September 1, 2021, claimant accepted the work.

Similarly, the record shows that claimant was available for work during the weeks at issue. Applying the criteria set forth under OAR 471-030-0036(3), claimant's frequent attempts to obtain linesman work and

subsequent acceptance of an offer of work on or about September 1, 2021 demonstrates that claimant was willing to perform linesman work during the usual hours and days customary for the work sought during the weeks at issue. There is no indication from the record that claimant was absent from his labor market during the weeks at issue or that he lacked the capability to accept and report for suitable work opportunities within his labor market during those weeks. Nor does the record show that claimant imposed any conditions that substantially reduced his opportunities to return to work at the earliest time during the weeks at issue. Although claimant had not begun working as of September 11, 2021 despite having accepted linesman work for the employer on or about September 1, 2021, the record shows that the drug evaluation assessment which caused the delay was required by the employer. Therefore, to the extent the drug evaluation assessment reduced claimant's opportunities to return to work at the earliest time, the record shows that the delay was due to a condition imposed by the employer, and not by claimant.

For the above reasons, the record shows that claimant was actively seeking work and available for work during the weeks at issue. Claimant was therefore eligible to receive benefits for those weeks.

DECISION: Order No. 21-UI-176517 is set aside, as outlined above.

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

DATE of Service: December 1, 2021

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.

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 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.

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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