

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0561**

*Affirmed*  
*Ineligible Week 08-22*

**PROCEDURAL HISTORY:** On March 23, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work for the week of February 20, 2022 through February 26, 2022 (week 08-22), and was therefore ineligible to receive unemployment insurance benefits for that week (decision # 111530). Claimant filed a timely request for hearing. On May 2, 2022, ALJ Demarest conducted a hearing at which the employer failed to appear, and on May 2, 2022 issued Order No. 22-UI-192639, affirming decision # 111530. On May 12, 2022, 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) On May 26, 2021, claimant filed her initial claim for unemployment insurance benefits.

(2) Claimant's regular work schedule for the week of February 20, 2022 through February 26, 2022 (week 08-20, herein "the week at issue") was Monday through Friday, 2:30 p.m. to 10:30 p.m.

(3) On February 21, 2022, claimant worked her regular shift for the employer. On February 22, 2022, claimant experienced cold-like symptoms and was concerned that she might have contracted COVID-19. Claimant drove to work for her regular shift despite her symptoms. When claimant arrived at the employer's location, she contacted the employer's human resources (HR) department from the parking lot. Claimant left a voicemail for HR telling them that she was experiencing cold-like symptoms and seeking guidance as to whether she should work because of her concerns about having potentially contracted COVID-19.

(4) After calling HR, claimant proceeded to her workstation intent on working her regular shift. Fifteen minutes later, claimant's supervisor told her to leave the workplace due to her symptoms. Claimant returned to the parking lot and subsequently spoke to an HR representative who told claimant to go

home. The HR representative told claimant that if tested for COVID-19 and receive a negative result she could return to work in two days and that otherwise she should stay home for five days.

(5) Claimant stayed home from work on February 23, 2022.

(6) On February 24, 2022, claimant took a home COVID-19 test and received a negative result. Claimant did not go to work that day or the following day.

(7) Claimant claimed benefits for the week at issue. The Department paid claimant benefits for the week at issue.

**CONCLUSIONS AND REASONS:** Claimant was able to work during the week at issue. Claimant was not available to work during week 08-22.

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). Because the Department paid claimant benefits for the week at issue, the Department has the burden to prove that benefits should not have been paid for that week. *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).

**Able to work.** An individual shall be considered able to work in a particular week 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. *Former temporary* OAR 471-030-0036(2) (September 26, 2021 through March 24, 2022).

Claimant was able to work during week 08-22. The record shows that claimant worked her regular shift on February 21, 2022, and that despite becoming ill on February 22, 2022, she was prepared to work her shifts on February 22, 2022 and February 23, 2022 had the employer allowed her to do so. However, the employer shared claimant's concerns over claimant's having potentially contacted COVID-19 and instead directed claimant to go home. In so directing, the employer told claimant that if she received a negative COVID-19 test result she could return to work two days later. Although claimant missed work on February 22 and 23, 2022, she took a COVID-19 test on February 24, 2022 and received a negative test result. Although the employer did not *allow* claimant to return to work until two days after the date she received her negative test result, for purposes of *former temporary* OAR 471-030-0036(2)(a) claimant was considered able to work during the week issue. Specifically, the record shows that claimant was physically and mentally capable of performing her job during the week at issue, notwithstanding her cold-like symptoms or concerns that she may have contracted COVID-19. As such, claimant was able to work during the week at issue.

**Available to work.** For the purposes of ORS 657.155(1)(c), an individual is not available for work in any week claimed if they turn down an offer of or miss scheduled, suitable work. *Former temporary* OAR 471-030-0036(3)(h)(A).

Claimant was not available for work during the week at issue. The record shows that during that week, claimant was scheduled for work from February 21, 2022 through February 25, 2022, and that the work she was scheduled to perform was suitable.<sup>1</sup> While claimant completed her scheduled shift on February 21, 2022, the preponderance of the evidence shows that she missed her regularly scheduled shifts for the remainder of the week. At hearing, claimant testified to her view that notwithstanding the scheduled work she missed, claimant “was available for work [during the week at issue] regardless of whether [she] was sick or not,” and that she would have worked if the employer had not “forced” her not to. Transcript at 11, 18. However, even if the employer removed claimant from her regularly scheduled work on February 22, 2022, the record does not support the conclusion that extended to her scheduled work on February 25, 2022. Instead, the record shows when the employer sent claimant home on February 22, 2022, they instructed claimant that upon receiving a negative COVID-19 test result she could return to work within two days. Therefore, it is more likely than not that had claimant taken the home COVID-19 test on February 22, 2022, instead of waiting until February 24, 2022, she could have returned to work on or before her scheduled shift on February 25, 2022. Under these circumstances, the preponderance of the evidence shows that because claimant missed scheduled, suitable work, she was not available for work under *former temporary* OAR 471-030-0036(3)(h)(A) during the week at issue.

For the above reasons, while claimant was able to work during the week at issue, she was not available for work during the week at issue, and was therefore ineligible for benefits for that week.

**DECISION:** Order No. 22-UI-192639 is affirmed.

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

**DATE of Service:** July 29, 2022

**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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<sup>1</sup> In determining whether any work is suitable for an individual, the Director of the Employment Department shall consider, among, other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual. ORS 657.190. The record fails to show any evidence indicating that the work claimant typically performed for the employer was not suitable.



# 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

**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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