

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0813

Request to Reopen Allowed
Modified – Eligible Weeks 23-21 through 27-21

PROCEDURAL HISTORY: On July 20, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work for the weeks including June 6, 2021 through July 10, 2021 (weeks 23-21 through 27-21) and was therefore not eligible to receive unemployment insurance benefits for those weeks and until the reason for the denial had ended (decision # 95904). Claimant filed a timely request for hearing.

On August 11, 2021, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for August 24, 2021 at 8:15 a.m. On August 24, 2021, claimant failed to appear for the hearing, and ALJ Amesbury issued Order No. 21-UI-173225, dismissing the hearing request due to claimant's failure to appear. On September 7, 2021, claimant filed a request to reopen the August 24, 2021 hearing. On June 28, 2022, ALJ Logan conducted a hearing, and on July 1, 2022 issued Order No. 22-UI-197410, allowing claimant's request to reopen the hearing and modifying decision # 95904 by concluding that claimant was available for work and therefore eligible for benefits for weeks 23-21 through 25-21, but not available for work and therefore ineligible for benefits for weeks 26-21 through 27-21. On July 21, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

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.

Claimant asserted in her written argument that "due to all of this I was denied for the month of August 2021." Claimant's Written Argument. The weeks at issue in this case do not extend into August 2021. To the extent claimant wishes to appeal any denial of benefits for weeks other than the weeks at issue in this case, she should ask the Department to issue an administrative decision on any other weeks denied and then request a hearing by the applicable deadline.

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 allowing claimant's request to reopen the hearing is **adopted**. The remainder of this decision relates to whether claimant was available for work during the weeks at issue.

FINDINGS OF FACT: (1) Claimant worked as a server at two different restaurants. After the onset of the COVID-19 pandemic, both employers scheduled her less than full time because restaurants were not at full capacity. From about mid-March 2020 onward, claimant worked as scheduled by her employers on a less than full time basis.

(2) On March 16, 2020, claimant filed an initial claim for unemployment insurance benefits.

(3) Claimant had a 15-year old son who attended high school. In April 2021, her son's school allowed parents the option to have students return to in-class instruction or continue to attend class remotely with parental assistance. Claimant opted to have her son continue learning remotely at home with her assistance. While claimant was assisting with her son's remote learning, she was not available to work full time.

(4) On June 25, 2021, claimant's son's school year ended. However, claimant had another child she was responsible to care for. After June 25, 2021, claimant became available for additional work hours but, due to childcare responsibilities, claimant remained unavailable to work full time. Specifically, claimant was available for work only three days per week and sometimes on Saturdays, if she could find a babysitter.

(5) Claimant claimed benefits for the weeks including June 6, 2021 through July 10, 2021 (weeks 23-21 through 27-21). These are the weeks at issue. The Department did not pay claimant benefits for week 23-21, but did pay claimant benefits for weeks 24-21 through 27-21.¹

CONCLUSIONS AND REASONS: Claimant was available for work and eligible for benefits for weeks 23-21 through 27-21. Order No. 22-UI-197410 is modified to the extent it concluded that claimant was ineligible for benefits for weeks 26-21 through 27-21.

Claimant did not receive benefits for week 23-21 and, therefore, as to that week, claimant had the burden to prove that she should have been paid benefits. The Department paid claimant benefits for weeks 24-21 through 27-21 and therefore, as to those weeks, the Department had the burden to prove benefits should not have been paid. *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).

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) (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

¹ EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1). 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.

Department may waive, otherwise limit, or modify the requirements of OAR 471-030-0036. OAR 471-030-0071 (September 13, 2020). Paragraph (5) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility (March 8, 2020), <http://records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/7604239>, provides that a person will not be deemed unavailable for work because:

* * *

(d) They normally work less than full-time and are only available for less than full-time work.

The order under review concluded that that claimant was available for work and eligible for benefits for week 23-21 through 25-21 but not available for work and ineligible for benefits for weeks 26-21 through 27-21. Order No. 22-UI-197410 at 3. The record does not support the conclusion that claimant was not available for work for weeks 26-21 through 27-21.

The record shows that claimant was available for work and therefore eligible for benefits by operation of paragraph (5)(d) of the Temporary Rule for Unemployment Insurance Flexibility. Beginning in about mid-March 2020, claimant's normal work schedule became a less than full time one because, due to the COVID-19 pandemic, the restaurants at which she worked were not at full capacity. Thus, during the weeks at issue, claimant normally worked less than full time.

The record further shows that, during the weeks at issue, claimant was only available for less than full time work. During the period of June 6, 2021 through June 25, 2021, which encompasses week 23-21 through the majority of week 25-21, claimant was not available to work full time because she was assisting with her son's remote learning. Thereafter, claimant's son's school year ended and claimant became available for additional work hours, but she still had another child she was responsible to care for. At hearing, claimant testified that following June 25, 2021, she was available for work only three days per week and sometimes on Saturdays if she could find a babysitter. Transcript at 22. Given that claimant was only available for work three days per week (with the possibility of a fourth contingent upon a factor beyond her control), this testimony is sufficient to support that, more likely than not, claimant was only available for less than full time work during weeks 26-21 and 27-21. Thus, taken together, the record shows that claimant was only available for less than full time work during all of the weeks at issue in this case.

Accordingly, because claimant normally worked less than full time and was only available for less than full time work during the weeks at issue, claimant was available for work during the weeks at issue pursuant to paragraph (5)(d) of the Temporary Rule for Unemployment Insurance Flexibility. Claimant was therefore eligible to receive unemployment insurance benefits for all of the weeks including June 6, 2021 through July 10, 2021 (weeks 23-21 through 27-21).

DECISION: Order No. 22-UI-197410 is modified, as outlined above.

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

DATE of Service: October 26, 2022

NOTE: This decision modifies an order that denied benefits in part. 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.

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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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