

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0283**

*Affirmed*  
*Eligible Weeks 46-20 Through 51-20*

**PROCEDURAL HISTORY:** On January 5, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work from November 8, 2020 through December 19, 2020 (weeks 46-20 through 51-20) and therefore was ineligible to receive unemployment insurance benefits for those weeks (decision # 133336). Claimant filed a timely request for hearing. On March 31, 2021, ALJ Logan conducted a hearing, and on April 8, 2021 issued Order No. 21-UI-164429, reversing decision # 133336 by concluding that claimant was able to work during and therefore eligible for benefits for weeks 46-20 through 51-20. On April 13, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

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

**FINDINGS OF FACT:** (1) On March 29, 2020, claimant filed an initial claim for unemployment insurance benefits.

(2) From sometime before October 17, 2020 until at least the end of 2020, Banks Construct Inc. employed claimant. Claimant claimed benefits from November 8, 2020 through December 19, 2020 (weeks 46-20 through 51-20). These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue.<sup>1</sup>

(3) The physical requirements of claimant's work for the employer depended on the projects he was completing for the employer. Claimant sometimes sat at a table to review documents and perform other office work. At other times, claimant used a "SKIL saw" at a cutting station on a flat surface at a work

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<sup>1</sup> 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.

site to cut lumber for assemblers. Transcript at 9. Claimant would stay in one “32 square foot cut zone” while other employees transported the cut pieces to the assemblers. Transcript at 10. Claimant occasionally had to walk to check on the work being performed in different areas, but primarily stayed in one place. Claimant’s work did not require him to climb.

(4) On October 17, 2020, claimant slipped and fell at home, fracturing his leg. The fracture required surgical repair, and claimant subsequently spent two weeks recuperating from the surgery, during which time he used narcotic medication for pain. By the end of October 2020, claimant was no longer using narcotic medication for his leg, and the narcotics “were out of [his] system.” Transcript at 10. At the end of October 2020, claimant began using a walking boot, and was able to sit, stand and walk without the use of crutches or a cane.

(5) As of November 1, 2020, claimant was physically able to perform all aspects of the job. Also on November 1, 2020, claimant told the employer that he was able to return to full-time work without restrictions. Claimant’s doctor did not impose restrictions on claimant’s activities other than recommending that claimant refrain from climbing.

(6) During the weeks at issue, the employer did not have work for claimant due to weather conditions, and because the employer was waiting for permits for its projects.

(7) On December 16, 2020, claimant completed physical therapy for his leg injury.

**CONCLUSIONS AND REASONS:** Claimant was able to work from November 8, 2020 through December 19, 2020 (weeks 46-20 through 51-20), and is eligible to receive unemployment insurance benefits for those weeks.

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) (August 2, 2020 through December 26, 2020).

Claimant did not receive benefits for weeks 46-20 through 51-20 and, therefore, had the burden to prove that the Department should have paid him benefits for those weeks. *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 preponderance of the evidence shows that claimant was able to work from November 8, 2020 through December 19, 2020, and was therefore eligible for benefits for those weeks. The Department witness testified that the Department determined claimant was not able to work during the weeks at issue because its records showed that claimant “was released from modified work on December 16<sup>th</sup> of 2020.” Transcript at 6. However, claimant explained at hearing that being “released” by his doctor meant that he had completed all his treatment for his leg injury, including his physical therapy. Transcript at 16, 18-19. Although claimant continued physical therapy for his leg injury until December 16, 2020, as of November 1, 2020, claimant’s doctor did not restrict claimant from engaging in any activities that he

would normally perform at work. Although claimant was restricted from climbing, he was not required to climb to perform his work tasks. Claimant's conduct on November 1, 2020 corroborated his testimony because on that day, claimant told the employer that he was able to return to work without restrictions. The record does not show that claimant refused any work with the employer during the weeks at issue.

For the above reasons, claimant met his burden to show that he was, more likely than not, able to work during all the weeks at issue. Claimant was therefore eligible to receive benefits for those weeks, if otherwise eligible.

**DECISION:** Order No. 21-UI-164429 is affirmed.

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

**DATE of Service:** May 20, 2021

**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](https://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 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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
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