

## EMPLOYMENT APPEALS BOARD DECISION

2015-EAB-0046

*Reversed*  
*Eligible*

**PROCEDURAL HISTORY:** On December 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks of October 26, 2014 through November 22, 2014 (decision # 145913). Claimant filed a timely request for hearing. On January 14, 2015, ALJ Holmes-Swanson conducted a hearing at which the Department did not appear, and on January 16, 2015 issued Hearing Decision 15-UI-31990, affirming the Department's decision. On January 21, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that sought to introduce facts that were not presented during the hearing. Because claimant did not explain why he did not offer this new information during the hearing and otherwise failed to show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090 (October 29, 2006), EAB did not consider that new information. EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

Since no adversely affected party sought review of that portion of Hearing Decision 15-UI-31990 which concluded claimant was not unavailable for work because of a lack of transportation, EAB confined its review to the other aspects of that decision.

**FINDINGS OF FACT:** (1) Claimant customarily worked seasonally at golf course from March through October of each year. Claimant earned \$10.40 per hour for this work and usually worked between forty and fifty hours per week at the golf course. October 31, 2014 was claimant's last day of work at the golf course during the 2014 season.

(2) On November 1, 2014, claimant filed an initial claim for unemployment benefits. The Department determined that claimant's claim was valid and the first effective week of his claim began on October 26, 2014. Claimant claimed benefits for the weeks of October 26, 2014 through January 10, 2015 (week 44-14 through week 01-15), the weeks at issue.

(3) During the weeks at issue, claimant sought work in retail sales, as an all-purpose helper for property management companies and as a food service worker. Claimant lived in Sunriver, Oregon and sought work in Sunriver, Bend and La Pine.

(4) During the weeks at issue, claimant expected that he could return to his seasonal job at the golf course beginning in March 2015. For this reason, claimant was not willing to accept permanent work during the weeks at issue if that work paid less than \$10 per hour. If a job paid less than \$10 per hour, claimant would accept it if it was expected to end before March 2015, when claimant could return to the golf course, or if the hours of that job allowed claimant to resume working at the golf course. On December 17, 2014, claimant refused the offer of a permanent job because it paid only minimum wage or \$9.10 per hour.

**CONCLUSIONS AND REASONS:** Claimant was available for suitable work during the weeks of October 26, 2014 through January 10, 2015 (weeks 44-14 through 01-15).

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 for any suitable work opportunities within the labor market, and refrain from imposing conditions that substantially reduce the individual's opportunities to return to suitable work at the earliest possible time. *Id.*

In Hearing Decision 15-UI-31990, although the ALJ stated that he was modifying administrative decision # 145913 to include all weeks for which claimant had claimed benefits through the January 14, 2015 date of the hearing, he expressly limited the language of that decision to cover only the weeks of October 26, 2014 through November 22, 2014, exactly the same weeks as the administrative decision. Hearing Decision 15-UI-31990 at 3. Because claimant presented evidence at hearing about his work availability through the week ending January 10, 2015, it appears that the ALJ inadvertently excluded the weeks after November 22, 2014 from the scope of his decision. EAB takes jurisdiction over all the weeks for which claimant had claimed benefits at the time of the hearing, and this decision addresses claimant's availability for benefits during the period of October 26, 2014 through January 10, 2015.

In Hearing Decision 15-UI-31990, the ALJ concluded that claimant was not available for all suitable work during the weeks at issue. The ALJ reasoned that claimant's unwillingness to accept permanent work that paid less than \$10 per hours imposed a condition that "substantially interfered with his returning to work at the soonest opportunity." Hearing Decision 15-UI-31990. We disagree.

Whether a person has substantially reduced his opportunities to return to work at the earliest possible time by limiting the work that he will accept depends on whether that limitation operates to exclude "suitable" work opportunities. *See* ORS 657.155(1)(c). ORS 657.190 states the factors that must be considered to determine whether work is "suitable" for a claimant, and includes the length of unemployment and the prospects of securing local work in claimant's customary occupation. While there is no specific regulation addressing the factors for determining whether work is "suitable" in the context of an availability analysis under ORS 657.155(1)(c), OAR 471-030-0037(1) (August 3, 2011)

states that, for purposes of determining whether a claimant has refused to accept suitable work when offered under ORS 176.(2)(d) and ORS 176.195(1)(b), the work is not "suitable" if its rate of pay is substantially less favorable than the rate prevailing for that position in the locality, and that regulation defines "substantially less favorable" as being a rate of pay that is at least ten percent or more lower than the average rate of pay for similar work in the locality. In the absence of a specific regulation, we will use the guidance of OAR 471-030-0037(1) to determine whether claimant substantially reduced his work opportunities by imposing the limitation that he was not willing to accept permanent work that paid less than \$10 per hour.

It does not appear unreasonable that claimant was not willing to accept work that paid less than \$10 per hour or 96 percent of the \$10.40 he expected to earn at the golf course unless the new work was temporary or would allow him to work at that new work in addition to resuming his work at the golf course. Because claimant expected to return to work at the golf course in March 2015 and the maximum duration of the period he expected to be unemployed was only four months (November 2014 through February 2015), imposing the condition of earning at least \$10 per hour for a permanent position during this relatively limited period, would not appear to substantially reduce his opportunities to return to suitable work at the earliest possible time. In this respect, we note that to hold otherwise would require claimant to permanently forego for a wage of \$10 per hour the wage of \$10.40 that he would receive from the golf course in a matter of only a very few months. Absent an instruction from the Department that claimant needed to actively seek permanent work opportunities that paid less than \$10 per hour, we are unwilling to conclude that he made himself unavailable for suitable work by imposing this limitation. Similarly, that claimant turned down an offer for a permanent position that paid \$9.10 per hour, or 87 percent of his pay at the golf course, also was not unreasonable in light of the guideline for suitability set out in OAR 4711-030-0037(1), which is applied here by analogy.

Claimant was available for work during the period October 26, 2014 through January 10, 2015. Claimant is eligible to receive benefits during this period.

**DECISION:** Hearing Decision 15-UI-31990 is set aside, as outlined above.

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

**DATE of Service:** March 10, 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](http://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.

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