

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0832**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On May 26, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work and was therefore not eligible to receive unemployment insurance benefits from May 9, 2021 through May 22, 2021 (weeks 19-21 through 20-21) and until the reason for the denial had ended (decision # 70856). Claimant filed a timely request for hearing. On September 29, 2021, ALJ Wymer conducted a hearing at which the employer failed to appear and issued Order No. 21-UI-175944, modifying decision # 70856 by concluding that claimant was not able to work from May 9, 2021 through July 10, 2021 (weeks 19-21 through 27-21) and was not eligible to receive benefits for those weeks, but was able to work from July 11, 2021 through August 14, 2021 (weeks 28-21 through 32-21) and was eligible to receive benefits for those weeks. On October 6, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) As of August 2020, claimant worked for the employer, Portland Bottling Co., as a bottling machine operator. Claimant's work duties required that she be able to lift cases of bottled drinks and stand on her feet for 12-hour shifts.

(2) On August 26, 2020, claimant fell off a ladder at work and injured her shoulder and knees. Claimant filed a worker's compensation claim and took a leave of absence from the employer. Claimant's doctor restricted her from lifting anything heavy and from standing on her feet for more than 15 minutes.

(3) In January 2021, claimant's doctor removed claimant's work restrictions and claimant returned to work for the employer. Upon returning to work, claimant discovered that she still could not lift or carry the cases of bottled drinks because of her injuries. The employer sent claimant home after one day.

(4) On May 12, 2021, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks from May 9, 2021 through August 14, 2021 (weeks 19-21 through 32-21). Those are the weeks at issue.

(5) On July 6, 2021, claimant became able to use her arm to lift and carry lightweight objects. After July 6, 2021, claimant was able to do certain kinds of work that did not involve heavy lifting, like working cash registers or cleaning tables.

(6) At some point during the weeks at issue, claimant sought work with other employers by turning in job applications.

**CONCLUSIONS AND REASONS:** Order No. 21-UI-175944 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). 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 actually is seeking during all of the week. OAR 471-030-0036(2) (August 2, 2020 through December 26, 2020). An individual prevented from working full time or during particular shifts due to a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h) shall not be deemed unable to work solely on that basis so long as the individual remains available for some work. OAR 471-030-0036(2)(b).

The order under review concluded that claimant was not able for work from May 9, 2021 through July 10, 2021 (weeks 19-21 through 27-21) because of her inability to lift heavy objects during those weeks. Order No. 21-UI-175944 at 3. Applying OAR 471-030-0036(2)(b), the order concluded that claimant was able to work during the weeks including July 11, 2021 through August 14, 2021 (weeks 28-21 through 32-21) because she was available for “some work” during those weeks given that she was able to lift and carry lightweight objects. Order No. 21-UI-175944 at 3. The record as developed does not support the conclusions of the order under review.

To assess whether claimant was able to work during the weeks at issue, the record needs to contain evidence of the work claimant actually sought each week. Once the work claimant actually sought is identified, an evaluation may be made as to whether claimant was physically and mentally capable of performing it. Once that evaluation is complete, the applicability of the exception for individuals with permanent or long-term physical or mental impairments set forth under OAR 471-030-0036(2)(b) may be assessed. For some of the weeks at issue—possibly all the weeks preceding July 6, 2021—claimant was on a leave of absence from the employer, intended to return to work for the employer, and may have not have sought work with other employers. That could mean that the only work claimant sought during those weeks was the bottling machine operator work from which she was on leave. However, the record also shows that at some point during the weeks at issue, claimant sought work from other employers by turning in job applications, but when these applications were made and the type of work claimant sought is unknown from the record.<sup>1</sup> Remand is therefore necessary to develop the record as to what work claimant actually was seeking each week during the weeks at issue.

On remand, the ALJ should determine, for each of the weeks at issue, what work claimant actually was seeking on a week-by-week basis. To this end, the record should be developed to establish if and when

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<sup>1</sup> At hearing, the Department’s representative testified that claimant was not required to seek work during the weeks at issue. Audio Record at 15:53. Nevertheless, claimant testified that she had been seeking work with other employers. Audio Record at 28:13.

claimant separated from work from the employer during the weeks at issue, and whether claimant intended to return to work for the employer during the weeks at issue prior to that separation. The ALJ should also ask questions to develop when claimant sought work from other employers and what type of work claimant sought. Once these inquiries are complete, the ALJ should ask questions to assess the applicability of OAR 471-030-0036(2)(b), if the record on remand warrants it.

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 able to work during the weeks at issue, Order No. 21-UI-175944 is reversed, and this matter is remanded.

**DECISION:** Order No. 21-UI-175944 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: November 10, 2021**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-175944 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

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## 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**

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**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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