

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1639

Reversed
Eligible

PROCEDURAL HISTORY: On July 22, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work from June 29 through July 19, 2014 (weeks 27-14 through 29-14) (decision # 102353). Claimant filed a timely request for hearing. On August 11, 2014, ALJ Lohr conducted a hearing, and on October 17, 2014 issued Hearing Decision 14-UI-27130, affirming the Department's decision. On October 29, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument and the entire hearing record.

FINDINGS OF FACT: (1) Claimant's employer laid her off from work on June 20, 2014. Claimant claimed and was denied benefits for the weeks from June 29 through July 19, 2014 (weeks 27-14 through 29-14), the weeks at issue. Claimant was part of a closed roofers' union.

(2) During the weeks at issue, claimant was pregnant. On June 25, 2014, claimant met with her doctor regarding her pregnancy. Claimant's doctor told claimant she was not restricting claimant's work activities at that time, but gave her an advice letter stating that, "during pregnancy we advise against" lifting over 40 pounds, prolonged periods of standing, exposure to chemicals that induce nausea, overexposure to sun and heat, and climbing ladders. Audio Record at 41:45 to 42:24.

(3) During the weeks at issue, claimant sought and was able to perform work from her employer and union hall performing commercial roofing work, flagging, safety monitoring, cleaning, quality control, and office administration. Claimant did not tell her employer, union, or the Department that she was unable to work. The customary days and hours for commercial roofing work were Monday through Friday, 8 a.m. to 5 p.m.

CONCLUSIONS AND REASONS: Claimant was able to work from June 29 through July 19, 2014 (weeks 27-14 through 29-14).

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 is actually seeking during all of the week. OAR 471-030-0036(2) (February 23, 2014). An individual occasionally and temporarily disabled for less than half of the week is not considered unable to work. OAR 471-030-0036(2)(a). When the Department has paid benefits to a claimant, the Department carries the burden to show that claimant was unable to work. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By extension of that principle, claimant carries the burden to establish that she was able to work where, as here, the Department has not paid benefits during the weeks at issue.

In Hearing Decision 14-UI-27130, the ALJ concluded that claimant was not able to work during the weeks at issue, reasoning that “claimant’s restrictions due to her pregnancy prevented her from performing work as a commercial roofer or seeking work in construction during the weeks at issue.”¹ We disagree.

During the weeks at issue, claimant sought work as a commercial roofer, flagger, safety monitor, cleaner, quality control, and office administrator. The Department representative testified that it determined claimant was unable to work during the weeks at issue because she was on a leave of absence from work during those weeks due to pregnancy-related work restrictions imposed by her doctor. Audio Record at 10:03 to 10:30. However, claimant did not take a leave of absence from work. The employer laid claimant off work on June 20, 2014, even before claimant met with her doctor and received her doctor’s letter advising her about work during pregnancy. Claimant requested work from her employer and union hall every day during the weeks at issue.

Nor did the Department show that the doctor’s advice barred claimant from performing the types of work claimant sought, or that claimant was unable to perform such work. Claimant testified that her doctor told her that the letter contained advice regarding working during pregnancy, and not work restrictions. Audio Record at 34:39 to 34:57. The Department’s witness testified that the distinction between “advisements” and “restrictions” was “semantics” because, based on the doctor’s advice, the employer did not have suitable work for claimant. Audio Record at 32:47 to 33:23. However, the doctor’s advice did not bar claimant from performing the duties listed in the letter, and the letter alone does not show claimant was unable to perform the work she was seeking. Nor does the record otherwise show claimant was unable to perform the work. Claimant actively sought work and did not tell her employer, union, or the Department that she was unable to work.

The Department asserted that flagging work was not “suitable” work because claimant was not able to perform all aspects of the work, such as standing for long periods. Audio Record at 33:27 to 33:49. The Department determined flagging would require claimant to stand for long periods based on “adjudicator knowledge.” *Id.* However, claimant sought work with only her employer and her roofers’ union. The

¹ Hearing Decision 14-UI-27130 at 2.

Department representative did not show he had specific knowledge regarding flaggers' job requirements working in commercial roofing. Thus, claimant's testimony that she was able to perform those duties outweighs the Department witness' testimony.

In sum, claimant met her burden to show she was able to work during from June 29 through July 19, 2014 (weeks 27-14 through 29-14), and is not ineligible from receiving benefits for that reason.

DECISION: Hearing Decision 14-UI-27130 is set aside, as outlined above.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: December 10, 2014

NOTE: 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.

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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.