

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1138**

*Affirmed*  
*Ineligible*

**PROCEDURAL HISTORY:** On June 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work during the weeks of April 19, 2015 through May 16, 2015 (decision # 104713). Claimant filed a timely request for hearing. On August 4, 2015, ALJ Murdock convened a hearing at which claimant did not appear, and issued Hearing Decision 15-UI-42530, dismissing claimant's request for hearing. On August 24, 2015, claimant filed a request to reopen the hearing. On September 8, 2015, ALJ Shoemaker conducted a hearing, and on September 14, 2015 issued Hearing Decision 15-UI-44302, allowing claimant's request to reopen and otherwise affirming administrative decision # 104713. On September 28, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Because no adversely affected party sought review of that portion of Hearing Decision 15-UI-44302 that allowed claimant's request to reopen, EAB confined its review to claimant's ability to work.

**FINDINGS OF FACT:** (1) Sometime before April 5, 2015, claimant worked for Goodwill Industries of the Columbia and Willamette as a lead cashier in one of its stores. As a lead cashier, claimant was required not only to handle transactions at the cash register, but also to spend a significant amount of time restocking merchandise, helping in the fitting room area and performing miscellaneous other tasks. In the course of these duties, claimant was frequently required to lift items above his shoulders and head and to bend, twist and pull.

(2) On April 5, 2015, claimant sustained an injury in the workplace when he tripped on a pallet. Claimant hurt his hip, back, neck and shoulder. Since his regular primary care physician was on vacation, claimant went to another healthcare provider for an evaluation of his injuries. Claimant received notes from that provider that excused him from work due to injury from April 5, 2015 through at least April 11, 2015. Claimant was expected to make a full recovery from his injuries.

(3) After the employer received the healthcare provider's notes evaluating claimant, it sent a "job analysis" to the provider asking for specific information about claimant's work restrictions so it could design a modified position that would allow him to return to work. Transcript at 16. Sometime before April 15, 2015, the provider responded to the employer's request, the employer sent the provider a proposal for a modified work assignment, and the provider approved that proposed work as within claimant's medical restrictions. At that time, the provider listed claimant's work restrictions as allowing him "frequently" to engage in pulling, pushing and lifting, "frequently" to lift above his shoulders, "frequently" to bend and twist and "frequently" to engage in fine manipulation. Transcript at 34. On April 15, 2015, the employer mailed to claimant an offer for work at the provider-approved position and asked claimant to indicate whether he was accepting the offer of modified work. On April 21, 2015, claimant declined the offer of modified work because he thought the provider's description of the permitted work activities was "incorrect" and less restrictive than it should have been. Transcript at 22-23, 30.

(4) On April 22, 2015, claimant filed an initial claim for unemployment benefits. Claimant claimed benefits for the weeks of April 19, 2015 through May 16, 2015 (weeks 16-15 through 19-15), the weeks at issue.

(5) Sometime after April 22, 2015, claimant's primary care physician returned from vacation and evaluated claimant's injuries. Claimant's primary care physician modified the provider's previous restrictions to allow claimant only to "occasionally" perform pushing and pulling of up to nine pounds, only "occasionally" to lift up to ten pounds over his shoulders, and "never" to bend, twist, kneel, squat, climb stairs or ladders and "never" to lift more than fifty pounds. Transcript at 11, 34. On May 4, 2015, the employer received the primary care physician's restrictions for claimant and shortly thereafter created another modified position for him. Transcript at 34. On May 11, 2014, claimant reported for work and worked 1.8 hours. Claimant did not work hours that were scheduled for him on May 12, 13 and 14, 2015. On May 15, 2015, claimant returned to work and began performing the modified job duties that his primary care physician had authorized. Claimant's work restrictions were in place and he was performing modified work duties until June or July 2015.

**CONCLUSIONS AND REASONS:** Claimant was not able to work during the weeks of April 19, 2015 through May 16, 2015 and is ineligible to receive benefits during those weeks.

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 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).

Despite his provider's and his physician's restrictions claimant contended that he was able to perform his usual work during all of the weeks at issue. Transcript at 25-26, 26. While claimant suggested that the employer was trying unreasonably to place him on work restrictions during the weeks at issue, this contention is belied by claimant's refusal to return to work on April 21, 2015 because he thought that the provider he saw first had not sufficiently restricted his work activities, and he returned to work only after his primary care physician had significantly increased the range of restrictions. Transcript at 22, 23, 30. The primary care physician's restrictions plainly did not allow claimant to perform many of the duties that his regular, unmodified position required. Because the restrictions were not lessened until June or

July 2015, it appears most likely that in his primary care physician's opinion claimant was not able to return to regular, unmodified work until approximately that time. Claimant suggested, regardless of the medical restrictions in place, that he was able to work during the weeks at issue in a regular cashier position that did not entail the miscellaneous physical demands of his lead cashier role for the employer. However, claimant did not dispute that the restrictions under which he ultimately was willing to return to work were fairly restrictive, including never twisting, kneeling or bending and not more than occasionally lifting more than nine pounds. Transcript at 11. Aside from his speculation about the physical demands of the actual cashier jobs for which he applied during the weeks at issue, it appears likely that a cashier at Bi-Mart, Ross or other stores would need to be able to grasp, lift and pick up purchased items in weights in excess of nine pounds fairly often. Transcript at 26. On this record, in view of the medical restrictions that claimant's primary physician imposed on the employer at claimant's apparent insistence, it is likely that claimant lacked the ability to perform the cashier work that he sought during the weeks at issue, and the record fails to show that claimant sought other work that he was physically capable of performing during that period. Given that there was no reason to doubt the legitimacy of claimant's medical restrictions, claimant was not able to work during the weeks of April 19, 2015 through May 16, 2015. Claimant was not eligible to receive benefits during those weeks.

**DECISION:** Hearing Decision 15-UI-44302 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

**DATE of Service:** October 23, 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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