

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0946

Order No. 21-UI-177668 Affirmed ~ Ineligible Week 34-21
Order No. 21-UI-177669 ~ Reversed and Remanded

PROCEDURAL HISTORY: On September 10, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from August 22, 2021 through August 28, 2021 (week 34-21) and was therefore ineligible to receive unemployment insurance benefits for that week (decision # 73609). Also on September 10, 2021, the Department served notice of an administrative decision concluding that claimant did not actively seek work for the weeks from July 25, 2021 through September 4, 2021 (weeks 30-21 through 35-21) and was therefore ineligible to receive benefits for those weeks (decision # 75314). Claimant filed timely requests for hearing on decisions # 73609 and 75314. On October 20, 2021, ALJ Janzen conducted a consolidated hearing on both administrative decisions, and on October 21, 2021 issued Orders No. 21-UI-177668 and 21-UI-177669, affirming decisions # 73609 and 75314, respectively. On November 10, 2021, claimant filed applications for review of Orders No. 21-UI-177668 and 21-UI-177669 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 21-UI-177668 and 21-UI-177669. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2021-EAB-0945 and 2021-EAB-0946).

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 the new information contained in claimant's written argument, 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.

Based on a *de novo* review of the entire consolidated record in these cases, and pursuant to ORS 657.275(2), Order No. 21-UI-177668, concluding that claimant was not available for work during week 34-21, is **adopted**. The remainder of this decision addresses the merits of Order No. 21-UI-177669, regarding whether claimant actively sought work during weeks 30-21 through 35-21.

FINDINGS OF FACT: (1) On July 16, 2021, claimant filed an initial claim for unemployment insurance benefits. The Department established claimant's weekly benefit amount at \$171. Claimant subsequently claimed benefits for the weeks from July 25, 2021 through September 4, 2021 (weeks 30-21 through 35-21). Those are the weeks at issue. The Department paid claimant benefits for the weeks including July 25, 2021 through August 21, 2021 (weeks 30-21 through 33-21). The Department did not pay claimant benefits for the weeks including August 22, 2021 through September 4, 2021 (weeks 34-21 and 35-21).

(2) Starting in approximately 2016, claimant worked for Premium Retail Services (the employer) as a retail merchandiser. Claimant did not work for the employer during week 34-21 (August 22, 2021 through August 28, 2021) because she was out of town on a camping trip. For each of the weeks at issue other than week 34-21, claimant worked part-time for the employer, earning between \$184 and \$281 each week. Claimant also worked part-time for the employer during the weeks of July 11, 2021 through July 17, 2021 (week 28-21) and July 18, 2021 through July 24, 2021 (week 29-21), and earned \$267 and \$344, respectively, during those weeks.

(3) Claimant did not perform any work seeking activities during week 34-21. During the weeks at issue other than week 34-21, claimant performed some work seeking activities, including looking for work on job websites and making in-person inquiries with potential employers.

CONCLUSIONS AND REASONS: Claimant was unemployed during the weeks at issue. Order No. 21-UI-177669 is reversed and remanded for further inquiry as to whether claimant actively sought work during weeks 30-21 through 35-21.

“Unemployed.” The order under review concluded that claimant was not “unemployed,” as that term is defined under ORS 657.100(1), during any of the weeks at issue other than week 34-21 because she earned more than her weekly benefit amount during each of those weeks. Order No. 21-UI-177668 at 4. In so concluding, the order under review relied upon a former version of that statute, which considered a claimant to be “unemployed” in any week during which the individual performs no services and with respect to which no remuneration for services performed is paid or payable to the individual, or in any week of less than full-time work *if the remuneration paid or payable to the individual for services performed during the week is less than the individual's weekly benefit amount.* (Emphasis added). However, Oregon House Bill 3178, signed into law by the Governor on May 17, 2021, temporarily modified the definition of “unemployed” to remove the emphasized portion, above. The effect of this temporary amendment, which is effective for weeks beginning May 17, 2021 through January 1, 2022, is to consider individuals working less than full time to have been “unemployed,” and therefore potentially eligible for benefits, even if they earned more than their weekly benefit amount during weeks claimed during the period in which the amendment is effective.

The record shows that claimant worked less than full time for each of the weeks at issue. Therefore, claimant was “unemployed” during each of the weeks at issue under the temporarily-amended provisions of ORS 657.100(1), and is not ineligible for benefits on that basis.

Actively Seeking Work. 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) (December 8, 2019); ORS 657.155(1)(c). For purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a). In order to be considered actively seeking work, individuals are “required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual.” OAR 471-030-0036(5)(a). “Direct contact” means “making contact with an employer . . . to inquire about a job opening or applying for job openings in the manner required by the hiring employer.” OAR 471-030-0036(5)(a)(B).

For individuals who are temporarily unemployed, OAR 471-030-0036(5)(b) defines “actively seeking work” as follows:

(A) They are considered to be actively seeking work when they remain in contact with their regular employer and are capable of accepting and reporting for any suitable work with that employer;

(B) There is a reasonable expectation that they will be returning to work for their regular employer. The work the individual is returning to must be full time or pay an amount that equals or exceeds their weekly benefit amount;

(C) The department will not consider the individual to be temporarily unemployed if they were separated from their employer for reasons other than a lack of work, the work the individual is returning to is not with their most recent employer, or the length the individual is unemployed is longer than the period described in subsection (D) of this section; and

(D) The department will consider that the period for which an individual is temporarily unemployed:

(i) Begins the last date the individual performed services for the employer. In the case of an individual still working for the employer, it is the last date worked during the week in which the individual had earnings less than their weekly benefit amount; and

(ii) Cannot be greater than four weeks between the week the individual became temporarily unemployed and the week the individual returns to work as described in subsection (B) of this section.

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> [hereinafter OED Temporary COVID-19 Rule], 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.

Claimant's eligibility for benefits during weeks 30-21 through 35-21 turns on the determination of which definition of "actively seeking work" applied to each of the weeks at issue. In turn, that determination must be made by resolving: first, whether the Department notified claimant in writing that she was required to seek work prior to or during any of the weeks at issue; second, whether claimant met the definition of "temporarily unemployed" under OAR 471-030-0036(5)(b)(D); and third, whether claimant performed five work seeking activities, at least two of which were direct contacts with employers, during each of the weeks at issue.

As a preliminary matter, the OED Temporary COVID-19 Rule was still in effect during all of the weeks at issue. Therefore, unless the Department otherwise notified claimant in writing, claimant would have satisfied the actively seeking work requirement merely by being willing to look for work when state and local emergency declarations related to the coronavirus expire or otherwise are no longer in effect. At hearing, the Department's witness testified regarding the Department having sent such notices to claimants, stating:

Uh, e-mails out to people that were registered by e-mail notifications. Uh, even letters went out and I think they started like back in June. Like middle of June, um, sending letters out to the Claimant that the Department was reinstating the work search requirements.

Transcript at 10. However, the Department's witness did not testify or otherwise offer evidence that the Department specifically notified *claimant* in writing that she was required to seek work, or if it did, when it notified claimant in writing. Likewise, the record does not show whether claimant received such a notice from the Department. On remand, the ALJ should develop the record to show whether the Department sent claimant written notice of the requirement to begin seeking work; if so, when and by what means the notice was sent to claimant, and to what email or postal address; and when, if at all, claimant received the notice. If the record on remand does not show that the Department notified claimant in writing, prior to any or all of the weeks at issue, that she was required to look for work, the ALJ should inquire as to whether claimant was willing to look for work when state and local emergency declarations related to the coronavirus expired or were no longer in effect. The ALJ should also note that, even if the Department did not so notify claimant prior to any or all of the weeks at issue, the record nevertheless shows that claimant was not available for work during week 34-21 because she was out of her labor market, as concluded in Order No. 21-UI-177668.

Should the record on remand show that the Department did, prior to any or all of the weeks at issue, notify claimant that she was required to seek work, further inquiry is necessary to determine whether claimant was “temporarily unemployed” as that term is defined under OAR 471-030-0036(5)(b). The order under review concluded that claimant was not “temporarily unemployed” because she worked for the employer, and earned more than her weekly benefit amount, during each of the weeks at issue other than 34-21, and therefore was never “laid off.” Order No 21-UI-177669 at 4. However, OAR 471-030-0036(5)(b) does not require a claimant to be “laid off” in order to be considered temporarily unemployed. The rule *does* consider a claimant who is still working for their employer to be considered “temporarily unemployed” as of the last date worked during the week in which the individual had earnings less than their weekly benefit amount. During the weeks at issue (and the weeks immediately preceding them), claimant was still working for the employer and never worked a week in which she earned less than her weekly benefit amount.¹

However, it is unclear from the record how the Department has interpreted OAR 471-030-0036(5)(b)(D) to apply in light of the temporary amendment to ORS 657.100(1) in effect at the time, under which individuals working less than full time were considered to have been “unemployed” even if they earned more than their weekly benefit amount. The ALJ should ask the Department’s witness what effect, if any, that had on OAR 471-030-0036(5)(b)(D), which otherwise appears to consider an individual still working for their employer “temporarily unemployed” only if the individual had earnings less than their weekly benefit amount.

If the record on remand shows both that the Department provided claimant with written notice that she was required to seek work *and* that she was not “temporarily unemployed” during the weeks at issue, claimant would have been required to perform five work seeking activities, at least two of which were direct contacts with employers, during each of the weeks at issue in order to be eligible for benefits for those weeks. However, the record is not sufficiently developed to determine whether claimant performed the requisite work seeking activities during any or all of the weeks at issue. The record contains a general, broad account of employers claimant contacted—such as asking about job openings when she was shopping for groceries—and other work seeking activities, such as searching online, that she had performed. Transcript at 25, 27. On remand, the ALJ should conduct a thorough week-by-week inquiry of claimant’s work searches, inquiring specifically as to which employers, if any, claimant contacted during each of the weeks at issue; what other work seeking activities claimant performed during each of the weeks at issue; and on what dates claimant contacted each employer or otherwise performed specific work seeking activities.

The Department’s witness testified, for example, that “going in [to a store] and just kind of browsing [and] asking [what jobs are] available,” as claimant had testified she had done, did not constitute direct contacts with employers. Transcript at 30. On remand, however, further inquiry is needed to determine whether the contacts that claimant made with potential employers constituted “making contact with an employer . . . to inquire about a job opening or applying for job openings in the manner required by the hiring employer” per OAR 471-030-0036(5)(a)(B).

¹ Although claimant did not work or earn any wages during week 34-21, OAR 471-030-0036(5)(b)(C) provides that an individual will not be considered temporarily unemployed if they are separated from employment for any other reason than a lack of work. Therefore, claimant would not be considered “temporarily unemployed” as a result of her camping trip during that week.

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 actively sought work during weeks 30-21 through 33-21 and 35-21, Order No. 21-UI-177669 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-177668 is affirmed. Order No. 21-UI-177669 is reversed and remanded, as outlined above.

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

DATE of Service: December 21, 2021

NOTE: You may appeal EAB Decision 2021-EAB-0945 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.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-177669 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 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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