

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0782

Modified

Eligible Weeks 13-20 through 23-20, 42-20 through 48-20, and 03-21 through 21-21

Ineligible Weeks 24-20 through 29-21

PROCEDURAL HISTORY: On October 15, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from March 22, 2020 through July 18, 2020 (weeks 13-20 through 29-20), October 11, 2020 through November 28, 2020 (weeks 42-20 through 48-20) and January 17, 2021 through May 29, 2021 (weeks 03-21 through 21-21), and therefore was ineligible for benefits for those weeks (decision # 72728). Claimant filed a timely request for hearing. On June 2 and 27, 2022, ALJ L. Lee conducted a hearing. On July 6, 2022 ALJ L. Lee issued Order No. 22-UI-197522 modifying decision # 72728 by concluding that claimant was available for work and therefore eligible for benefits for weeks 13-20 through 23-20 and 09-21 through 10-21, but was not available for work and therefore ineligible for benefits for weeks 24-20 through 29-20, 42-20 through 48-20, 03-21 through 08-21, and 11-21 through 21-21. On July 12, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's August 11, 2022 written argument when reaching this decision. Because claimant's August 16, 2022 written argument was not received by EAB within the time period allowed under OAR 471-041-0080(1) (May 13, 2019), the argument was not considered by EAB when reaching this decision. OAR 471-041-0080(2)(b).

FINDINGS OF FACT: (1) On March 23, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant's weekly benefit amount was \$151. Claimant claimed benefits for the weeks 13-20 through 29-20, 42-20 through 48-20, and 03-21 through 21-21. These are the weeks at issue. The Department paid claimant benefits for the weeks at issue.¹

¹ EAB has taken notice of this fact which is contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

(2) Claimant's two children were approximately 12 and 15 years old during the weeks at issue. Prior to the weeks at issue, both children attended school in-person during the school year.

(3) Prior to the weeks at issue, claimant worked part time as an assistant pre-school teacher at The Learning Tree Montessori School (the employer). Claimant typically worked about 13 to 20 hours per week for the employer during the school year. The employer operated a camp program during the summer. Claimant did not work for the employer during the summer, both because they did not need her and because she stayed home to care for her children while school was out for the summer.

(4) Prior to and during the weeks at issue, claimant was also self-employed as a jewelry designer. Claimant sold her jewelry online at craft fairs retail stores. Claimant considered her jewelry business to be her primary occupation, and she typically earned more selling jewelry than she did in her part-time work for the school.

(5) On March 17, 2020, all Oregon schools, including the employer, were closed for in-person learning due to the onset of the COVID-19 pandemic. As such, both of claimant's children stayed home and attended school remotely. While her children were attending school remotely, claimant was required to stay home with them, as her husband worked during the day and she had nobody else to stay with them. Claimant therefore could not have worked in-person at the Montessori school or for any other employer during that time. Claimant's jewelry business also saw a drop in demand as a result of the pandemic. Notwithstanding the fact that she needed to stay home with her children while they attended classes remotely, claimant would have been willing to drop or reschedule her self-employment activities in order to accept work with an employer.

(6) In or around May 2020, the employer reopened on a limited basis, and asked claimant if she could work on May 19, 2020 as a substitute teacher. Claimant declined the employer's request because she needed to stay home with her children, who were still attending their schools remotely.

(7) On or around June 8, 2020, claimant's children's schools let out for the summer. In September 2020, the children's schools resumed remote learning. The schools continued with remote learning until February 1, 2021, at which point they resumed in-person classes. Thereafter, at least one of the children's schools was closed from February 24, 2021 until March 11, 2021 due to a positive test for COVID-19 at the school, temporarily returning claimant's children to remote learning. The schools' academic years ended on June 10, 2021.

CONCLUSIONS AND REASONS: Claimant was available for work and therefore eligible for benefits for weeks 13-20 through 23-20, 42-20 through 48-20, and 03-21 through 21-21. Claimant was not available for work and therefore ineligible for benefits for weeks 24-20 through 29-20.

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). For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be:

- (a) Willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, 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 any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities; and

(c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time [.]

* * *

OAR 471-030-0036(3).

However, Oregon temporary rules set out unemployment insurance provisions applicable to the unique situations arising due to COVID-19 and the actions to slow its spread. OAR 471-030-0070(5)(b) (effective March 8, 2020 through September 12, 2020) provides that a person will not be deemed unavailable for work because they are home solely because they lack childcare for a child or children due to school or daycare closures or curtailments.

Additionally, 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)(b) 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], provided that, effective September 13, 2020 through September 25, 2021, a person will not be deemed unavailable for work because they are home solely because they lack childcare for a child or children due to school or daycare closures or curtailments.

The order under review concluded that while claimant was available for work and therefore eligible for benefits for weeks 13-20 through 23-20 and 09-21 through 10-21, she was not available for work and therefore ineligible to receive benefits for weeks 24-20 through 29-20, 42-20 through 48-20, 03-21 through 08-21, and 11-21 through 13-21. Order No. 22-UI-197522 at 6-7. These conclusions were premised largely on claimant's need to stay home while her children's schools were closed for in-person learning, which the order under review found no longer applied "once in-person classes resumed for the fall term on September 8, 2020." Order No. 22-UI-197522 at 6. The record does not support this finding and, as explained herein, the only period during the weeks at issue during which claimant was not available for work was weeks 24-20 through 29-20.

First, the order under review correctly concluded that claimant's self-employment activities did not render her unavailable for work during the weeks at issue. Order No. 22-UI-197522 at 6. An individual who pursues self-employment while claiming benefits may sometimes be considered unavailable for work if they are unwilling to forgo their self-employment if it presents a conflict with the days and hours during which the Department determines they are required to be available to accept work, as such unwillingness could constitute the imposition of a condition which substantially reduces the individual's opportunities to return to work at the earliest possible time. Here, however, the record shows that claimant *was* willing to drop or reschedule her self-employment activities in order to accept work with

an employer. Therefore, claimant was not unavailable for work on the basis of her self-employment during any of the weeks at issue.

The record shows that for many of the weeks at issue, claimant was not capable of accepting and reporting for any suitable work opportunities within her labor market because she was staying home with her children. Claimant's children were home and attending school remotely due to school closures from March 2020 through early June 2020, September 2020 through early February 2021, and for a short period in February and March 2021. For all of the weeks at issue during which claimant was home specifically because her children were attending school remotely, claimant was not considered unavailable for work under paragraph (5)(b) of either OAR 471-030-0070 or the OED Temporary COVID-19 Rule. Notably, and in contrast to the finding in the order under review, the record shows that claimant's children were home and attending school remotely from March 2020 through the end of the 2019-2020 school year on or around June 8, 2020, and from the beginning of the following school year in September 2020 until *February 1, 2021*. Thus, for weeks 13-20 through 23-20, 42-20 through 48-20 and 03-21 through 05-21, claimant was not unavailable for work because she was home solely because she lacked childcare for her children due to school closures. Similarly, to the extent that claimant had to stay home with her children when their school or schools were temporarily closed between February 24, 2021 until March 11, 2021 due to a COVID-19 exposure (a period encompassed by weeks 08-21 through 10-21), claimant was not unavailable for work for the same reason.

For the weeks in 2021 during which claimant's children's schools were open to in-person learning, the record does not show that claimant was not capable of accepting and reporting for any suitable work opportunities within her labor market or otherwise unavailable for work for any other reason. The Department bears the burden of proof in this case,² and failed to show that claimant was not capable of accepting and reporting for suitable work for these weeks. Therefore, claimant was also available for work during weeks 06-21 through 07-21 and 11-21 through 21-21.

Finally, the record shows that claimant was *not* available for work during the period in which her children were home for the 2020 summer break, which corresponds to weeks 24-20 through 29-20. At hearing, claimant explicitly stated that she had "never worked in the summer" "because "[her] kids are home," and she had "primary responsibility for [them]." June 27, 2022 Transcript at 5, June 2, 2022 Transcript at 44. The record therefore does not show that claimant stayed home during the summers due to school or daycare closures that resulted from the COVID-19 pandemic. As claimant was incapable of accepting and reporting for suitable work opportunities within her labor market for a reason that does not fall within the provisions of either OAR 471-030-0070 or the OED Temporary COVID-19 Rule, claimant was not available for work during weeks 24-20 through 29-20.

For the above reasons, claimant was available for work and therefore eligible for benefits for weeks 13-20 through 23-20, 42-20 through 48-20 and 03-21 through 21-21, and was not available for work and therefore ineligible for benefits for weeks 24-20 through 29-20.

DECISION: Order No. 22-UI-197522 is modified, as outlined above.

² 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).

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

DATE of Service: October 14, 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.

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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.