

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0482

Affirmed
Requests to Reopen Allowed
Eligible Week 43-22

PROCEDURAL HISTORY: On November 17, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work during the week of October 23, 2022 through October 29, 2022 (week 43-22) and was therefore ineligible to receive unemployment insurance benefits for that week (decision # 113154). Claimant filed a timely request for hearing. On January 3, 2023, notice was mailed to the parties that a hearing was scheduled for January 11, 2023. Claimant failed to appear at the hearing, and on January 12, 2023, ALJ Roberts issued Order No. 23-UI-212396, dismissing claimant's request for hearing due to his failure to appear. On January 26, 2023, claimant filed a timely request to reopen the January 11, 2023, hearing.

On September 11, 2023, notice was mailed to the parties that a hearing was scheduled for September 20, 2023. Claimant failed to appear at the hearing, and on September 20, 2023, ALJ Roberts issued Order No. 23-UI-236259, denying claimant's request to reopen the January 11, 2023 hearing due to his failure to appear and leaving Order No. 23-UI-212396 undisturbed. On September 30, 2023, claimant filed a timely request to reopen the September 20, 2023 hearing. On May 7, 2024 and continuing on May 10, 2024, ALJ Mellor conducted a hearing at which the Department failed to appear, and on May 28, 2024 issued Order No. 24-UI-255112, cancelling Orders No. 23-UI-236259 and 23-UI-212396, allowing claimant's requests to reopen the September 20, 2023, and January 11, 2023, hearings, and reversing decision # 113154 by concluding that claimant was available for work during week 43-22 and was eligible to receive unemployment insurance benefits for that week. On June 4, 2024, the employer filed an application for review of Order No. 24-UI-255112 with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

The employer asserted that the hearing proceedings were unfair or the ALJ was biased. Specifically, the employer asserted that the hearing was unfair because they were not allowed to cross-examine claimant about the location and use of his P.O. Box. Employer's Argument at 1. At the time the employer

attempted to engage in this line of questioning, which was curtailed by the ALJ as irrelevant to the issue then under consideration, the issue to be decided was solely whether claimant had good cause to reopen the *September 20, 2023* hearing. See *May 7, 2024 Transcript* at 15-16. Claimant had previously testified that he no longer used the P.O. Box as of June 2023 and that he advised the Department of this change of address in August 2023, prior to notice of the *September 20, 2023* hearing being mailed. *May 7, 2024 Transcript* at 10-11. As the employer did not attempt to rebut this testimony, further information regarding the P.O. Box was not relevant to determining why claimant missed the *September 20, 2023* hearing, and was properly excluded by the ALJ.

Once the ALJ ruled that claimant's request to reopen the *September 20, 2023* hearing was allowed, the issue to be decided then became whether claimant's request to reopen the *January 11, 2023* hearing should be allowed. Claimant's use of the P.O. Box in *January 2023* was relevant to this issue, as the record shows that claimant discovered the notice of that hearing on *January 23, 2023*, in the P.O. Box, after failing to check the P.O. Box for a period of time. The employer asked claimant two questions regarding the P.O. Box during cross-examination regarding this issue, which were answered, and the employer was not prevented by the ALJ from posing further questions to claimant or calling witnesses of their own on the issue. *May 7, 2024 Transcript* at 24. EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

FINDINGS OF FACT: (1) On February 14, 2022, claimant filed an initial claim for unemployment insurance benefits that the Department determined to be monetarily valid.¹ Claimant thereafter made weekly claims for benefits, including for the week of October 23, 2022 through October 29, 2022 (week 43-22). This is the week at issue. The Department paid claimant benefits for the week at issue.

(2) In October 2022, Omega Morgan Sarens, LLC employed claimant in the construction of a solar collection facility. On October 21, 2022, claimant's foreman told claimant that he would not be needed for work during the following week due to weather conditions. Claimant confirmed this with the foreman on October 27, 2022. The employer did not attempt to recall claimant to work until he returned to work on October 31, 2022, as planned.

(3) In the afternoon of Thursday, October 27, 2022, claimant left for a hunting trip and returned to his home in the morning of October 30, 2022. *May 7, 2024 Transcript* at 28. The trip was not undertaken for the purpose of seeking or engaging in work. Claimant did not miss any offers of work or work referrals while on the trip.

(4) On November 17, 2022, the Department issued decision # 113154. Claimant received the decision and filed a timely request for hearing on December 4, 2022.

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.

(5) On December 19, 2022, the Office of Administrative Hearings (OAH) mailed claimant a letter at his P.O. Box in Redmond, Oregon, stating, “We will schedule your hearing as quickly as we can, but please be aware that it may be several months before we contact you.” Exhibit 3 at 7. The letter further stated, “If you have not received a Notice of Hearing within four months of the date of this letter, please contact us[.]” Exhibit 3 at 7.

(6) In January 2023, claimant was living approximately 70 miles from his P.O. Box. Claimant believed that this was the best location to receive his mail because he traveled frequently around central Oregon and the place where he resided did not have a private mailbox. Claimant checked the P.O. Box approximately every two weeks due to his work schedule and the distance of the post office from his residence.

(7) On January 23, 2023, claimant checked the P.O. Box and discovered the notice of the January 11, 2023 hearing, which had been mailed January 3, 2023. On January 26, 2023, claimant filed a request to reopen the January 11, 2023 hearing and included a statement explaining that he missed the hearing due to his late receipt of the notice.

(8) In June 2023, claimant stopped using the P.O. Box and began receiving mail at a street address in Prineville, Oregon. A change of address was filed with the post office.

(9) In August 2023, claimant updated his mailing address with the Department to the street address in Prineville when he filed a reopened claim.

(10) On September 11, 2023, OAH mailed notice of the September 20, 2023 hearing to claimant’s former P.O. Box. Claimant did not receive it until “two weeks after the hearing.” May 7, 2024 Transcript at 4. On September 20, 2023, Order No. 23-UI-236259 was mailed to the P.O. Box, but was forwarded by the U.S. Postal Service to claimant’s street address on or before September 30, 2023. On September 30, 2023, claimant filed a request to reopen the September 20, 2023, hearing and included a statement explaining that he missed the hearing due to not receiving the notice.

CONCLUSIONS AND REASONS: Claimant’s requests to reopen the January 11, 2023 and September 20, 2023 hearings are allowed. Claimant was available for work during week 43-22.

Requests to reopen. ORS 657.270(5) provides that any party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and shows good cause for failing to appear. “Good cause” exists when the requesting party’s failure to appear at the hearing arose from an excusable mistake or from factors beyond the party’s reasonable control. OAR 471-040-0040(2) (February 10, 2012). The party requesting reopening shall set forth the reason(s) for missing the hearing in a written statement, which the Office of Administrative Hearings (OAH) shall consider in determining whether good cause exists for failing to appear at the hearing. OAR 471-040-0040(3).

Each of claimant’s requests to reopen was filed within 20 days of the issuance of the order following the missed hearing, and contained an explanation for why the hearing was missed. Therefore, claimant met the threshold requirements for consideration of the requests.

September 20, 2023 hearing. Claimant missed the September 20, 2023 hearing because he was unaware that it had been scheduled. Claimant testified that he did not receive the hearing notice until after the hearing, and later learned that the notice had been mailed to his former P.O. Box. May 7, 2024 Transcript at 4-6. Under OAR 471-040-0040(2)(a), good cause to reopen a hearing exists when it was missed due to “[f]ailure to receive a document because the Employment Department or Office of Administrative hearings mailed it to an incorrect address despite having the correct address[.]” Claimant testified that he updated his address with the Department in August 2023, before the hearing notice was mailed. May 7, 2024 Transcript at 10-11. The record therefore shows that OAH mailed the notice of hearing to an incorrect address despite the Department having the correct address, causing claimant to miss the hearing. Accordingly, good cause exists under the rule to reopen the September 20, 2023 hearing, and claimant’s request to reopen is allowed.

January 11, 2023 hearing. Claimant missed the January 11, 2023 hearing because he was unaware that it had been scheduled. Claimant testified that he received the hearing notice at his P.O. Box on January 23, 2023, after the hearing had taken place. May 7, 2024 Transcript at 17. Claimant also testified that it had been “[p]robably at least two weeks” since he had last checked the P.O. Box. May 7, 2024 Transcript at 17. It is reasonable to infer that claimant was not expecting a hearing notice to be sent approximately two weeks after OAH’s December 19, 2022 letter stating that it may be “several months” before he would be contacted regarding his request for hearing, and that he should check with OAH after four months if he was not contacted. Exhibit 3 at 7. Further, claimant’s explanation that he was living in a trailer that did not have its own mail receptacle, and that he frequently traveled around central Oregon for work and family matters, suggests that renting a P.O. Box in a location central to these travels but 70 miles from the trailer was not unreasonable under the circumstances. Because of that distance, failing to check the P.O. Box more frequently than every other week, when time-sensitive correspondence from OAH was not reasonably anticipated, was an excusable mistake. Accordingly, claimant has shown good cause for missing the hearing, and his request to reopen the January 11, 2023 hearing is allowed.

Availability for work. Where the Department has paid benefits, it has the burden to prove benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). 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
- (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; and

(d) Physically present in the normal labor market area as defined by [OAR 471-030-0036(6) (March 25, 2022)], 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.

* * *

OAR 471-030-0036(3).

As the Department did not participate in the hearing, it is unclear what it considered to be claimant's normal labor market area. However, it is possible to infer from claimant's testimony at hearing, agreeing that he was "basically in the wilderness" for the duration of his hunting trip, that he may have been outside of his labor market during that trip, which took place, in part, during the week at issue. May 7, 2024 Transcript at 26. However, even if the trip took claimant outside of his normal labor market area, he was absent for less than half of the week at issue. Claimant testified that the trip began in the afternoon of Thursday, October 27, 2022 and continued through the end of the benefit week on Saturday, October 29, 2022. May 7, 2024 Transcript at 25. The testimony of the employer's witness tended to corroborate claimant's account regarding these dates. *See* May 7, 2024 Transcript at 37-38. As this period was less than three full days, it constituted less than half of the benefit week.

The employer asserted at hearing that, prior to leaving on the hunting trip, claimant had been offered continuing work for the days he would be on the trip, and presented hearsay testimony that claimant's foreman reported that claimant declined the offer of work and instead asked for time off to take the trip. May 7, 2024 Transcript at 31; May 10, 2024 Transcript at 12. Claimant gave a contrasting hearsay account, testifying that his foreman told him on October 21, 2022 that there would be no work for him "that following week" due to anticipated weather conditions which would prevent work from being done on the project to which claimant was assigned, and that claimant confirmed this with the foreman on October 27, 2022 before leaving on the trip. May 10, 2024 Transcript at 6. As these hearsay accounts are no more than equally balanced, the Department has not met its burden of showing by a preponderance of the evidence that claimant was unwilling to accept a work opportunity from the employer for the days he was absent or that he missed such an opportunity because of his hunting trip, and the facts have been found accordingly. Therefore, the Department has failed to show that claimant's trip was not an infrequent absence as described in OAR 471-030-0036(3)(d)(B), or that claimant was otherwise unwilling to work or unavailable for work during the week at issue.

For these reasons, claimant was available for work and eligible to receive unemployment insurance benefits for week 43-22.

DECISION: Order No. 24-UI-255112 is affirmed.

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

DATE of Service: July 10, 2024

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 desisyong ito.

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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