

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0300**

*Order No. 20-UI-147787 Affirmed ~ Ineligible Week 05-20*  
*Order No. 20-UI-147790 Modified ~ Eligible Weeks 12-20 through 14-20*

**PROCEDURAL HISTORY:** On March 6, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not actively seeking work and ineligible to receive unemployment insurance benefits during the period from January 26, 2020 through February 1, 2020 (decision # 160247). On March 10, 2020, the Department served notice of another administrative decision concluding claimant was unavailable for work and ineligible for benefits during the period from January 26, 2020 through February 1, 2020 (decision # 105555). Claimant filed timely requests for hearing on decisions # 160247 and # 105555. On April 8, 2020, ALJ Griffin conducted a consolidated hearing on decisions # 160247 and # 105555, and on April 9, 2020, issued Order No. 20-UI-147787, affirming decision # 160247, and Order No. 20-UI-147790, modifying<sup>1</sup> decision # 105555, and concluding that claimant was not available for work and was ineligible for benefits from January 26, 2020 through February 8, 2020, and from March 8, 2020 through April 4, 2020. On April 13, 2020, claimant filed an application for review of Orders No. 20-UI-147787 and 20-UI-147790 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 20-UI-147787 and 20-UI-147790. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2020-EAB-0301 and 2020-EAB-0300).

**FINDINGS OF FACT:** (1) Abby's Pizza had employed claimant part time for about ten years to perform maintenance and janitorial work in the mornings at its Newberg, Oregon restaurant. On January 24, 2020, claimant's manager at Abby's Pizza laid claimant off work because the employer was remodeling the restaurant. Claimant's manager gave claimant "no specific time" and "didn't know for sure" when claimant would return to work. Transcript at 20.

<sup>1</sup> Order No. 20-UI-147790 states incorrectly that it affirmed decision # 105555, but it modified the decision by taking jurisdiction of additional weeks.

(2) At all relevant times, claimant was also self-employed part time in his lawn care business doing yard work for clients. Claimant worked doing yard work for his business between 11:00 a.m. and 5:00 p.m., when the weather permitted. His self-employment did not interfere with his work at Abby's Pizza.

(3) On January 29, 2020, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the period from January 26, 2020 through February 8, 2020 (weeks 05-20 through 06-20), and from March 8, 2020 through April 4, 2020 (weeks 11-20 through 14-20). The Department did not give claimant waiting week credit or pay him benefits for the weeks at issue. The Department's denial was based on claimant's failure to seek work during week 05-20, and his alleged lack of availability for work due to the restrictions his self-employment placed on his ability to accept full-time, part-time, or temporary work during all the weeks at issue.

(4) Claimant's labor market area was Dundee, Newberg and McMinnville, Oregon. Janitorial and maintenance work was customarily performed all days, during all shifts in claimant's labor market area. Lawn care work was customarily performed Monday through Friday, between 7:00 a.m. and 4:00 p.m. in claimant's labor market area.

(5) There was little yard work available during the weeks at issue due to rain. Claimant reported to the Department, "[S]ince it is raining I've not had much yard work." Transcript at 6. Claimant also stated to a Department representative that the rain was "really hitting [him]." Transcript at 7.

(6) During week 05-20, claimant did not look for work other than for his yard care business. Claimant did not look for other work because he expected to return to work for Abby's Pizza after the restaurant remodel was completed. During week 06-20, claimant's manager at Abby's Pizza told claimant that it would be an additional three to four weeks before claimant returned to work.

(7) Claimant was not willing to accept work other than from Abby's Pizza or self-employment during weeks 05-20, 06-20 and 11-20 because he planned to return to work for Abby's Pizza after it finished remodeling its restaurant. During week 11-20, claimant's manager at Abby's Pizza told claimant that he would return to work on March 28, 2020. Claimant did not return to work at Abby's Pizza after week 11-20 because the restaurant did not reopen during weeks 12-20 through 14-20 due to COVID-19.

**CONCLUSIONS AND REASONS:** Claimant did not actively seek work, and was not eligible to receive unemployment insurance benefits, from January 26, 2020 through February 1, 2020 (week 05-20). Claimant was not available for work, and was not eligible for benefits from January 26, 2020 through February 8, 2020, and from March 8, 2020 through March 14, 2020 (weeks 05-20, 06-20, and 11-20). Claimant was available for work and was eligible for benefits from March 15, 2020 through April 4, 2020 (weeks 12-20 through 14-20).

**Actively Seeking Work.** To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c); OAR 471-030-0036(5) (December 8, 2019). For purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a) (December 8, 2019). With limited exceptions, individuals are "required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might

hire the individual.” OAR 471-030-0036(5). For individuals who are temporarily unemployed, OAR 471-030-0036(5)(b) 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.

It is undisputed that claimant did not search for work during week 05-20, and the Department denied claimant benefits for week 05-20 for that reason. Claimant did not look for work other than self-employment during week 05-20 because he expected to return to work at Abby’s Pizza after it completed its remodel. Claimant reported to the Department when he claimed week 05-20 that he expected to return to work in “four weeks.” Transcript at 8. The issue is whether claimant was exempt from the standard work search requirements because he was “temporarily unemployed.”

When claimant filed his claim, he had a reasonable expectation that he would be returning to work for Abby’s Pizza. However, claimant did not have a reasonable expectation that his unemployment would not be greater than four weeks because his manager gave him “no specific time,” and “didn’t know for sure” when claimant would return to work. Transcript at 20. It was not until the week of March 8, 2020 that claimant’s manager told claimant that he expected claimant to return to work on March 28, 2020. Therefore, claimant did not meet his burden to show that the Department should have paid him benefits for week 05-20 because he was temporarily unemployed and actively seeking work during that week because the length of time between claimant’s last date of work with Abby’s Pizza and the week claimant reasonably expected to return to work was greater than four weeks. *See 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 principal, where benefits have not been paid claimant has the burden to prove that the Department should have paid benefits).

**Available for Work.** 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 \* \* \*.

\* \* \*

OAR 471-030-0036(3). Here, again, claimant has the burden to show that the Department should have paid him benefits.

Order No. 20-UI-147790 concluded that claimant was not available for work during all the weeks at issue because he imposed a condition which substantially reduced his opportunities to return to work at the earliest possible time by being “unwilling to curtail his self-employment activities to accommodate traditional employment.”<sup>2</sup> The order reasoned that, although claimant had some flexibility regarding his self-employment work schedule, that he was not available during all of the usual hours that the work he sought was customarily performed in his labor market, he was not available for work during any of the weeks at issue.<sup>3</sup> The record supports the order’s conclusion, but for different reasons, regarding weeks 05-20, 06-20, and 11-20. The record does not support the order’s conclusion regarding weeks 12-20 through 14-20.

At hearing, claimant testified that he “wouldn’t really wanna work at another [establishment]” while he believed he would be returning to Abby’s Pizza because once Abby’s Pizza called him back to work, claimant would “hate to have [to] tell the other guy, hey I gotta quit and I’m . . . gonna go back to my job that I love more [at Abby’s Pizza]. Transcript at 28. In other words, claimant was not willing to accept what he anticipated would be temporary work for an employer other than Abby’s Pizza, and have to quit work with that other employer once claimant returned to work at Abby’s Pizza. Because claimant was not willing to accept temporary work opportunities performing janitorial and maintenance work for another employer during weeks 05-20, 06-20 and 11-20, and absent evidence that accepting temporary work would have substantially interfered with claimant’s return to his regular employment at Abby’s

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<sup>2</sup> Order No. 20-UI-147790 at 3.

<sup>3</sup> Order No. 20-UI-147790 at 3.

Pizza, claimant was not available for work during those weeks. Claimant was not therefore eligible to receive benefits during those weeks.

However, claimant met his burden to show that he was available for work and eligible for benefits during weeks 12-20 through 14-20. During week 12-20, claimant learned that Abby's Pizza would not be reopening in March due to COVID-19. The record does not show that claimant continued to be unwilling to accept other work opportunities after he learned that Abby's Pizza would not be reopening in March. Nor does the record show that claimant's self-employment imposed a condition that "substantially" reduced claimant's opportunities to return to work at the earliest possible time. Claimant claimed weeks 12-20 through 14-20 because the weather reduced or eliminated his self-employment during those weeks. The record shows that claimant reported to the Department that he had, "not had much yard work" due to the rain during the weeks at issue. The record does not show that claimant's self-employment caused a conflict or potential conflict with a work opportunity during weeks 12-20 through 14-20. Therefore, the record does not show that claimant's self-employment "substantially" reduced his opportunities to return to work during weeks 12-20 through 14-20.

In sum, claimant did not actively seek work, and was not eligible to receive unemployment insurance benefits, from January 26, 2020 through February 1, 2020 (week 05-20). Claimant was not available for work, and was not eligible to receive benefits on that basis from January 26, 2020 through February 8, 2020, and from March 8, 2020 through March 14, 2020 (weeks 05-20, 06-20, and 11-20). Claimant was available for work and was eligible to receive benefits from March 15, 2020 through April 4, 2020 (weeks 12-20 through 14-20).

**DECISION:** Order No. 20-UI-147787 is affirmed. Order No. 20-UI-147790 is modified.

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

**DATE of Service:** May 14, 2020

**NOTE:** This decision modifies 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 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

**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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

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