

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0518

Reversed
Eligible

PROCEDURAL HISTORY: On December 24, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from November 24, 2013 through November 30, 2013 (decision #121013). Claimant filed a timely request for hearing. On March 4, 2014, ALJ Holmes-Swanson conducted a hearing, and on March 12, 2014 issued Hearing Decision 14-UI-12140, affirming the Department's decision. On April 1, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Claimant claimed benefits for the week from November 24, 2013 through November 30, 2013 (week 48-13), the week at issue. The Department paid claimant benefits for that week.

(2) Forest River, Inc. was claimant's regular employer and employed claimant as a production laborer. On November 22, 2013, the employer told claimant he would be laid off from November 24 to November 30, 2013. On November 22, 2013, the employer offered claimant work doing inventory on November 24, 2013.

(3) On November 24, 2013, claimant worked doing inventory for the employer. The employer did not offer claimant additional work for the week at issue.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ and conclude claimant was available for work during the week 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). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to full time, part time and temporary work opportunities throughout the labor market, and refrain from imposing conditions that limit the individual's opportunities to return to

work at the earliest possible time. *Id.* Where, as here, the Department initially pays a claimant benefits, the Department has the burden to establish by a preponderance of evidence that the claimant was not eligible to receive those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

The ALJ determined claimant was not willing to work during the week at issue because claimant testified he would have refused a job offer for a permanent, comparable job from an employer other than his regular employer, Forest River.¹ The ALJ's hypothetical question elicited a speculative response from claimant insufficient to outweigh his testimony that he was not offered work from November 25 to November 30, 2013 and that he was willing to work had work been offered to him. Audio Record ~ 19:00 to 19:39. The Department presented only hearsay evidence to the contrary, testifying that the employer said claimant refused work during the week at issue. Audio Record ~ 7:28 to 7:38. Absent a basis to conclude claimant was not a credible witness, his sworn testimony outweighs the Department's hearsay evidence from the employer. The Department failed to show by a preponderance of the evidence that claimant was unwilling to work or that he imposed conditions that limited his opportunities to return to work at the earliest possible time.

We therefore conclude that claimant was available for work during the week at issue.

DECISION: Hearing Decision 14-UI-12140 is set aside, as outlined above.

DATE of Service: April 22, 2014

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.

This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

¹ Hearing Decision 14-UI-12140 at 2.