

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0349

Reversed
Eligible Weeks 30-21 through 32-21

PROCEDURAL HISTORY: On October 21, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was out of her labor market and not available for work for the week of July 25, 2021 through July 31, 2021 (week 30-21) and was therefore not eligible to receive unemployment insurance benefits for that week (decision # 55020). Also on October 21, 2021, the Department served notice of an administrative decision concluding that claimant had missed opportunities to work during the weeks including August 1, 2021 through August 14, 2021 (weeks 31-21 through 32-21) and was not available for work, and therefore was ineligible to receive benefits for those weeks (decision # 55744). Claimant filed timely requests for hearing on decisions # 55020 and 55744. On March 3, 2023 at 8:15 a.m. and 9:30 a.m., ALJ Nyberg conducted separate hearings on # 55020 and 55744, respectively.¹ On March 10, 2023, ALJ Nyberg issued Order No. 23-UI-218701, affirming decision # 55774 by concluding that claimant did not actively seek work during weeks 31-21 through 32-21 and therefore was ineligible to receive benefits for those weeks. On March 15, 2023, ALJ Nyberg issued Amended Order No. 23-UI-219111, affirming decision # 55020 by concluding that claimant was not available for work, and did not actively seek work, during week 30-21 and therefore was ineligible to receive benefits for that week.² On March 22, 2023, claimant filed applications for review of Order No. 23-UI-218701 and Amended Order No. 23-UI-219111 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order No. 23-UI-218701 and Amended Order No. 23-UI-219111 For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2023-EAB-0348 and 2023-EAB-0349).

¹ The administrative decisions at issue in each of the respective hearings were transposed, such that the testimony taken during the hearing on decision # 55020 actually related to the weeks at issue in decision # 55744, and vice versa. To avoid further confusion, citations to the respective audio recordings of the hearings in this decision will identify the hearings by the date and time of the hearing, rather than the order number with which the respective record is associated.

² Amended Order No. 23-UI-219111 amended Order No. 23-UI-218718, issued March 10, 2023, in order to correct errors in the original order.

FINDINGS OF FACT: (1) On August 2, 2021, claimant filed an initial claim for unemployment insurance benefits. Claimant subsequently claimed benefits for the weeks including July 25, 2021 through August 14, 2021 (weeks 30-21 through 32-21). These are the weeks at issue. The Department paid claimant benefits for the weeks at issue.

(2) Claimant lived in Eagle Point, Oregon and worked as a medical biller for the employer. The Department determined that claimant's labor market for this type of work was Medford, Central Point, and Eagle Point, Oregon, and that this type of work was customarily performed in claimant's labor market Monday through Friday during the day shift.

(3) In June 2021, claimant submitted a request to the employer that she be permitted to take time off from work in July 2021 in order to travel to Ione, Washington and work on a rental trailer she and her husband owned there. In particular, claimant requested to take the week of July 18, 2021 through July 24, 2021 off entirely; and then to be allowed to perform her work remotely from Washington for the week of July 25, 2021 through July 31, 2021. The employer granted claimant's request.

(4) On July 18, 2021, while claimant and her husband were en route to Washington, claimant began experiencing symptoms of COVID-19 and, later that night, tested positive for COVID-19. Claimant and her husband nevertheless continued on to Washington the following day and stayed there as planned, returning on July 30, 2021. However, for the duration of their stay in Washington, claimant was too ill with COVID-19 to be able to perform her work. Had claimant been physically able to work, she would have performed her work remotely during the week of July 25, 2021 through July 31, 2021.

(5) Claimant remained ill and largely unable to work due to her COVID-19 infection until about August 12, 2021. This caused claimant to miss her regularly-scheduled shifts for the employer on August 2, 3, and 4, 2021. On August 5, 2021, claimant returned to work for the employer because there were tasks that the office needed done which only she was able to perform. Claimant worked for about six hours that day, but the effort so exhausted claimant that she was unable to work for several days afterwards.

(6) On the evening of August 6, 2021, claimant and her husband returned to Ione, Washington so that her husband could continue working on their rental trailer. Claimant and her husband remained there until August 9, 2021, at which point they returned home to Oregon.

(7) Claimant missed work again on August 10 and 11, 2021 because she remained ill with COVID-19 symptoms. On August 12, 2021, claimant was well enough that she returned to work for the employer.

(8) During the weeks at issue, claimant did not look for work or perform any work seeking activities other than keeping in touch with the employer.

CONCLUSIONS AND REASONS: Claimant was available for work, and actively sought work, under the applicable rules during the weeks at issue.

Actively seeking work. To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed as defined by OAR 471-030-0036(5)(a) (December 27, 2020 through September 25, 2021); ORS 657.155(1)(c). However, 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 (4) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility (March 8, 2020), <http://records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/7604239>, provides the following:

The federal Families First Coronavirus Response Act permits states to temporarily modify their unemployment insurances laws regarding work search requirements on an emergency basis to respond to the spread of COVID-19 (Section 4102(b)). Because of the vital importance to public health and safety of mitigating the spread of COVID-19, social distancing measures must be maintained. Accordingly, effective the week ending March 28, 2020, notwithstanding OAR 471-030-0036, and unless otherwise notified in writing by the Employment Department, a person will be considered actively seeking work for purposes of ORS 657.155 if they are willing to look for work when state and local emergency declarations related to the coronavirus expire or otherwise are no longer in effect.

The orders under review concluded that claimant was ineligible to receive benefits for the weeks at issue because she did not perform work seeking activities other than contacting her regular employer, and therefore did not actively seek work during the weeks at issue. Order No. 23-UI-218701 at 5; Amended Order No. 23-UI-219111 at 5. The record does not support these conclusions.

Under paragraph (4) of the OED Temporary COVID-19 Rule, which was effective through September 25, 2021, individuals were, unless otherwise notified in writing by the Department, considered to be actively seeking work if they were willing to look for work when state and local emergency declarations related to the coronavirus expired or otherwise were no longer in effect. At hearing, the ALJ asked the Department's witness if claimant had been sent an email advising her to resume actively seeking work as of July 25, 2021, but the Department's witness testified only that claimant was advised when she filed her initial claim that she must "begin seeking actively seeking work immediately," as she filed her initial claim when the "work search requirements were back in full force and effect." March 3, 2023 9:30 a.m. Audio Record at 14:45 to 15:30. By contrast, claimant testified at hearing that she was never given notice that the actively-seeking-work requirements had changed. March 3, 2023 9:30 a.m. Audio Record at 24:10. Neither party offered evidence to corroborate their assertions, so the evidence is equally balanced as to whether claimant was given written notice that she was required to perform work seeking activities for the weeks at issue.

The Department bears the burden in this case.³ As such, the Department has not met their burden to show by a preponderance of the evidence that claimant was given written notice that she was required to perform work seeking activities for the weeks at issue. Therefore, claimant's only duty under the actively seeking work requirement applicable to her during the weeks at issue was to be willing to look for work when state and local emergency declarations related to the coronavirus expire or otherwise were no longer in effect. The record does not show that claimant was unwilling to comply with this requirement. Therefore, it is reasonable to infer that she was so willing. As a result, claimant met the actively seeking work requirements for the weeks at issue and is not ineligible for benefits on that basis.

³ *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).

Available for work. To be eligible to receive benefits, unemployed individuals must, in relevant part, be available for work during each week claimed. ORS 657.155(1)(c). Under OAR 471-030-0036(3), for an individual to be considered “available for work” for purposes of ORS 657.155(1)(c), they must, in relevant part, be:

* * *

(d) Physically present in the normal labor market area as defined by section (6) of this rule, every day of the week, unless:

(A) The individual is actively seeking work outside his or her normal labor market area;
or

(B) The individual is infrequently absent from the normal labor market area for reasons unrelated to work search, for less than half of the week, and no opportunity to work or referral to work was missed by such absence.

* * *

Under OAR 471-030-0036(6)(a), an individual's normal labor market shall be that geographic area surrounding the individual's permanent residence within which employees in similar circumstances are generally willing to commute to seek and accept the same type of work at a comparable wage. The geographic area shall be defined by employees of the adjudicating Employment Department office, based on criteria set forth in this section[.]

The record shows that claimant was in Washington for only two days in each of weeks 31-21 and 32-21. As such, she was absent from her normal labor market area for less than half of each of those weeks, and was not considered unavailable for work under OAR 471-030-0036(3). However, claimant *was* absent from her normal labor market for more than half of week 30-21, as she was in Washington for six days that week. Amended Order No. 23-UI-219111 concluded that claimant was therefore not available for work during that week. Amended Order No. 23-UI-219111 at 5. The record does not support this conclusion.

Under OAR 471-030-0036(3)(d)(A), an individual is not considered unavailable for work during a particular week if they are outside of their normal labor market that week but are actively seeking work outside their normal labor market area. Paragraph (4) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility considered a person to be “actively seeking work” for purposes of ORS 657.155 if they are willing to look for work when state and local emergency declarations related to the coronavirus expire or otherwise are no longer in effect. As discussed above, that definition of the term applies to claimant’s circumstances, and claimant likewise met the applicable “actively seeing work” requirement during the weeks at issue. Thus, even if claimant was not performing work seeking activities while she was absent from her labor market during week 30-21, she was nevertheless *actively seeking work* while outside of her normal labor market. As a result, claimant was not unavailable for work during week 30-21, and is not ineligible for benefits on the basis of being unavailable for work.

DECISION: Order No. 23-UI-218701 and Amended Order No. 23-UI-219111 are set aside, as outlined above.

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

DATE of Service: May 4, 2023

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.

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.

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 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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