

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0280

Reversed
Eligible

PROCEDURAL HISTORY: On December 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from 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 failed to 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). On January 22, 2015, the Department served notice of an administrative decision concluding that claimant was not available for work from January 11 through 17, 2015 (decision # 94121). Claimant filed a timely request for hearing. On February 24, 2015, ALJ Triana conducted a hearing, and on February 25, 2015 issued Hearing Decision 15-UI-34022, concluding that claimant was not available for work from January 11 through February 14, 2015. On March 10, 2015, EAB issued Appeals Board Decision 2015-EAB-0046, reversing Hearing Decision 15-UI-31990, and concluding that claimant was available for work from October 26, 2014 through January 10, 2015. On March 13, 2015, claimant filed an application for review of Hearing Decision 15-UI-34022 with EAB.

FINDINGS OF FACT: (1) On November 20, 2014, claimant filed an initial claim for benefits after his seasonal work at a golf course ended at the end of October. Claimant was paid \$10.40 per hour for his work at the golf course. He expected to return to work at the golf course by April 2015.

(2) When claimant filed his initial claim for benefits he indicated that he was unwilling to accept a lower rate of pay than he received from his seasonal employer. Claimant further explained that if the job was located in Sunriver, Oregon, he would accept the same rate of pay, but otherwise was unwilling to accept anything under \$12 per hour. On December 1, 2014, claimant told a Department representative that he wanted to make more money than he was making at his last employer, and was unwilling to take a minimum wage paying job.

(3) Claimant claimed benefits for the weeks from January 11 through February 14, 2015 (weeks 02-15 through 06-15), the weeks at issue. During the weeks at issue, claimant sought work as a maintenance

worker and general laborer, and in the retail and food service industries. Claimant was willing to work for as little as Oregon minimum wage under most circumstances because he had been unemployed for over two months. Oregon minimum wage was \$9.25 per hour.¹

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ and conclude that claimant was 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 is that the individual refrain from imposing conditions that substantially reduce the individual’s opportunities to return to work at the earliest possible time. *Id.* In Hearing Decision 15-UI-34022, the ALJ concluded that claimant was not available for work during the weeks at issue because he was unwilling to work for less than \$10 per hour, and therefore was imposing a condition that substantially interfered with his returning to work at the earliest opportunity.² The ALJ did not find claimant’s testimony that he was willing to work for minimum wage credible, reasoning as follows:

Claimant stated that he would work for \$10 per hour “probably” and that he did not like the “certainty of yes.” Claimant specifically indicated that he would be unwilling to perform excavations for septic tanks for \$10 per hour. Furthermore, claimant testified that he was willing to do retail work for minimum wage because it was “easy” work. At hearing, claimant placed qualifiers on his statements. For example, that he was willing to accept minimum wage “if I got consistent hours.” Given claimant’s prior representations to both the Employment Department representative and to a prior Administrative Law Judge at hearing, and given his conditional and uncertain language regarding his willingness to accept minimum wage, I cannot find his testimony persuasive that he was willing to accept minimum wage employment.³

However, claimant’s prior representations to the Department indicating that he was unwilling to work for less than \$10 per hour were made on November 20 and December 1, 2014. With respect to claimant’s prior representations to another ALJ, the record shows only that that Hearing Decision 15-UI-31990 concluded that claimant was not available for work from October 26 through November 22, 2014 (weeks 44-14 through 47-14) because his unwillingness to accept work that paid less than \$10 per hour substantially interfered with his returning to work at the soonest possibility.⁴ However, Appeals Board Decision 2015-EAB-0046 reversed Hearing Decision 15-UI-31990, and concluded that claimant was available for work from October 26, 2014 through January 10, 2015 (weeks 44-14 through 01-15). At hearing, claimant testified that he was more willing to work for as little as Oregon minimum wage

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).

² Hearing Decision 15-UI-34022 at 3.

³ *Id.*

⁴ *Id.* at 2.

during weeks 02-15 through 06-15 because he had been unemployed for over two months. Audio Record at 43:30-44:00. Thus, although we agree with the ALJ that claimant's testimony shows an unwillingness to work for less than \$10 per hour during the weeks at issue in a few hypothetical circumstances, we find it unlikely that his unwillingness to do so substantially interfered with his opportunities to return to work at the earliest possible time.

We therefore conclude that claimant was available for work during the weeks at issue, and that he is eligible for benefits for those weeks.

DECISION: Hearing Decision 15-UI-34022 is set aside, as outlined above.

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

DATE of Service: April 30, 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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