

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0193

Affirmed
Ineligible

PROCEDURAL HISTORY: On December 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision (decision #100710) concluding claimant was not able to work from February 2, 2014 through February 15, 2014 (weeks 06-14 through 07-14). Claimant filed a timely request for hearing. On February 3, 2015, ALJ Monroe conducted a hearing, and on February 11, 2015 issued Hearing Decision 15-UI-33341, concluding claimant was not available to work during week 06-14, and not able to work during weeks 06-14 and 07-14. On February 20, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Claimant claimed unemployment insurance benefits for the weeks from February 2, 2014 through February 15, 2014 (weeks 06-14 through 07-14), the weeks at issue. The Department initially paid claimant benefits for those weeks.

(2) Claimant's labor market was Aloha, Beaverton, Cornelius, Forest Grove, Banks, Hillsboro, Tigard, and the southwest, northwest and downtown areas of Portland, Oregon.

(3) Claimant sought work as a flagger and traffic control supervisor. The customary days and hours for flagger work in claimant's labor market were all days, all hours. Flaggers stand for eight to ten hours, hold a sign, and use a handheld radio.

(4) Late at night on February 5, 2014, claimant traveled to Seattle and, while driving back to Oregon the morning of February 6, was in a car accident in southwest Washington during a snow storm. Claimant was taken to a hospital where she was diagnosed as having two fractured ribs on her right side. The medical providers advised claimant to rest, avoid lifting, and seek additional care from her primary care doctor.

(5) Claimant stayed in a hotel in southwest Washington from February 6 until February 10, 2014 because she felt “shaken,” was taking pain medication for her injuries, and was not willing to drive in the snow. Audio Record at 27:32 to 27:49.

(6) The weather improved on February 10, 2014, and claimant rented a car and returned to her home in Aloha, Oregon.

(7) On or about February 17, 2014, claimant sought additional medical treatment from her primary care provider, and was diagnosed as having three additional fractured ribs on her left side. Claimant’s doctor advised claimant to stay in bed to allow her ribs to heal.

(8) Claimant received personal injury protection insurance benefits after she certified to her insurance company that she was unable to work due to her injuries from the February 6, 2014 accident.

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

To be eligible to receive benefits, unemployed individuals must be able to work and available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). Where, as here, the Department paid a claimant benefits, the Department carries the burden to show that claimant is ineligible for those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Ability to Work. 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). An individual prevented from working full time or during particular shifts due to a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h) shall not be deemed unable to work solely on that basis so long as the individual remains available for some work. OAR 471-030-0036(2)(b).

Claimant stayed in a hotel in southwest Washington from February 6 until the morning of February 10, 2014 because, among other reasons, she was injured and mentally “shaken” by the accident. Audio Record at 27:32 to 27:49. The record does not show that claimant’s injuries amounted to a permanent or long-term impairment. Therefore, we do not apply the provisions of OAR 471-030-0036(2)(b). Because claimant’s injuries rendered her temporarily disabled for less than half of week 06-14, she is not considered to have been unable to work during that week. However, claimant continued to experience pain from her fractured ribs during week 07-14. Claimant asserted that she was able to stand and perform flagging work during that week, despite her fractured ribs, and that she would have been able to stand and hold a sign for long periods of time because she would use the sign as a “crutch.” Audio Record at 40:09 to 40:38, 20:48 to 21:55. However, claimant certified to her insurance company that she was unable to work to obtain personal injury insurance, sought additional medical treatment for her injuries, and was advised by her doctor to stay in bed and allow her ribs to heal. Thus, the preponderance of evidence shows that claimant was unable to work during week 07-14.

Availability for Work. 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). 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.* Flagger work was performed all days and all hours in claimant’s labor market. Claimant was not available for work from February 6 through the morning of February 10, 2014, a portion of each week at issue, because she was not willing to drive in the snow. Claimant demonstrated her unwillingness to drive in the snow by waiting until February 10, when the weather was “clearing up,” before she rented a vehicle and drove home. Audio Record at 27:55 to 28:38. Therefore, because claimant chose to stay in a hotel rather than to rent a vehicle so she could drive in the snow, the preponderance of the evidence shows claimant was not willing to work during all of the usual hours and days of the week customary for the flagger work she sought, or that she was capable of accepting and reporting for any suitable work opportunities within her labor market.

In sum, the Department established that claimant was not able to work during week 07-14, and that she was not available for work during weeks 06-14 and 07-14. She therefore is ineligible for benefits for those weeks.

DECISION: Hearing Decision 15-UI-33341 is affirmed.

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

DATE of Service: April 8, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘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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