

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0770**

*Reversed*  
*Eligible*

**PROCEDURAL HISTORY:** On July 5, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from March 31, 2019 to June 22, 2019, and until the reason for the denial had ended (decision # 120117). Claimant filed a timely request for hearing. On July 23, 2019, ALJ Seideman conducted a hearing, and on July 30, 2019 issued Order No. 19-UI-134160, modifying decision # 120117 and concluding that claimant was not available for work from March 31, 2019 to May 4, 2019, May 12, 2019 to June 29, 2019, and July 7, 2019 to July 13, 2019. On August 14, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Claimant filed weekly claims for benefits for weeks including March 31, 2019 to May 4, 2019 (weeks 14-19 to 18-19), May 12, 2019 to June 29, 2019 (weeks 20-19 to 26-19), and July 7, 2019 to July 13, 2019 (week 28-19), the weeks at issue.

(2) During the weeks at issue, claimant sought work as a recruiter and human resources professional. Claimant's labor market included Banks, Forest Grove, Gaston, Yamhill, Hillsboro, and McMinnville, Oregon. In claimant's labor market, recruiter and human resources work were performed Mondays through Fridays from 8:00 a.m. to 5:00 p.m.

(3) During late March or early April 2019, claimant began exploring a self-employment opportunity. Claimant's father-in-law owned a farm and had planted several acres of hemp that would be ready to harvest and extract in September and October 2019; he also had one or more empty buildings available for claimant's use. Claimant began considering opening a CBD extraction and product business and began to spend time researching and preparing to open the business.

(4) While exploring self-employment, claimant continued to seek full-time work. Claimant needed to work to help support her family and planned to accept any offer of work she received and perform tasks in furtherance of self-employment around her work schedule if it was possible. Claimant's husband supported the self-employment efforts, helped her with preparatory activities, and would oversee any self-employment venture if claimant obtained a job with another employer that conflicted with the LLC.

(5) On June 18, 2019, claimant registered Forest Edge CBD, LLC with the Oregon Secretary of State's business registry. In sum, claimant invested \$5,000 in her LLC during the weeks at issue and obtained some permits or licenses; however, she did not draw any income, pay herself, or pay any employees, nor did the business have any equipment, conduct any business, or produce any product. At all relevant times, claimant continued to seek full-time work elsewhere and planned to work for the LLC around her work schedule while maintaining full-time work elsewhere, at least until the LLC became profitable enough to support her family.

(6) Claimant reported to the Department during a July 2019 phone call that she would do both full-time employment and self-employment if she was able to obtain a job elsewhere.

**CONCLUSIONS AND REASONS:** Claimant was available for 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). 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

\* \* \*

(c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time; \* \* \*

OAR 471-030-0036(3) (April 1, 2018). The order under review concluded that claimant was not available for work; however, the record does not support that conclusion.

As a preliminary matter, the order under review found as fact, apropos of nothing, "Claimant has four kids at home (two are hers, two step-sons) and she is pregnant." Order No. 19-UI-134160 at 2. The ALJ then reasoned, "Another factor which could interfere with the overall situation is that she has two children, two step-children and is pregnant. I conclude that claimant has enough going on that she is not available for all suitable work." *Id.* at 3.

There is nothing in this record that suggests that claimant's status as a parent or any associated childcare obligations she might have had interfered with her availability for work. After claimant made reference to the importance of working – whether full-time or in self-employment – to support her family, the ALJ asked, "Do you have kids at home, is that what you're saying?" and claimant replied that she did and was expecting another.<sup>1</sup> Audio record at 19:30-19:45. The ALJ did not further inquire as to whether or how that affected claimant's availability during the weeks at issue, nor did the Department allege that it

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<sup>1</sup> The record evidence shows that claimant was "expecting" a child, but did not reflect whether claimant was pregnant or expecting the child through another means such as adoption, surrogacy, or fostering. The ALJ's conclusion that claimant was pregnant is not supported by any evidence in this record.

did. Yet the ALJ concluded that claimant's children and a pregnancy interfered with her availability and that she should be ineligible for benefits at least in part on that basis. We reject the ALJ's findings and conclusions as wholly unsupported by the record; absent actual *evidence*, the ALJ's remarks amounted to nothing more than gratuitous and specious commentary, which has no place in an unemployment insurance hearing, and should not factor into any decision to deny a person benefits.

We turn now to the issue presented by this case, which is whether claimant's efforts to enter self-employment suggested that she more likely than not was not available for work. The order under review stated that claimant was not available for work because – assuming she gained employment and her self-employment venture got off the ground – the ALJ did “not find it credible that she would continue the outside employment.” Order No. 19-UI-134160 at 3. Neither the record nor the law support that conclusion.

First, claimant did not claim at the hearing or elsewhere that she would never leave work to pursue self-employment in the future; she therefore cannot be deemed to lack credibility for having done so. Second, individuals are only required to be available for work on a week-by-week basis during the weeks they actually claim benefits. No individual is required under ORS chapter 657 to guarantee that they will be available for work indefinitely, or will never leave a job to enter self-employment, as a condition of receiving benefits. It is therefore both speculative and irrelevant to a determination of claimant's availability during the weeks at issue that claimant might, at some unknown future time, choose to leave employment she does not yet have to focus on her LLC that is not yet doing business.<sup>2</sup>

Finally, during the weeks at issue, claimant provided unrefuted testimony that she actively pursued full-time employment with other employers, that she would accept any work she found in order to support her family, and that she would continue working for another employer despite her self-employment activities. Claimant also provided unrefuted testimony that if her self-employment and full-time employment activities conflicted with each other, she would pursue full-time employment and her husband would oversee the LLC. There is nothing internally inconsistent about claimant's testimony to that effect during the hearing. Notably, claimant's testimony was also consistent with what she told the Department representative during the July 2019 phone call, and what she wrote on her request for hearing. Nothing in this record suggests claimant lacked credibility or that her testimony was anything less than reliable evidence of her availability for work.

It is more likely that not based upon the evidence in this record that claimant was in fact available for work during the weeks at issue despite her self-employment efforts. She is therefore not ineligible for benefits on the basis of those activities.

**DECISION:** Order No. 19-UI-134160 is set aside, as outlined above.

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<sup>2</sup> If there was record evidence suggesting that claimant warned prospective employers that – if hired – she anticipated asking for a lot of time off work to pursue self-employment, or planned to leave work soon in favor of self-employment, claimant might be considered to have imposed conditions that substantially reduced her opportunities to return to work at the earliest possible time, and might therefore be considered ineligible for benefits under OAR 471-030-0036(3)(c). No such evidence exists in this case, however. Nothing suggests claimant notified prospective employers about the existence of her LLC, much less limited her work schedule or the duration of any possible employment because of the LLC.

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

**DATE of Service: September 18, 2019**

**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](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 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**

ទោរទៅ – តម្រូវការនេះមិនមែនជាបញ្ហាបច្ចេកទេសនៃការងារនោះទេ វាគឺជាបញ្ហាបច្ចេកទេសនៃការងាររបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**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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