

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0527

Modified
Eligible Weeks 01-22 through 04-22
Ineligible Weeks 05-22 through 13-22

PROCEDURAL HISTORY: On January 24, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work, available for work, or actively seeking work from January 2, 2022 through January 15, 2022 (weeks 01-22 through 02-22) and therefore was ineligible to receive benefits during that period and until the reason for the denial had ended (decision # 111103). Also on January 24, 2022, the Department served notice of an administrative decision concluding that claimant was not able to work, available for work, or actively seeking work from January 9, 2022 through January 22, 2022 (weeks 02-22 through 03-22) and therefore was ineligible to receive benefits during that period and until the reason for the denial had ended (decision # 73008). Claimant filed timely requests for hearing on decisions # 111103 and 73008.

On April 5, 2022, ALJ Frank conducted a hearing on decisions # 111103 and 73008. On April 13, 2022, ALJ Frank issued Order No. 22-UI-191240, modifying decision # 111103 by concluding that claimant was not available for work, and therefore ineligible to receive benefits, from January 2, 2022 through April 2, 2022 (weeks 01-22 through 13-22). Also on April 13, 2022, ALJ Frank issued Order No. 22-UI-191238, modifying decision # 73308 by concluding that claimant was not available for work, and therefore ineligible to receive benefits, from January 9, 2022 through April 2, 2022 (weeks 02-22 through 13-22). On April 29, 2022, claimant filed applications for review of Orders No. 22-UI-191240 and 22-UI-191238 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 22-UI-191240 and 22-UI-191238. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2022-EAB-0527 and 2022-EAB-0528).

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 him 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.

FINDINGS OF FACT: (1) From October 3, 2016 until December 5, 2021, claimant worked as a dispatcher for a cab company. Claimant also learned how to work as a software developer, though he had never worked as one professionally.

(2) On December 26, 2021, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks from January 2, 2022 through April 2, 2022 (weeks 01-22 through 13-22), the weeks at issue. The Department did not pay claimant benefits for those weeks.

(3) On January 24, 2022, the Department served copies of decisions # 111103 and 73008 on claimant. Those administrative decisions advised claimant that to be eligible for benefits, claimant “must be seeking work you have recently performed that you have experience in to be most likely hired.” Transcript at 7.

(4) During the weeks at issue, claimant sought work as a software developer, and did not seek work as a dispatcher.

CONCLUSIONS AND REASONS: Claimant was available for work, and therefore eligible to receive benefits, from January 2, 2022 through January 29, 2022 (weeks 01-22 through 04-22). Claimant was not available for work, and therefore ineligible to receive benefits from January 30, 2022 through April 2, 2022 (weeks 05-22 through 13-22).

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed as defined by OAR 471-030-0036(3) (December 8, 2019); ORS 657.155(1)(c). However, during a state of emergency declared by the Governor under ORS 401.165, or a public health emergency declared under ORS 433.441, the Department may waive, otherwise limit, or modify the requirements of OAR 471-030-0036. OAR 471-030-0071 (effective September 13, 2020). *Former temporary* OAR 471-030-0036(3) (September 26, 2021 through March 12, 2022)¹ provides that a person shall be considered available for work if, at a minimum, the individual is:

(a) Willing to work full time, part time, and accept temporary work opportunities, 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 suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities[.]

* * *

¹ *Former temporary* OAR 471-030-0036 was, when first promulgated, originally effective through March 24, 2022. That version of the rule was repealed and replaced effective March 13, 2022; the version of the rule effective March 13, 2022 was itself amended on March 21, 2022 in order to correct minor typographical errors. The version of the rule effective March 13, 2022 (and its subsequent corrections) contain substantive eligibility requirements under ORS 657.155 which differ from the previous (former temporary) version of the rule. However, while there are effectively three separate versions of OAR 471-030-0036 which apply to the weeks at issue in these cases, the provisions of the rule applicable to the analyses in these cases are the same throughout all three versions of the rule. Therefore, for the sake of clarity, all citations to OAR 471-030-0036 herein refer to the former temporary version of the rule that was effective from September 26, 2021 through March 12, 2022.

In determining whether any work is suitable for an individual, the Director of the Employment Department shall consider, among other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual. ORS 657.190. In considering suitable work factors under ORS 657.190 and for purposes of determining eligibility under 657.155(1)(c), the Director may require an individual to actively seek the type of work the individual is most capable of performing due to prior job experience and training. OAR 471-030-0036(1). An individual will be considered not available for work if the individual fails or refuses to seek the type of work required by the Director pursuant to OAR 471-030-0036(1). OAR 471-030-0036(3)(i).

The orders under review concluded that claimant was not available for work during the weeks at issue because he “exclusively sought work in a field in which he had never worked and for which he was not academically qualified,” and therefore did not seek work which was suitable for him. Order No. 22-UI-191240 at 3; Order No. 22-UI-191238 at 3. In fact, the record does not show that the work claimant sought as a software developer was unsuitable for him. While claimant confirmed in his testimony that he did not hold a degree in computer science, claimant also testified that he was “actively a programmer,” that not all software developer positions require a degree, and that he had only been applying for positions for which he met the qualifications. Transcript at 15, 17–18. Claimant thereby met his burden² to show that he sought suitable work under ORS 657.190 during the weeks at issue. To the extent that the orders under review concluded that claimant was ineligible because he was not, under OAR 471-030-0036(3)(b), capable of accepting and reporting for suitable work opportunities within the labor market in which he sought work, those conclusions were in error, and claimant is not ineligible to receive benefits on that basis.

However, the orders under review also concluded that “a claimant of unemployment insurance benefits must seek the ‘type of work required by the Director’. . . to be available for work and eligible for benefits,” and that claimant did not do so because he sought work as a software developer rather than a dispatcher during the weeks at issue. Order No. 22-UI-191240 at 3; Order No. 22-UI-191238 at 3. The orders under review are correct in stating that the Director (or their authorized representative) may, under OAR 471-030-0036(1), require an individual to actively seek the type of work the individual is most capable of performing due to prior job experience and training. Likewise, the orders are correct that an individual will, under OAR 471-030-0036(3)(i), be considered not available for work if they fail or refuse to seek the type of work required by the Director. However, implicit in those rule provisions is the requirement that the Department *notify* the individual of the type of work that the Department requires them to seek.

At hearing, the Department’s witness testified that the Department did not notify claimant prior to issuing decisions # 111103 and 73008. Transcript at 9. Nor does the record otherwise show that claimant knew or had reason to know, prior to the issuance of the two administrative decisions, that the

² *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).

Department required him to seek work as a dispatcher in order to be eligible for benefits. As those decisions were issued on January 24, 2022 (the Monday of week 04-22), it is reasonable to conclude that claimant more likely than not did not receive the decisions early enough in the week in order to be on notice that the Department required him to seek work as a dispatcher. Therefore, because claimant did not have notice of the Department's requirement during weeks 01-22 through 04-22, claimant did not fail to seek the type of work required by the Department during those weeks, and was eligible to receive benefits for those weeks.

Nevertheless, the record shows that claimant's receipt of the two administrative decisions *did* constitute notice, because they specifically stated that claimant was required to seek work as a dispatcher. Although the record does not explicitly show when claimant received the decisions in the mail, in the absence of this information it is reasonable to conclude that claimant likely received them by January 31, 2022 (the Monday of week 05-22), a week after they were mailed. Thus, because claimant did not seek the type of work that the Department required him to seek, despite having had notice of that requirement from week 05-22 onwards, claimant was not available for work, and therefore not eligible to receive benefits for weeks 05-22 through 13-22.

DECISION: Orders No. 22-UI-191240 and 22-UI-191238 are modified, as outlined above.

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

DATE of Service: July 21, 2022

NOTE: This decision modifies orders 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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 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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