

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0247**

*Order No. 21-UI-163107 Reversed & Remanded as to Weeks of April 12, 2020 through May 30, 2020*  
*Order No. 21-UI-163107 Vacated as to Weeks of November 22, 2020 through January 23, 2021*

**PROCEDURAL HISTORY:** On November 5, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was available for work and eligible to receive unemployment insurance benefits from April 12, 2020 through May 30, 2020 (decision # 144959). The employer filed a timely request for hearing. On March 15, 2021, ALJ Hoppe conducted a hearing, and on March 22, 2021 issued Order No. 21-UI-163107, reversing decision # 144959 and concluding that claimant was not available for work and therefore ineligible to receive unemployment insurance benefits from April 12, 2020 through May 30, 2020, and November 22, 2020 through January 23, 2021.<sup>1</sup> On April 1, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**JURISDICTIONAL RULING:** The ALJ erred in considering evidence about and deciding the issue of claimant's availability for work from November 22, 2020 through January 23, 2021. Order No. 21-UI-163107 therefore is vacated as to those weeks.

The Department sometimes issues open-ended decisions that deny benefits for a particular period and until the circumstances change. In this case, however, the Department's administrative decision addressed only the specific period of April 12, 2020 through May 30, 2020, for which it allowed benefits. ORS 657.270(4)(b) and OAR 471-040-0025(8) (August 1, 2004) permit an ALJ to "address issues raised by evidence in the record, including . . . continued claims filed subsequent to the issuance of [an administrative decision]," and to "hear and enter a decision on any issue not previously considered by [the Department] and which arose during the hearing," unless "an interested party to such new issue has not waived right to notice." Here, however, although all parties purportedly agreed to allow the ALJ to take jurisdiction of the weeks from November 22, 2020 through January 23, 2021, the record fails to show that claimant knowingly waived his right to notice of a hearing on his availability for work during those additional weeks. Transcript at 6. For example, claimant was not informed that he

<sup>1</sup> Order No. 21-UI-163107 contained a clerical error. It erroneously stated that claimant was not eligible to receive benefits from April 12, 2020 through May 30, 2020, and from November 22, 2020 through January 23, 2020 (emphasis added).

could be denied benefits he already had been allowed and paid for those additional weeks, that such a denial could result in claimant having to repay the benefits he received, plus a monetary penalty of at least 15%, and that he could be disqualified from benefits for up to 52 weeks.

Because decision # 144959 only addressed the period of April 12, 2020 through May 30, 2020, and the record does not show that claimant knowingly waived his right to notice regarding his availability during any other weeks, the ALJ did not have jurisdiction to rule on claimant's availability for other weeks. Order No. 21-UI-163107 therefore is vacated as to the weeks from November 22, 2020 through January 23, 2021. The remainder of this decision addresses only the weeks of April 12, 2020 through May 30, 2020, the weeks over which EAB has jurisdiction.

**FINDINGS OF FACT:** (1) Bertsch Moving and Storage employed claimant as a mover and driver until April 9, 2020 when claimant left work due to concerns about exposure to COVID-19 while working.

(2) On April 10, 2020, claimant filed an initial claim for unemployment insurance benefits.

(3) Claimant claimed and was paid benefits for each week from April 12, 2020 through May 30, 2020, the weeks at issue.

(4) During the weeks at issue, claimant had medical conditions that posed a risk for him if he were to contract COVID-19. Claimant obtained advice and a note from his doctor about working, COVID-19, and his underlying health conditions. The doctor's advice began in April 2020 and was in effect until May 31, 2020.

(5) Claimant did not work and stayed in his home due to risk of exposure to COVID-19 during the weeks at issue.

**CONCLUSIONS AND REASONS:** Order No. 21-UI-163107 is set aside and this matter remanded for another hearing and order.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed as defined by OAR 471-030-0036(3) (August 2, 2020 through December 26, 2020); ORS 657.155(1)(c). However, Oregon temporary rules set out unemployment insurance provisions applicable to the unique situations arising due to COVID-19 and the actions to slow its spread. OAR 471-030-0070(5) (effective March 8, 2020 through September 12, 2020) provides that a person will not be deemed unavailable for work because:

- (a) They are staying in their home, or are quarantined, due to risk of exposure to, or spread of, the novel coronavirus at the advice of a health care provider or by advice issued by public health officials or by directive of a government official, even if their employer had work for them they could otherwise have performed;

\* \* \*

The order under review concluded that claimant had the burden of proving that he was available for work, or more precisely, that "the only reason he was not available was due to coronavirus,"

and that claimant did not meet that burden. Order No. 21-UI-163107 at 4. However, because the Department initially paid claimant benefits, it was the Department, and not claimant, that had the burden of showing that claimant was not available for work, and not eligible for benefits, during the weeks at issue. *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).

The order under review found that the employer told claimant that it had work available that claimant could perform alone, without exposure to others. Order No. 21-UI-163107 at 2. The order also found that claimant had a note from his doctor advising him to “stay safe.” Order No. 21-UI-163107 at 1. However, the record is insufficient to determine if claimant was staying in his home, or was quarantined “at the advice of a health care provider,” regardless of whether the employer may have had work that claimant could have performed. *See* OAR 471-030-0070(5)(a).

On remand, the record should be developed to determine what specific advice claimant’s doctor gave him, verbally and in writing, in relation to work in particular, and if applicable, in relation to all circumstances that might put claimant at risk of exposure to COVID-19. Inquiry should be made as to whether claimant’s doctor told him verbally to stay home or quarantine due to the risk of exposure to COVID-19, and for what period of time. Further, the record should be developed as to exactly what the letter from claimant’s doctor stated, when the doctor gave him the letter, and the effective dates of the letter, if any, so it is possible to determine if the written advice correlates to the weeks at issue.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant was available for work as defined by OAR 471-030-0070(5) (effective March 8, 2020 through September 12, 2020) during the weeks from April 12, 2020 through May 30, 2020, Order No. 21-UI-163107 is reversed, and this matter is remanded.

**DECISION:** Order No. 21-UI-163107 is set aside, and this matter remanded for further proceedings consistent with this order regarding weeks 16-20 through 22-20. Order No. 21-UI-163107 is vacated due to lack of jurisdiction regarding weeks 48-20 through 3-21.

S. Alba and D. Hettle;  
Angela Steger-Bentz, not participating.

**DATE of Service:** May 7, 2021

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-163107 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 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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