

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1909

Affirmed
Ineligible

PROCEDURAL HISTORY: On October 21, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from September 28 through October 18, 2014 (decision # 81418). Claimant filed a timely request for hearing. On November 25, 2014, ALJ Murdock conducted a hearing, and on November 26, 2014 issued Hearing Decision 14-UI-29426, concluding that claimant was not available for work from September 28 through November 22, 2014. On December 9, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Claimant claimed benefits for the weeks from September 28 through November 22, 2014 (weeks 40-14 through 47-14), the weeks at issue. The Department did not pay claimant benefits for those weeks.¹

(2) During the weeks at issue, claimant sought various types of hospital work, including work as a cashier, receptionist, patient admitter, home health clerk, and medical records clerk. The usual hours and days of the week customary for the work claimant sought included day and evening shifts on weekdays.

(3) In week 40-14, claimant became the legal guardian of a child under 13 years of age. During the weeks at issue, the child attended school and after-school programs from no earlier than 7:45 a.m. to no later than 6:00 p.m. on weekdays. Claimant therefore was willing to work only day shifts on weekdays, and not on weekends.

¹ We take notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was not available for work during the weeks at issue.

To be eligible to receive benefits, unemployed individuals must be available for 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 during all of the usual hours and days of the week customary for the work being sought. *Id.* However, an individual who is the guardian or other court/legally-appointed caretaker of a child under 13 years of age, and not willing to work a particular shift because of a lack of care for that child acceptable to the individual shall be considered available for work if the work the individual is seeking is customarily performed during other shifts, and the individual is willing to and capable of working during such shift(s). OAR 471-030-0036(4). Where, as here, the Department did not pay the individual benefits, the individual has the burden to establish by a preponderance of evidence that she is eligible for those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In the present case, it is undisputed that claimant was the legal guardian of a child under 13 years of age, and unwilling to work weekday evenings or weekends because of a lack of child care acceptable to her. It also is undisputed that the usual hours and days of the week customary for some of the hospital work claimant sought included weekday and evenings. At issue is whether the usual hours and days of the week customary for at least some of the work claimant sought also included night shifts or weekends. At hearing, claimant testified that they did not. Audio Record 33:50-35:30. However, the Department’s witness testified that they did,² and we find the evidence on that issue, at best, equally balanced. Claimant therefore was unwilling to work during all of the usual hours and days of the week customary for the work she sought, and failed to show that she merely was unwilling to work particular shift, and not unwilling to work multiple shifts during which the work she sought was customarily performed, and days on which it was customarily performed.

Claimant failed to establish that she was available for work during the weeks at issue. We therefore conclude that claimant is ineligible for benefits for those weeks.

DECISION: Hearing Decision 14-UI-29426 is affirmed.

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

DATE of Service: January 22, 2015

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

² Audio Record at 30:45-33:00.

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.