

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0073**

*Reversed*  
*Eligible Weeks 44-22 through 46-22 and Weeks 48-22 through 49-22*

**PROCEDURAL HISTORY:** On November 10, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work for the week of October 30, 2022 through November 5, 2022 (week 44-22) and was therefore not eligible to receive unemployment insurance benefits for that week and until the reason for the denial had ended (decision # 121111). Claimant filed a timely request for hearing. On December 20, 2022, ALJ L. Lee conducted a hearing, and on December 28, 2022 issued Order No. 22-UI-211148, modifying decision # 121111 by concluding that claimant was not available and therefore not eligible to receive benefits for the weeks including October 30, 2022 through November 19, 2022 (weeks 44-22 through 46-22) and November 27, 2022 through December 10, 2022 (weeks 48-22 through 49-22). On January 10, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Beginning on or near 2005 until mid-2022, claimant worked for Knife River Corporation. In 2014, claimant founded a dump truck business as a sole proprietor. Claimant took on a business partner and reorganized the business as a limited liability company (LLC) in 2020. Claimant worked as an employee of Knife River and carried on the dump truck business concurrently.

(2) In mid-2022, claimant's employment for Knife River ended. Thereafter, claimant worked as an employee for the LLC he co-owned. In late 2022, the LLC's business slowed. The LLC was forced to sell one of its three dump trucks and was able to provide only part-time work to claimant.

(3) On November 3, 2022, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks including October 30, 2022 through November 19, 2022 (weeks 44-22 through 46-22) and November 27, 2022 through December 10, 2022 (weeks 48-22 through 49-22). These are the weeks at issue. The Department did not pay claimant benefits for any of the weeks at issue.

(4) Claimant actively sought work as a truck driver during the weeks at issue. Claimant's labor market area was the Stayton, Sublimity, Lyons, and Aumsville, Oregon area. Truck driving work was customarily performed in claimant's labor market area during all hours and all days of the week.

(5) During the weeks at issue, claimant remained a co-owner of the LLC during the weeks at issue and, when the LLC had business, worked as a driver for the LLC Monday through Saturday, 6:00 a.m. to 6:00 p.m. During the weeks at issue, claimant had “nothing else” and was not willing to close his LLC down. Transcript at 23. However, claimant was willing to stop working as an employee for the LLC and accept any suitable full-time, part-time, permanent or temporary work. If he was offered suitable work, claimant would accept the work and either hire a driver to fill the position for the LLC he would vacate or simply “shut the business down[.]” Transcript at 24.

**CONCLUSIONS AND REASONS:** Claimant was available for work during the weeks including weeks 44-22 through 46-22 and weeks 48-22 through 49-22 and was eligible for unemployment insurance benefits for those weeks.

Under ORS 657.155(1)(c), to be eligible to receive benefits, unemployed individuals must be available for work during each week claimed as defined by OAR 471-030-0036(3). 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[.]

\* \* \*

The order under review concluded that claimant was not available for all suitable work due to his self-employment status. Order No. 22-UI-211148 at 4. The record does not support this conclusion.

Claimant met his burden to prove that he was available for work during the weeks at issue.<sup>1</sup> The mere fact that he was a co-owner of an LLC did not render him unavailable for work. During the weeks at issue, claimant was not willing to close his LLC down because he had “nothing else.” Transcript at 23. However, claimant was willing to stop working as an employee for the LLC and accept any suitable full-time, part-time, permanent or temporary work. Claimant was “willing to work anywhere” and would do so “anytime any day[.]” Transcript at 17, 18. If he was offered suitable work, claimant would accept the work and either hire a driver to fill the LLC’s job he would vacate or simply “shut the business down[.]” Transcript at 24.

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<sup>1</sup> *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 order under review reasoned that claimant’s testimony that he would “drop his self-employment activities for a job” was not believable. Order No. 22-UI-211148 at 4. However, claimant credibly testified that the LLC had a former driver that the LLC could re-hire to fill the job driving the dump truck that claimant would vacate if he was offered a suitable work opportunity. Transcript at 24. Additionally, claimant’s assertion that he would be willing to “shut the business down and just go work for somebody else” was plausible given that the LLC’s business was slow and it had recently been forced to sell one of its dump trucks. Transcript at 24. During the Department’s investigation, claimant had stated on a written questionnaire and in a conversation with a Department adjudicator that he would not drop his self-employment for other full-time work. Transcript at 35-36. However, claimant explained at hearing that he was confused by those questions. Transcript at 16-17. That the questions were confusing to claimant was credible given that claimant’s English language proficiency was somewhat limited and the record supports the inference that the questionnaire and adjudicator interview were in English.<sup>2</sup>

Accordingly, claimant established that he was 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 a truck driver because he was “willing to work anywhere” as a truck driver and would do so “anytime any day[.]” Transcript at 17, 18. Further, claimant was capable of accepting and reporting for any suitable work opportunities within his labor market and was not imposing conditions that would substantially reduce his work opportunities because claimant would accept any suitable job offered and either hire a driver to fill the LLC’s job he would vacate or simply “shut the business down[.]” Transcript at 24.

For these reasons, claimant was available for work during the weeks at issue. Therefore, claimant was eligible to receive benefits for the weeks including October 30, 2022 through November 19, 2022 (weeks 44-22 through 46-22) and November 27, 2022 through December 10, 2022 (weeks 48-22 through 49-22).

**DECISION:** Order No. 22-UI-211148 is set aside, as outlined above.

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

**DATE of Service:** March 6, 2023

**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.

**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

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<sup>2</sup> At hearing, the witness for the Department testified that claimant provided his work search information to the Department in Spanish and that the witness had a colleague translate that information for him into English. Transcript at 32-33. The witness made no mention of the questionnaire or adjudicator interview being in Spanish, which supports the inference that they were in English.

'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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**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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