

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0285**

*Affirmed*  
*Ineligible*

**PROCEDURAL HISTORY:** On January 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from September 28 to November 29, 2014 (decision # 121248). Claimant filed a timely request for hearing. On February 12, 2015, ALJ Seideman conducted a hearing, and on March 2, 2015 issued Hearing Decision 15-UI-34349, affirming the Department's decision. On March 14, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

**FINDINGS OF FACT:** (1) Claimant filed weekly claims for benefits from September 28 through November 29, 2014 (weeks 40-14 through 48-14), the weeks at issue. The Department denied claimant benefits for week 40-14, and initially paid benefits for weeks 41-14 through 48-14.<sup>1</sup>

(2) During 2014, claimant worked as a delivery driver for the employer. Drivers' duties included washing dishes. On September 29, 2014, the employer learned that claimant was no longer permitted to drive for the employer because he received a new driving violation.

(3) On September 30, 2014, the employer's manager offered claimant work on Fridays and Saturdays from 4:00 p.m. to 8:00 p.m., washing dishes. Claimant told the manager he was "not interested" in the employer's offer. Audio Record at 19:58 to 20:52. During the weeks at issue, claimant was unwilling to accept work washing dishes for the employer.

<sup>1</sup> 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 is ineligible for benefits for weeks 40-14 through 48-14.

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 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 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.* The Department has the burden of persuasion with respect to any weeks in which the Department initially paid, and now seeks to retroactively deny, benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By extension of that principle, claimant has the burden of persuasion with respect to weeks the Department withheld benefits. Therefore, in this case, claimant has the burden with respect to week 40-14, and the Department has the burden with respect to weeks 41-14 through 48-14.

The issue in this case is whether claimant was available for work during the weeks at issue. At hearing, claimant testified that he did not remember the employer offering him work washing dishes. Audio Record at 18:49 to 19:07. The employer’s manager testified that he offered claimant two shifts per week washing dishes, and that he wrote a memorandum (Exhibit 2) shortly after he offered the work to claimant, to document the incident. Audio Record at 19:58 to 20:52. There is no reason to doubt the testimony of either party, or the reliability of the memorandum stating the employer offered claimant the dishwashing work. *See Exhibit 2.* The employer’s testimony plus contemporaneous written documentation that he offered claimant work washing dishes, and that claimant refused the offer, outweighs claimant’s testimony that the offer was not made. Moreover, the record does not show that claimant subsequently became willing to perform dishwashing. Thus, the preponderance of evidence shows claimant limited his availability for work by refusing to accept dishwashing work, even though dishwashing was one of his duties as a driver. Because claimant imposed a condition that limited his opportunities to return to work at the earliest possible time, claimant was not willing to work during the weeks at issue for purposes of ORS 657.155(c), and therefore was not available for work during those weeks.

Claimant was not available for work during the weeks at issue. Thus, claimant is not eligible for benefits for those weeks.

**DECISION:** Hearing Decision 15-UI-34349 is affirmed.

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

**DATE of Service:** May 1, 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](http://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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