

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0577**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On June 14, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from May 23, 2021 through June 5, 2021 (weeks 21-21 through 22-21) and was therefore not eligible to receive unemployment insurance benefits for those weeks and until the reason for the denial had ended (decision # 92605). Claimant filed a timely request for hearing. On July 13, 2021, ALJ S. Lee conducted a hearing, and on July 15, 2021 issued Order No. 21-UI-170393, modifying decision # 92605 by concluding that claimant was not available for work from May 23, 2021 through July 10, 2021 (weeks 21-21 through 27-21) and therefore not eligible to receive benefits for those weeks. On July 19, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Prior to May 2021, claimant worked the day shift on an assembly line, and her husband worked at night. Claimant had a three-year old daughter and the shifts she and her husband worked enabled claimant to watch her daughter at night and her husband to do so during the day. At some point in approximately May 2021, claimant's husband was transferred to the day shift. Around the same time, claimant stopped working and began watching her daughter during the day.

(2) On May 24, 2021, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks of May 23, 2021 through July 10, 2021 (weeks 21-21 through 27-21). These are the weeks at issue. The Department did not pay claimant benefits for those weeks.

(3) During the weeks at issue, claimant sought only part-time work scheduled at night. She did so to accommodate her need to watch her daughter during the day and also because she was pregnant. During the weeks at issue, claimant sought work as a sales associate, retail worker, and barista. These types of work are customarily performed in claimant's labor market on all days, beginning at 5 a.m. Claimant's labor market was the greater Portland, Oregon metropolitan area.

**CONCLUSIONS AND REASONS:** Order No. 21-UI-170393 is set aside and this matter remanded for further development of the record.

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

However, OAR 471-030-0036(4) provides, in pertinent part, that “[n]otwithstanding the provisions of OAR 471-030-0036(3), an individual who is the parent . . . of a child under 13 years of age, who is not willing to or capable of working a particular shift because of a lack of care for that child . . . shall be considered available for work if:

- (a) The work the individual is seeking is customarily performed during other shifts in the individual’s normal labor market area as defined by OAR 471-030-0036(6); and
- (b) The individual is willing to and capable of working during such shift(s).”

Furthermore, during a state of emergency declared by the Governor under ORS 401.165, the Department may waive, otherwise limit, or modify the requirements of OAR 471-030-0036. OAR 471-030-0071 (September 13, 2020). Paragraph (5) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility (March 8, 2020), <http://records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/7604239>, provides that a person will not be deemed unavailable for work because:

\* \* \*

- (d) They normally work less than full-time and are only available for less than full-time work.

The order under review concluded that claimant was not available for work during the weeks at issue and therefore was not eligible for benefits for those weeks because she was not willing to work full-time hours. Order No. 21-UI-170393 at 3. The record as developed does not support that conclusion.

The record shows that claimant sought only part-time hours and was unwilling to work during the day. Typically, an individual is not considered available for work if they are not willing to work full-time. However, under the temporary COVID-19 “available for work” provision cited above, if claimant normally worked less than full-time and was only available for less than full-time work during the weeks at issue, then claimant would not be considered unavailable for work because of her unwillingness to work full-time. Similarly, an individual is typically not considered available for work if they are unwilling to work the usual hours and days of the week customary for the work being sought. Claimant was not willing to work the day shift, which was a shift in which the sales associate, retail worker, and barista work claimant sought is customarily performed. However, if claimant met the elements of OAR 471-030-0036(4) during the weeks at issue, then she would not be considered unavailable for work because of her unwillingness to work during the day.

Thus, it is possible for claimant to be considered available for work and therefore eligible for benefits for the weeks at issue if she satisfies the elements of both the temporary COVID-19 “available for work” provision and OAR 471-030-0036(4). Further inquiry is necessary to determine whether claimant meets the requirements of those provisions. On remand, the ALJ should ask whether claimant normally worked less than full-time hours when she worked on an assembly line prior to May 2021. The ALJ should also ask whether claimant was unwilling to work only the day shift, or whether her commitment to watching her daughter also rendered her unwilling to work during “swing” or second shift hours. The ALJ should ask questions to develop whether the sales associate, retail worker, and barista work claimant sought was customarily performed in claimant’s labor market area during shifts other than day shifts, such as during “swing” shift or night shift hours, and to this end should ask questions to develop when the sales associate, retail worker, and barista work claimant sought customarily ended each day.<sup>1</sup> To the extent the record on remand shows that the work claimant sought was customarily performed during shifts other than day shifts, the ALJ should ask questions to determine whether claimant was willing to and capable of working during those shifts.

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 during the weeks at issue, Order No. 21-UI-170393 is reversed, and this matter is remanded.

**DECISION:** Order No. 21-UI-170393 is set aside, and this matter remanded for further proceedings consistent with this order.

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

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

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<sup>1</sup>At hearing, the witness for the Department testified as to the customary start time of this work in claimant’s labor market (5:00 a.m., and generally no later than 9:00 a.m.), but not when the work customarily ends each day. Transcript at 7.

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-170393 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.

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