

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0381

Reversed & Remanded

PROCEDURAL HISTORY: On December 30, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant failed to actively seek work for the weeks including July 25, 2021 through September 4, 2021 (weeks 30-21 through 35-21) (decision # 71842). Also on December 30, 2021, the Department served notice of an administrative decision concluding that claimant failed to actively week work for the weeks including September 12, 2021 through September 25, 2021 (weeks 37-21 through 38-21) (decision # 73800). Claimant filed timely requests for hearing on decisions # 71842 and 73800. On March 1, 2022, ALJ Demarest conducted a consolidated hearing and issued Orders No. 22-UI-187549 and 22-UI-187550, affirming decisions # 71842 and 73800, respectively. On March 17, 2022, claimant filed applications for review of Orders No. 22-UI-187549 and 22-UI-187550 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 22-UI-187549 and 22-UI-187550. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2022-EAB-0380 and 2022-EAB-0381).

FINDINGS OF FACT: (1) Beginning prior to July 25, 2021 and during all times relevant to this decision, claimant worked for an employer loading and unloading household goods. On or before July 25, 2021, claimant filed an initial claim for unemployment insurance benefits.

(2) Claimant claimed benefits for the weeks including July 25, 2021 through September 4, 2021 and September 12, 2021 through September 25, 2021 (weeks 30-21 through 35-21 and 37-21 through 38-21). These are the weeks at issue. The Department paid claimant benefits for the weeks including July 25, 2021 through August 7, 2021, August 22, 2021 through September 4, 2021, and September 19, 2021 through September 25, 2021 (weeks 30-21 through 31-21, 34-21 through 35-21, and 38-21). The Department did not pay claimant benefits for the weeks including August 8, 2021 through August 21, 2021 and September 12, 2021 through September 18, 2021 (weeks 32-21 through 33-21 and 37-21).

(3) During the weeks at issue, claimant worked for his employer on a part-time basis. Claimant did not seek work other than to make himself available for work with his employer.

CONCLUSIONS AND REASONS: Orders No. 22-UI-187549 and 22-UI-187550 are reversed, and the matters remanded for further development of the record.

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.

Claimant received benefits for weeks 30-21 through 31-21, 34-21 through 35-21, and 38-21 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 32-21 through 33-21 and 37-21 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 orders under review concluded that claimant was not eligible for benefits during the weeks at issue because he failed to actively seek work during each of those weeks. Order No. 22-UI-187549 at 2; Order No. 22-UI-187550 at 2. The consolidated record as developed does not support this conclusion because the orders failed to apply paragraph (4) of the Temporary Rule for Unemployment Insurance Flexibility. Under that rule, claimant's activities during the weeks at issue may have been sufficient for claimant to be considered to have actively sought work, depending upon whether the record on remand shows that claimant met the elements of the temporary rule.

The Temporary Rule for Unemployment Insurance Flexibility, which was effective from September 13, 2020 through September 25, 2021, applied to claimant's work search activities during the weeks at issue.¹ Therefore, claimant's work search obligations were governed by the temporary rule. Under that

¹ The Department posted on its website that beginning the week of July 25, 2021 through July 31, 2021 (week 30-21) claimants must start seeking work and report their work search details. *See* <https://unemployment.oregon.gov/returntowork>. However, this post is not construed as having rescinded the temporary Rule for Unemployment Insurance Flexibility, which remained effective until September 25, 2021. Rather, the post is construed as stating the Department's intention to require work search activities within the parameters of the temporary rule, which required notifying claimants in writing that they were bound to report work search details.

rule, to be considered to have actively sought work—unless the Department notified claimant otherwise in writing—claimant only needed to have been willing during the weeks at issue to look for work when state and local emergency declarations relating to the coronavirus expire. On remand, the ALJ should develop the record to determine whether the Department provided written notification to claimant that he was bound by a requirement to actively seek work other than that set forth by paragraph (4) of the Temporary Rule for Unemployment Insurance Flexibility and, if so, when he was so notified. In the event claimant was not provided this written notification, the ALJ should develop the record to determine whether claimant was willing during the weeks at issue to look for work when state and local emergency declarations relating to the coronavirus expire.

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 actively seeking work during the weeks at issue, Order No. 22-UI-187549 and 22-UI-187550 are reversed, and these matters are remanded.

DECISION: Orders No. 22-UI-187549 and 22-UI-187550 are set aside, and the matters are remanded for further proceedings consistent with this order.

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

DATE of Service: June 2, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Orders No. 22-UI-187549 and 22-UI-187550 or return these matters 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.

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