

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1097

Reversed
Eligible Weeks 2-22 and 3-22

PROCEDURAL HISTORY: On January 27, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from January 9, 2022 through January 22, 2022 (weeks 2-22 to 3-22) and was not eligible for benefits for those weeks and until the reason for the denial had ended (decision # 122056). Claimant filed a timely request for hearing. On October 10, 2022, ALJ McGorin conducted a hearing, and on October 11, 2022 issued Order No. 22-UI-204787, affirming decision # 122056. On October 31, 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.

FINDINGS OF FACT: (1) On January 11, 2022, claimant filed an initial claim for benefits. Claimant claimed benefits for weeks 2-22 and 3-22, the weeks at issue. The Department did not pay claimant benefits for those weeks.¹

(2) During the weeks at issue, claimant was seeking work as a promotions manager, and her labor market was the Portland metropolitan area. The typical hours and days for this work within claimant's labor market was 8:00 a.m. to 6:00 p.m. Monday through Saturday.

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.

(3) On January 27, 2022, claimant engaged in a phone call with an adjudicator regarding her work searches. In this call, claimant told the adjudicator that it was difficult for her to complete her work searches and start her self-employment business, but that she was doing both.

(4) During the weeks at issue, claimant completed self-employment activities at home, but was willing postpone these activities if work opportunities arose.

CONCLUSIONS AND REASONS: Claimant was available for work during the weeks at issue and therefore eligible for benefits for those weeks.

To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. 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

* * *

Because the Department did not pay claimant benefits for the weeks at issue, claimant had the burden to prove that the Department should have paid her 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 order under review concluded that claimant was not available for work during the weeks at issue because, during a phone call with an adjudicator, “claimant said she was unwilling to leave her self-employment for other work, and talked about difficulties of searching for work while starting a business.” Order No. 22-UI-204787 at 4. The record does not support this conclusion.

At hearing, the parties disagreed about what claimant said during the January 27, 2022 phone call between her and the adjudicator. The department’s witness offered hearsay testimony that claimant told the adjudicator that she would not give up her self-employment business for other work. According to the witness, the adjudicator asked “Would you leave self-employment to take employment?” and claimant responded, “No, plus it is really hard to look for work because I am focusing on self-employment.” Audio Record at 8:21 to 8:32. The witness based her testimony on notes she reviewed from the adjudicator who conducted the phone call. When questioned about these statements, however, this witness could not provide additional context or definitively state whether the notes were a verbatim record of what claimant stated in the phone call. Claimant, on the other hand, offered first-hand testimony that she did not tell the adjudicator that she was unavailable for full time work because of her self-employment business. Audio Record at 11:37 to 11:56. According to claimant, she told the adjudicator that “it was difficult, it was really hard, but I was doing both.” Audio Record 13:02 to 13:07.

Lastly, claimant testified that she was available for work, and would have stopped her self-employment activities to accept work. Audio Record at 14:53 to 15:10.

Absent a basis for concluding that claimant was not a credible witness, her first-hand testimony regarding what she told the adjudicator outweighs the Department's hearsay evidence to the contrary. Thus, without additional evidence supporting the Department's hearsay testimony, claimant's account is more persuasive. The record shows that, more likely than not, claimant only stated that it was difficult to complete both her work searches and her self-employment activities. This statement is not inconsistent with claimant's testimony that she was available for work during the weeks at issue. Claimant therefore established that she was available for work during the weeks at issue, and therefore eligible for benefits for those weeks.

DECISION: Order No. 22-UI-204787 is set aside, as outlined above.

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

DATE of Service: January 5, 2023

NOTE: This decision reverses an order 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.

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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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