

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0081

Reversed
Eligible Weeks 42-22 and 43-22

PROCEDURAL HISTORY: On November 8, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant failed to actively seek work for the weeks including October 16, 2022 through October 29, 2022 (weeks 42-22 through 43-22) and therefore was not eligible to receive unemployment insurance benefits for those weeks (decision # 64514). Claimant filed a timely request for hearing. On December 23, 2022, ALJ Buckley conducted a hearing, and on December 27, 2022 issued Order No. 22-UI-210962, affirming decision # 64514. On January 11, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's January 11, 2023 written 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2). Because claimant's February 27, 2023 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) In October 2022, claimant's employer laid claimant off from work. The last day claimant worked for the employer was October 7, 2022. On that date, the employer told claimant they expected some business soon that would enable claimant to have full-time work and hoped claimant would be laid off for no longer than two to three weeks.

(2) On October 17, 2022, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks of October 16, 2022 through October 29, 2022 (weeks 42-22 through 43-22). These are the weeks at issue.

(3) During each of the weeks at issue, claimant reported on his weekly claim forms that he was temporarily laid off work from his regular employer and expected to return to full-time work for them within four weeks of when he was laid off. Claimant remained in contact with the employer and was

capable of accepting work from them during each of the weeks at issue. However, because he considered himself temporarily laid off work from the employer, claimant did not conduct any work-seeking activities during the weeks at issue besides remaining in contact with the employer. The Department regarded this as sufficient to actively seek work under a rule that applied to temporarily unemployed individuals. As a result, the Department gave claimant waiting week credit for week 42-22 and paid claimant benefits for week 43-22.

(4) Shortly after claimant claimed and was compensated for the weeks at issue, a Department adjudicator reviewed claimant's initial claim form and believed that claimant had listed November 18, 2022 as his return to work date. However, claimant "never gave a date" of his anticipated return to work on his initial claim form. Audio Record at 24:30. Instead, on or around the time of his initial claim filing he "just said two or three weeks lay off to somebody" in a conversation with a Department representative, and "never said this is the exact date I'm going back to work." Audio Record at 24:32.

(5) Based on the adjudicator's belief that claimant had listed November 18, 2022 as his return to work date, the Department concluded that claimant did not constitute a temporarily unemployed individual because he did not have a reasonable expectation of returning to work for the employer. Based on its view that claimant did not constitute a temporarily unemployed individual, the Department concluded that claimant's failure to conduct any work-seeking activities during the weeks at issue besides remaining in contact with the employer was insufficient to meet the actively seeking work requirement. As a result, the Department concluded claimant was not eligible to receive the waiting week credit and payment he received for those weeks.

(6) After claiming the weeks at issue, claimant received a letter from the Department requesting a specific date claimant expected to return to work. Claimant contacted his employer to obtain a precise date but the employer advised they could not give claimant a confirmed date to return. Claimant informed the Department and a representative told claimant that he should stop listing that he was temporarily laid off on his weekly claim forms and start conducting work search activities each week. From that point forward, claimant performed work search activities each week while claiming benefits. He had not returned to work for the employer as of December 23, 2022.

CONCLUSIONS AND REASONS: Claimant actively sought work during weeks 42-22 and 43-22 and was therefore eligible to receive benefits for those weeks.

Because the Department gave claimant waiting week credit for week 42-22 and paid claimant benefits for week 43-22, the Department bears the burden of proving that claimant was ineligible to receive benefits for the weeks at issue. *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).

To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c). Typically, to be actively seeking work, an individual "must conduct at least five work-seeking activities per week," with two of the five work-seeking activities being a direct contact with an employer who might hire the individual. OAR 471-030-0036(5)(a) (March 25, 2022). However, these work search requirements do not apply if "the individual is temporarily unemployed as described in section (b)" of the administrative rule. OAR 471-030-0036(5)(a). For individuals who are

temporarily unemployed, OAR 471-030-0036(5)(b) (March 25, 2022) defines “actively seeking work” as follows:

- (A) They are considered to be actively seeking work when they remain in contact with their regular employer and are capable of accepting and reporting for any suitable work with that employer;
- (B) There is a reasonable expectation that they will be returning to work for their regular employer. The work the individual is returning to must be full time or pay an amount that equals or exceeds their weekly benefit amount;
- (C) The department will not consider the individual to be temporarily unemployed if they were separated from their employer for reasons other than a lack of work, the work the individual is returning to is not with their most recent employer, or the length the individual is unemployed is longer than the period described in subsection (D) of this section; and
- (D) The department will consider that the period for which an individual is temporarily unemployed:
 - (i) Begins the last date the individual performed services for the employer. In the case of an individual still working for the employer, it is the last date worked during the week in which the individual had earnings less than their weekly benefit amount; and
 - (ii) Cannot be greater than four weeks between the week the individual became temporarily unemployed and the week the individual returns to work as described in subsection (B) of this section.

The order under review concluded that claimant did not actively seek work, and was therefore not eligible to receive benefits for the weeks at issue, because claimant was not a temporarily unemployed individual and did not conduct the work-seeking activities required for individuals who are not temporarily unemployed. Order No. 22-UI-210962 at 3. The record does not support this conclusion.

Claimant met the criteria set forth by OAR 471-030-0036(5)(b) and, therefore, was a temporarily unemployed individual during the weeks at issue. Claimant’s circumstances satisfied subpart (A) because the record shows that claimant remained in contact with the employer and was capable of accepting suitable work from them during each of the weeks at issue. As to subpart (B), the employer informed claimant at the time of his October 7, 2022 layoff that they expected some business soon that would enable claimant to have full-time work and hoped claimant would be laid off for no longer than two to three weeks. This is sufficient to establish that claimant had a reasonable expectation that he would be returning to full-time work for his regular employer and thus fulfills OAR 471-030-0036(5)(b)(B).

That a Department adjudicator believed claimant listed November 18, 2022 as claimant’s return to work date on his initial claim form does not change the analysis. Claimant testified credibly that he “never

gave a date” of his anticipated return to work on his initial claim form. Audio Record at 24:30. Instead, on or around the time of his initial claim filing he “just said two or three weeks lay off to somebody” in a conversation with a Department representative, he “never said this is the exact date I’m going back to work.” Audio Record at 24:32. Based on claimant’s testimony, it is more likely than not that the November 18, 2022 return to work information appearing on the claim form was added by a Department representative when claimant contacted the Department for assistance with his claim and thus did not actually reflect when claimant expected to return to work. In light of claimant’s credible testimony and that the burden of persuasion rests on the Department, the adjudicator’s belief that the initial claim form listed November 18, 2022 as claimant’s return to work date was not sufficient to show that claimant lacked a reasonable expectation of returning to full-time work for his regular employer per subpart (B).

Finally, as applicable here, subparts (C) and (D) provide that the Department does not consider someone to be a temporarily unemployed individual if their length of unemployment is longer than four weeks between their last day worked and the week the individual returns to work. Here, claimant’s last day worked was October 7, 2022 and he had not returned to work for the employer as of December 23, 2022, a period of time longer than four weeks. However, given that the actively seeking work requirement is assessed on a week-by-week basis, it is reasonable to interpret subparts (C) and (D) to mean that if a layoff exceeds four weeks, a claimant will *no longer* be considered a temporarily unemployed individual.

The alternative interpretation would be to read the subparts as authorizing the Department to view someone who met the criteria to be a temporarily unemployed individual for the first few weeks of their claiming sequence to not actually have been temporarily unemployed because it turned out—in hindsight—that the individual’s period of unemployment lasted longer than four weeks. Under this view, the person would be denied temporarily unemployed individual status, and therefore be deemed to have not actively sought work, retroactively. This interpretation runs counter to assessing an individual’s actively seeking work status on a week-by-week basis, which in turn suggests that it is an unreasonable interpretation and not one the Department would employ.

Indeed, the record evidence lacked an indication that the Department viewed subparts (C) and (D) under this latter interpretation. The Department witness testified that the reason the Department deemed claimant ineligible was because it concluded that claimant did not have a reasonable expectation of returning to work for the employer, which reflects a view that claimant failed to meet subpart (B), not (C) and (D). Audio Record at 16:27 to 17:02. For these reasons, this decision proceeds with the interpretation that subparts (C) and (D) mean that if a layoff exceeds four weeks, a claimant will *no longer* be considered a temporarily unemployed individual after the initial four weeks have elapsed. Therefore, claimant was a temporarily unemployed individual because he fulfilled subparts (A) and (B) of OAR 471-030-0036(5)(b) and remained a temporarily unemployed individual per subparts (C) and (D) during the weeks at issue, as his period of unemployment had not exceeded four weeks during those weeks.

Because claimant was a temporarily unemployed individual, he was not required to make five work-seeking activities per week to count as actively seeking work. Instead, to actively seek work during the weeks at issue, it was sufficient for claimant to remain in contact with his regular employer, and be capable of accepting any suitable work from them. Claimant remained in contact with the employer and was capable of accepting work from them during the weeks at issue.

Thus, claimant actively sought work during the weeks at issue and was eligible to receive unemployment insurance benefits for those weeks.

DECISION: Order No. 22-UI-210962 is set aside, as outlined above.

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

DATE of Service: March 10, 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

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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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