

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0079

Affirmed
Eligible Weeks 43-21 through 46-21

PROCEDURAL HISTORY: On November 3, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from October 24, 2021 through October 30, 2021 (week 43-21) and was therefore not eligible to receive unemployment insurance benefits for that week and until the reason for the denial had ended (decision # 103124). Claimant filed a timely request for hearing. On December 29, 2021, ALJ Scott conducted a hearing, and on January 5, 2022 issued Order No. 22-UI-183315, reversing decision # 103124 by concluding that claimant was available for work and actively seeking work from October 24, 2021 through November 20, 2021 (weeks 43-21 through 46-21) and therefore eligible to receive benefits for those weeks. On January 7, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that claimant was actively seeking work from October 24, 2021 through November 20, 2021 (weeks 43-21 through 46-21), is **adopted**. The remainder of this decision relates to the portion of the order under review concluding that claimant was available for work during the weeks 43-21 through 46-21, and is eligible to receive unemployment insurance benefits for those weeks.

FINDINGS OF FACT: (1) Beginning at some point prior to August 2021 and continuing throughout the time period relevant to this decision, St. Charles Health System Inc. employed claimant as a registered nurse.

(2) In August 2021, the employer, in compliance with a state mandate, required that all of their employees either get vaccinated against COVID-19 or receive a religious or medical exception. Claimant requested a religious exception, which the employer granted. The reasonable accommodation the employer offered claimant in connection with the exception was to take an unpaid leave of absence beginning in late September 2021. Claimant accepted the reasonable accommodation and began unpaid leave at that time. Claimant did not get vaccinated against COVID-19.

(3) On September 22, 2021, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks from October 24, 2021 through November 20, 2021 (weeks 43-21 through 46-21), the weeks at issue. The Department did not pay claimant benefits for those weeks.

(4) Most registered nurse work in claimant's labor market area involved direct patient care and, by state mandate, required that claimant be vaccinated against COVID-19, absent receiving a vaccination exception. Receiving a vaccination exception from employers offering such work was possible, but such employers were unlikely to offer direct patient care work opportunities to an unvaccinated person seeking an exception. Some registered nurse work in claimant's labor market, such as utilization review, chart review, telephone consultations, and nursing journalism, did not involve direct patient care, and to do such work claimant was not required by state mandate to be vaccinated against COVID-19.

(5) During the weeks at issue, claimant was willing to accept registered nurse work that involved direct patient care and intended to request a vaccination exception if she was offered any such work opportunities. During the weeks at issue, claimant also was willing to accept registered nurse work that did not involve direct patient care, which she could perform without receiving a vaccination exception.

CONCLUSIONS AND REASONS: Claimant was available for work during the weeks including October 24, 2021 through November 20, 2021 (weeks 43-21 through 46-21), and is eligible to receive unemployment insurance benefits for those weeks.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). For purposes of ORS 657.155(1)(c), an individual shall be considered available for work if, at a minimum, the individual is:

* * *

(b) Capable of accepting and reporting for suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities[.]

Temporary OAR 471-030-0036(3)(September 26, 2021 through March 24, 2022). Claimant did not receive benefits for weeks 43-21 through 46-21, and therefore had the burden to prove that she 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).

Claimant was available for work during the weeks at issue because the record shows, more likely than not, that claimant was capable of accepting and reporting for suitable work opportunities within her labor market. During the weeks at issue, claimant was willing to accept and report for registered nurse work that involved direct patient care. Claimant was required by state mandate to be vaccinated against COVID-19 to perform registered nurse work that involved direct patient care, absent receiving an exception. Claimant was not vaccinated, and although it was technically possible for claimant to receive a vaccine exception from employers offering such work, employers were unlikely to offer direct patient care work opportunities to an unvaccinated person. For this reason, as to registered nurse work in claimant's labor market that involved direct patient care, the preponderance of evidence supports the

conclusion that claimant was not capable of accepting and reporting for such work during the weeks at issue.

However, during the weeks at issue, claimant was also willing to accept and report for registered nurse work that did not involve direct patient care, such as utilization review, chart review, telephone consultations, and nursing journalism. To perform such work claimant was not required by state mandate to be vaccinated against COVID-19. Because claimant's vaccination status would not hinder her ability to accept or report for work opportunities of this type, the preponderance of evidence supports the conclusion that claimant was capable of accepting and reporting for registered nurse work opportunities in her labor market that did not involve direct patient care during the weeks at issue.

The fact that during the weeks at issue claimant was capable of accepting and reporting for registered nurse work opportunities that did not involve direct patient care is sufficient to satisfy Temporary OAR 471-030-0036(3)(b). This is because that provision requires claimant be "capable of accepting and reporting for suitable work opportunities within the labor market in which work is being sought." This language is broad and covers a scenario such as the one presented here, where an individual is capable of accepting some, but not all, suitable work opportunities.

Interpreting Temporary OAR 471-030-0036(3)(b) in this less restrictive fashion is warranted because the previous administrative rule that Temporary OAR 471-030-0036(3) replaced contained several restrictive textual elements that do not now appear in Temporary OAR 471-030-0036(3). Specifically, former OAR 471-030-0036(3)(b) included the modifier "any" before "suitable work opportunities," which does not appear in the language of the existing rule. *Compare* OAR 471-030-0036(3) (effective August 2, 2020 through December 26, 2020) ("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[.]") (emphasis added).¹ It is logical to conclude that the Department removed this modifier deliberately and with the intent to establish a less restrictive standard. This conclusion is bolstered by language contained in the Department filing statement accompanying Temporary OAR 471-030-0036(3), which explains that the justification for the rule amendment was to provide "more clear guidance . . . regarding the availability of UI benefits and *expands the availability of benefits to people still impacted by COVID-19.*" See Temporary Administrative Order ED 4-2021, "Justification for Temporary Filing," available at, <https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=2337> (scroll to "471-030-0036," click on link for "ED 4-2021, temporary amend filed 09/23/2021, effective 09/26/2021 through 03/24/2022") (emphasis added).

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

DECISION: Order No. 22-UI-183315 is affirmed.

¹ Additionally, OAR 471-030-0036 (effective August 2, 2020 through December 26, 2020) also contained a provision, at subpart (3)(c), that required an individual to be "[n]ot imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time[.]" This provision does not appear in Temporary OAR 471-030-0036(3).

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

DATE of Service: February 18, 2022

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 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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