

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0571**

*Reversed*  
*Eligible Weeks 15-20 through 27-20*

**PROCEDURAL HISTORY:** On November 23, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from April 5, 2020 through July 4, 2020 (weeks 15-20 through 27-20) and was therefore ineligible to receive unemployment insurance benefits for those weeks (decision # 133431). Claimant filed a timely request for hearing. On June 16, 2021, ALJ Hoppe conducted a hearing and on June 24, 2021, issued Order No. 21-UI-169398, affirming decision # 133431. On July 13, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB considered claimant's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Prior to March 2020, claimant had spent approximately 25 years self-employed as a massage therapist and had worked part-time as an instructor at a massage school.

(2) In March 2020, based on the direction of the Governor of Oregon, claimant ceased operation of her massage therapy business, and the massage school closed due to COVID-19. As a result, claimant was unable to work either job.

(3) On April 7, 2020, claimant filed an initial claim for regular unemployment insurance benefits. As part of her claim, claimant completed a questionnaire and indicated that she had been self-employed as a massage therapist and that she was not willing to discontinue her self-employment if she received an offer of regular work. Claimant did not perform any work searches during the weeks she claimed benefits because the Department told her that she did not need to do so.

(4) On August 4, 2020, the Department determined that claimant had a valid claim and paid her regular benefits for the weeks from April 5, 2020 through June 6, 2020 (weeks 15-20 through 23-20), June 14, 2020 through June 20, 2020 (week 25-20), and June 28, 2020 through July 4, 2020 (week 27-20). The Department based its determination on claimant's initial claim and questionnaire responses. The Department did not contact claimant to clarify any of claimant's responses.

(5) On November 23, 2020, the Department denied claimant benefits for the weeks from April 5, 2020 through July 4, 2020 (weeks 15-20 through 27-20), the weeks at issue. The Department's denial was based on claimant's lack of availability for work due to restrictions her self-employment placed on her ability to accept full-time, part-time, or temporary work.

**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
- (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; and
- (d) Physically present in the normal labor market area as defined by section (6) of this rule, every day of the week \* \* \*.

\* \* \*

OAR 471-030-0036(3) (December 8, 2019). 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. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Order No. 21-UI-169398 concluded that claimant was not available for work during the weeks at issue. Order No. 21-UI-169398 at 3-4. The order based its conclusion solely on claimant's response to the Department's questionnaire, that she would not stop her self-employment in order to accept an offer of work. Order No. 21-UI-169398 at 3-4. The record does not support that conclusion.

Claimant's un rebutted testimony was that she had been self-employed as a massage therapist and employed, part-time, as a massage instructor for 25 years. However, due to the COVID-19 pandemic and the state of emergency that followed, both claimant's business and the massage school ceased operations. Although claimant stated on the Department questionnaire that she was unwilling to drop her self-employment as a massage therapist for other work, the record demonstrates that claimant was confused about "how to answer" the self-employment questions, and the Department did not contact claimant to give her an opportunity to clarify her responses as it "often" does. Transcript at 8, 26. The record further shows that claimant's unwillingness to drop her self-employment did not substantially reduce her opportunities to return to work at the earliest possible time because there was no massage

therapy work available at the time she filed her claim for benefits due to the COVID-19 pandemic. For this same reason, any attempt by claimant to conduct work searches during the weeks at issue, had conducting work searches been required,<sup>1</sup> would have been futile due to the lack of available work in her field to pursue. The Department has failed to meet its burden to show that claimant's stated unwillingness to drop her self-employment substantially reduced her opportunities to return to work at the earliest possible time, nor has it shown that claimant was otherwise not available for work. As such, claimant is eligible to receive benefits for the weeks at issue.

**DECISION:** Order No. 21-UI-169398 is set aside, as outlined above.

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

**DATE of Service: August 19, 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.

**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.

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<sup>1</sup> Claimant was considered to be actively seeking work during the weeks at issue and therefore not required to conduct work searches "as long as [she] was willing to look for work when state and local emergency declarations related to the coronavirus expire or otherwise no longer in effect." *COVID-19 related unemployment insurance provisions*, ED 3-2020, at 2 of 4. The record does not show that claimant was unwilling to do so.



# 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 الإستئناف 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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