

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0393**

*Reversed*  
*Eligible*

**PROCEDURAL HISTORY:** On March 11, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work during the weeks of January 20, 2019 through February 23, 2019 (decision # 133131). Claimant filed a timely request for hearing. On April 3, 2019, ALJ Frank conducted a hearing, and on April 11, 2019 issued Order No. 19-UI-127999, concluding that claimant was not able to work during the weeks of January 20, 2019 through March 16, 2019. On April 22, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but failed to certify that she provided copy of the argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record and claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). For these reasons, EAB did not consider claimant's argument or new information when reaching this decision.

**FINDINGS OF FACT:** (1) As of September 2018, Lakeview Senior Living employed claimant as a lifestyle assistant. In September 2018, claimant was injured away from the workplace and broke both of her wrists, the right much more severely than the left. After the injury, the employer authorized a leave of absence for claimant under the Family & Medical Leave Act (FMLA) due to her injuries.

(2) Sometime in approximately late January 2019, claimant's FMLA leave ended. As of that time, claimant's physician released her to work with restrictions. The restrictions included no driving, no pulling or pushing using her right hand or wrist, and no lifting in excess of two pounds with her right hand and wrist. There were no restrictions on claimant's use of her left wrist and hand. The restriction on driving was put in place because claimant's job as a lifestyle assistant required her to drive the employer's activity bus transporting residents, which was difficult for claimant because she needed to use both hands and wrists. Claimant's physician told her that the healing of her right wrist was ongoing and she should look for work that was suitable in light of the progress in healing.

(3) On January 24, 2019, claimant filed an initial claim for unemployment insurance benefits. Claimant's claim was determined valid. Claimant claimed benefits for the weeks of January 20, 2019 through March 16, 2019 (weeks 04-19 through 11-19), the weeks at issue. The Department paid claimant benefits for weeks 04-19 through 08-19, and did not pay benefits to claimant for weeks 09-19 through 11-19.

(4) During the weeks at issue, claimant sought various types of light duty work from potential employers. Because claimant had no left wrist restrictions, she considered herself capable of performing tasks where the use of the left wrist or hand could be substituted for the use of the right or where use of her right wrist did not require her to exert force or bear weight. Claimant told potential employers that her right wrist was healing and would get better, but she might initially require assistance if she had to perform some tasks, like lifting, with her right hand. Claimant practiced typing on her home laptop and determined that she was able to type using both hands, including her right hand, if she was careful. Despite her right hand and wrist limitations, claimant was able to answer and place phone calls and to speak on phones. Claimant concluded she was able to perform some non-lifting types of office and clerical work.

(5) During week 04-19, claimant sought light duty work from the employer. Claimant and an employer representative discussed the physical requirements of various tasks that the employer needed to have performed in the facility. Claimant told the employer representative that, despite her restrictions, she was able to perform light housekeeping work and to assist in the dining room. The employer did not offer claimant any light duty work. During week 04-19, claimant also sought work as a billing office clerk with Pacific West Ambulance.

(6) During week 05-19, claimant sought work as a cashier with Bi-Mart and as cashier with Grocery Outlet. During week 06-19, claimant sought work a teller with Wells Fargo Bank and any position with the United States Postal Service. During week 07-19, claimant sought work as a sale associate with Kitchen Collection and as an office support clerk with Chester's Thriftway. During week 08-19, claimant sought work as a sales associate with Famous Footwear and as a sales associate with Bi-Mart.

(7) During week 09-19, claimant sought work as a sales associate with Grocery Outlet and as a sale associate with Bi-Mart. Sometime around approximately week 10-19, the weight restriction on claimant's use of her right wrist and hand was modified to include weights up to five pounds. During week 10-19, claimant sought work as a sales associate at Ace Hardware and as a desk salesperson at Les Schwab. During week 11-19, claimant sought work as a sales associate at Grocery Outlet and as a sales associate at Goodwill Industries. Goodwill hired claimant despite her restrictions. At Goodwill, claimant's duties after she was hired included cashiering and putting away clothes.

**CONCLUSIONS AND REASONS:** Claimant was able to work during the weeks at issue.

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). An individual is considered able to work for purposes of ORS 657.155(1)(c) only if physically and mentally capable of performing the work the individual is actually seeking during all of the week. OAR 471-030-0036(2) (April 1, 2018).

Order No. 19-UI-127999 concluded that claimant was not able to work during the weeks at issue. In reaching this conclusion, the Order relied principally on the finding that “claimant conducted a work search primarily consisting of contacts with retailers offering work that generally required the lifting or handling of objects weighing in excess of what claimant was allowed to lift [five pounds].” Order No. 19-UI-127999 at 3; *see also* Order No. 19-UI-127999 at 2. However, Order No. 19-UI-127999 must be reversed because it is not supported by the record.

At the outset, there is a lack of evidence in the record that claimant was not physically capable of performing the work that she applied for during the weeks at issue. The principal evidence about the physical requirements of the work that claimant applied for during the weeks at issue was the conclusory statement of the Department representative that cashiering in grocery stores and retail stores like Goodwill generally required lifting in excess of claimant’s restrictions, which were either two or five pounds depending on the benefit week. Audio at ~18:38. While as a matter of common sense, it might be difficult for claimant to secure a cashier, sales associate or clerking job with a weight restriction of two or five pounds, the mere existence of such a restriction does not, in and of itself, mean that claimant was seeking work she was not physically able to perform. Claimant was not restricted in using her left hand or wrist, and the evidence did not show that claimant would not be able to substitute her left hand or wrist for her right one on occasion if required to perform tasks that otherwise might involve the use of her right hand or wrist. The preponderance of the evidence also failed to show that the potential employers from whom claimant sought work considered claimant unable to perform the work she was seeking, or would not have hired claimant and accommodated her work restrictions, either by placing her on restricted duty or making assistance available to her. That Goodwill hired claimant and put her to work despite her restrictions suggests otherwise.

Assessing claimant’s actual work searches for the weeks at issue also demonstrates that the record fails to show that claimant was incapable of performing the work that she sought. With respect to week 04-19, claimant testified that she was able to perform some light duty tasks for the employer that would have been within her restrictions if the employer had allowed her to do so, and the record fails to show otherwise. As to billing clerk work, there was no evidence as to the nature of its duties or that claimant was not physically able to perform those duties. With respect to week 05-19, there was a lack of specific evidence about the requirements of the cashier positions for which claimant applied and whether she was incapable of performing them.

With respect to the positions that claimant applied for in week 06-19, bank teller and a worker with USPS, there was no specific evidence of the physical requirements of those positions, or that they were outside claimant’s work restrictions. With respect to the jobs for which claimant applied in the remaining weeks, weeks 07-19 through 11-19, those of sales associate, cashier and desk sales person, there was no specific evidence about their duties, that they were outside claimant’s restrictions, or that she was incapable of performing them. Moreover, as previously mentioned, Goodwill hired claimant for the position she inquired into in week 11-19, which shows that claimant was capable of performing the work for which it hired her despite her restrictions.

On this record, the record fails to show that claimant was incapable of performing the work she sought during the weeks at issue. Claimant therefore is eligible to receive benefits for those weeks.

**DECISION:** Order No. 19-UI-127999 is set aside, as outlined above.

J. S. Cromwell and D. P. Hettle;  
S. Alba, not participating.

**DATE of Service: May 29, 2019**

**NOTE:** This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks 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](http://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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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