

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0939

Affirmed
Ineligible Week 22-21

PROCEDURAL HISTORY: On June 29, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work during the week of May 30, 2021 through June 5, 2021 (week 22-21) and therefore was not eligible for unemployment insurance benefits for that week (decision # 75744). Claimant filed a timely request for hearing. On October 21, 2021, ALJ Lucas conducted a hearing, and on October 29, 2021 issued Order No. 21-UI-178454, affirming decision # 75744. On November 4, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) On June 19, 2019, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant had a monetarily valid claim with a weekly benefit amount of \$186 and that claimant's labor market area was downtown Portland, North Portland, Beaverton, Gresham and Oregon City in Oregon.

(2) From May 30, 2021 until June 6, 2021, claimant was in the state of Idaho for personal reasons due to the death of a relative. While in Idaho, claimant did not seek work there.

(3) Claimant claimed, but was not paid benefits for the week May 30, 2021 through June 5, 2021 (week 22-21), the week at issue.

CONCLUSIONS AND REASONS: Claimant was not available for work during the week May 30, 2021 through June 5, 2021 (week 22-21) and is ineligible for benefits for that week.

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). ORS 657.155(2) provides, in relevant part:

(a) An individual who leaves the individual's normal labor market area for the major portion of any week is presumed to be unavailable for work within the meaning of this section.

(b) The presumption described in paragraph (a) of this subsection may be overcome if the individual establishes to the satisfaction of the director that the individual:

(A) Has conducted a bona fide search for work and has been reasonably accessible to suitable work in the labor market area in which the individual spent the major portion of the week to which the presumption applies; or

* * *

Thus, for an individual to be considered "available for work" for purposes of ORS 657.155(1) and (2), they must be:

* * *

(d) Physically present in the normal labor market area as defined by section (5) of this rule, every day of the week, unless:

(A) The individual is actively seeking work outside their normal labor market area; or

* * *

OAR 471-030-0036(3) (December 8, 2019).

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:

(a) They are staying in their home, or are quarantined, due to risk of exposure to, or spread of, the novel coronavirus at the advice of a health care provider or by advice issued by public health officials or by directive of a government official, even if their employer had work for them they could otherwise have performed;

(b) They are home solely because they lack childcare for a child or children due to school or daycare closures or curtailments;

(c) They are home to care for a family member due to the effects of novel coronavirus; or

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

Where, as here, the Department has not paid benefits, claimant has the burden to establish that benefits should have been paid. *See, 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 temporary COVID-19 rule set forth above that modified the “available for work” rule previously in effect, OAR 471-030-0036(3), did not waive, otherwise limit, or modify the requirements of OAR 471-030-0036(3)(d). At hearing, claimant asserted that she was in Idaho during the entire week at issue for personal reasons and that while there, she did not seek any work that was outside of her normal Oregon labor market area. Audio Record at 14:15 to 16:20. Accordingly, because claimant was not present in her normal Oregon labor market area during every day of the week at issue and did not actively seek work while in Idaho during that week, claimant was not available for work during that week.

At hearing, claimant asserted that she was actively seeking work while in Idaho because she followed the temporary COVID-19 rule that modified the requirements for “actively seeking work” contained in OAR 471-030-0036(4)(a) (December 8, 2019). Audio Record at 17:40 to 18:25. The temporary COVID-19 rule states:

To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed as defined by OAR 471-030-0036(5)(a) (August 2, 2020 through December 26, 2020); 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). 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 insurances 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.

However, at hearing the Department’s witness clarified the Department’s position that the “actively seeking work” COVID-19 temporary rule does not apply to the actively seeking work requirement of the OAR 471-030-0036(3)(d)(A) availability for work rule. The Department witness explained that during the pandemic if a claimant was out of their customary labor market for a period, “there was no suspension” of the requirement set forth in OAR 471-030-0036(3)(d)(A) that to be considered “available for work” during that period the claimant in question was required to seek work while outside of their normal labor market area. Audio Record at 23:45 to 25:30. Viewed objectively, the Department’s interpretation of those rules is reasonable and entitled to deference because it is not inconsistent with their text, context, or any other source of law. *See accord Ring v. Employment Dep’t.*, 205 Or App 532, 134 P3d 1096 (2006), *citing Don’t Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881

P2d 119 (1994); *Johnson v. Employment Dept.*, 189 Or App 243, 74 P3d 1159 (*Johnson II*), *adh'd to as modified on recons.*, 191 Or App 222, 81 P3d 730 (2003) (*Johnson III*). Temporary Rule for Unemployment Insurance Flexibility therefore does not apply to that portion of OAR 471-030-0036(3) defining the availability requirement by whether the individual was actively seeking work while outside of their normal labor market.

Claimant therefore was unavailable for work during the week of May 30, 2021 through June 5, 2021 (week 22-21) under ORS 657.155 and OAR 471-030-0036(3). Claimant therefore is ineligible for benefits for that week.

DECISION: Order No. 21-UI-178454 is affirmed.

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

DATE of Service: December 10, 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 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 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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