

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1278

*Hearing Decision 15-UI-46085 Modified
Eligible in Part and Ineligible in Part
Hearing Decision 15-UI-46051 Affirmed
Ineligible*

PROCEDURAL HISTORY: On August 19, 2015, the Oregon Employment Department (the Department) served notices of two administrative decisions, the first concluding that claimant was not able to work during the weeks of July 19, 2015 through August 15, 2015 (decision # 91230) and the second concluding that claimant did not actively seek work during the week of August 9, 2015 through August 15, 2015. Claimant filed timely requests for hearings on both administrative decisions. On October 8, 2015, ALJ Vincent conducted a consolidated hearing, and on October 16, 2015 issued two hearing decisions, the first concluding that claimant was not able to work during the weeks of July 19, 2015 through September 19, 2015 (Hearing Decision 15-UI-46085) and the second concluding that claimant did not actively seek work during the week of August 9, 2015 through August 15, 2015 (Hearing Decision 15-UI-46051). On October 30, 2015, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Claimant submitted a written argument which presented new information that he did not offer into evidence during the hearing. Claimant did not explain why he did not offer this information or otherwise show, as required by OAR 471-030-0090(2), that factors or circumstances beyond his reasonable control prevented him from doing so. For this reason, EAB did not consider the new information that claimant sought to present when reaching this decision.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-46085 and 15-UI-46051. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-1278 and 2015-EAB-1279).

FINDINGS OF FACT: (1) During the weekend of April 4 to April 5, 2015, claimant injured his back while performing some work around his house. Claimant informed his employer, City View Cemetery, he was not able to report for work on Monday, April 6, 2015 because of his injury. At that time, claimant was working for the employer as a landscape maintenance person.

(2) After he injured his back, claimant was not able to stand or walk because of pain. Claimant was required to crawl if he wanted to move between locations. Effective the week of April 3, 2015, claimant filed an initial claim for unemployment benefits. Claimant claimed benefits for the weeks of July 19, 2015 through September 19, 2015 (weeks 29-15 through 37-15), the weeks at issue.

(3) On approximately April 13, 2015, claimant's back injury was evaluated by a chiropractic physician. The physician diagnosed claimant with sciatic neuritis, lumbosacral radicular syndrome and low back pain lumbago. Exhibit 1 at 6. On approximately May 12, 2015, the physician diagnosed claimant's level of disability from his back injury at 76 percent, which was a "crippling" disability. *Id.* From May 27, 2015 through July 30, 2015, the physician treated claimant three times each week using a non-surgical spinal decompression therapy.

(4) During the week of July 19, 2015 through July 25, 2015 (week 29-15), claimant interviewed with the Salem-Keizer School District as a school bus driver. Claimant also looked for "light duty" work that he thought he was able to perform in newspapers and at his local WorkSource Center. Transcript at 16. Claimant did not find any work that he thought was suitable for him in light of his physical limitations. Transcript at 15, 16.

(5) On July 30, 2015 (during week 30-15), claimant's chiropractic physician evaluated claimant and determined he was able to perform some type of work. Exhibit 1 at 6. The physician told claimant that he needed to restrict the work duties he performed and the type of work he sought. *Id.* The physician advised claimant to change his "line of work" from the manual labor work he had previously been performing because such work would exacerbate his back injury and undo the improvements that had been achieved as a result of the spinal decompression therapy. *Id.* The chiropractor restricted claimant from performing work that required him to lift more than twenty pounds, or required him to climb, bend or twist. Transcript at 13. The chiropractor told claimant to exercise "common sense" in the type of work he sought. Transcript at 13. The chiropractor never formally lifted claimant's work restrictions.

(6) During the week of July 26, 2015 through August 1, 2015 (week 30-15), claimant sought work at a bottle recycling center known as Bottle Drop. Claimant also sought work as a gas station attendant at a Space Age gas station and a Union 76 gas station.

(7) During the week of August 2, 2015 through August 8, 2015 (week 31-15), claimant sought work in insurance sales through a friend. Claimant also inquired about employment in the stock room at Office Depot and as a maintenance or clean-up person at Advanced Automotive. Claimant told both potential employers of his work limitations. Claimant thought all the positions were consistent with his chiropractor's work restrictions.

(8) During the week of August 9, 2015 through August 15, 2015 (week 32-15), claimant inquired about stock room work at Bi-Mart, but did not submit an application when he learned that only a cashier position was available. Claimant did not seek work from any other employers in week 32-15.

(9) During the week of August 16, 2015 through August 22, 2015 (week 33-15), claimant inquired about work as a general laborer at Akie's Sandblasting, which was owned by a friend's father. Akie's was willing to work with claimant to design suitable work for him. Claimant also inquired about work at

Bowen's Plumbing, which was also owned by a friend. Bowen's was willing to try to find work for claimant that was within his work limitations. Claimant thought that he could perform the work he sought with both potential employers.

(10) During the week of August 23, 2015 through August 29, 2015 (week 34-15), claimant followed up with the Salem-Keizer School District about bus driver training. Claimant also submitted an application at Fred Meyer and inquired about a job at a Union 76 gas station.

(11) During week August 30, 2015 through September 5, 2015 (week 35-15), claimant again followed up on a bus driver position with the Salem-Keizer School District and confirmed that his application was still under consideration.

(12) During the week of September 6, 2015 through September 12, 2015 (week 36-15), claimant inquired of Easter Seals of Oregon about a retraining program into which he might be admitted. Claimant also inquired into a position with East View Home Improvement performing remodeling work and informed Eastview of his work limitations. Eastview later telephoned claimant and told him it did not have a position within his stated limitations.

(13) During the week of September 13, 2015 through September 19, 2015 (week 37-15), claimant had cataract surgery and, because of the instructions of his physician, he was not able to work that week and did not seek any work.

(14) Sometime in late September 2015, claimant performed home repair work for a friend that included climbing a ladder and repairing a rain gutter, and lifting and installing a door that weighed over fifty pounds. At around that same time, claimant repaired a pole shed in his own yard that included demolishing a roof and reinstalling it, and split, stacked and hauled a cord of firewood.

CONCLUSIONS AND REASONS: Claimant was not able to perform the work that he sought during the weeks of July 19, 2015 through August 1, 2015 (weeks 29-15 and 30-15), the week of August 9, 2015 through August 15, 2015 (week 32-15), the week of September 6, 2015 through September 12, 2015 (week 36-14) and the week of September 13, 2015 through September 19, 2015 (week 37-15). Claimant was able to work during week of August 2, 2015 through August 8, 2015 (week 31-15) and the weeks of August 16, 2015 through September 5, 2015 (weeks 33-15, 34-15 and 35-15). Claimant did not actively seek work during the week of August 9, 2015 through August 15, 2015 (week 32-15).

Able to Work. 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).

In Hearing Decision 15-UI-46085, the ALJ concluded that claimant was not physically able to perform the work that he was seeking during all of the weeks at issue, weeks 29-15 through 37-15. The ALJ reasoned that, during those weeks, claimant was not applying for jobs he was "actually capable of performing, but was instead asking employers to create jobs for him that he could perform." Hearing Decision 15-UI-46085 at 2. We disagree in part.

When the chiropractor evaluated claimant on July 30, 2015, he stated claimant was able to return to work but imposed very stringent physical restrictions on the type of work claimant was able to perform. In week 29-15 (July 19 through 25, 2015), based on these restrictions, claimant was unable to locate any positions he thought he could perform other than to apply for training as a school bus driver. Although claimant sought work at a bottle recycling center and as a gas station attendant in week 30-5 (July 26 through August 1, 2015), it does not appear, based on the physician's evaluation, that claimant was able to perform those jobs, without modification, since he applied for them relatively near in time to the physician's evaluation. Absent evidence that claimant's back injury was healing more rapidly than would be expected, we infer, more likely than not, that claimant was not able to perform the work he sought during weeks 29-15 and 30-15. However, based on the manual work that claimant was able to perform at his home by late September 2015, it appears that claimant's condition, and his ability to work, progressively improved.

For week 31-15 (August 2 through 8, 2015), claimant's testimony was unrebutted that the work he sought was within his chiropractic physician's work restrictions. He told all the potential employers of his work restrictions and they did not inform him that they had no suitable positions given his work restrictions. There is no evidence in the record that claimant was not able to perform the work about which he inquired in week 31-15, or from which it can be inferred that the work was beyond claimant's physical capacities. Based on the evidence in the record, claimant was able to perform the work he sought during week 31-15. For weeks 33-15 through 35-15 (August 16 through September 5, 2015), claimant's testimony was also unrebutted that the work he sought was within his work restrictions, that he told the potential employers of his restrictions, and they were willing to consider him for positions that accommodated those restrictions. While the ALJ reasoned that claimant was not able to perform the work he sought because he asked the employers to create jobs for him, the standard is whether claimant was able to perform the work he was seeking, and he was not precluded from seeking work that accommodated his limitations if the potential employers had such work available. There is no evidence in the record that claimant was not able to perform the work he was seeking during weeks 33-15 through 35-15 or from which it can be inferred that the positions he inquired about were beyond his physical abilities. Based on this record, claimant was able to perform the work that he sought or inquired about during weeks 33-15 through 33-15.

For week 32-15 (August 9 through 15, 2015), claimant applied only at Bi-Mart and was unwilling to accept the cashier work that was available at Bi-Mart. Transcript at 23, 24. While the reason that claimant did not pursue the available cashier position at Bi-Mart and why claimant did not seek work elsewhere was not clear from the record, it appears either that claimant was not available for work during that week or that he was not able to perform the work that he would otherwise have been seeking that week. Based on this record, claimant either was not available for work or not able to perform the work that he was seeking during week 32-15. For week 36-15 (September 6 through 12, 2015), aside from the re-training program at Easter Seals, the one apparently paying position that claimant applied for at Eastview Home Improvement was a remodeling position that apparently required him to perform heavy labor such as putting up sheet rock and performing related construction tasks. Transcript at 31. That Eastview told claimant that it had no suitable positions for him due to his work limitations demonstrates that claimant was not able to perform the work that he sought at Eastview during week 36-15. Transcript at 31. For week 37-15 (September 13 through 19, 2015), claimant stated that he did not inquire about work during that week because of work restrictions that were imposed on him as a result

of a cataract surgery. Transcript at 34. Due to the physician's restrictions, claimant was not able to perform the work he was seeking during week 37-15.

In sum, claimant was able to perform the work he was seeking during weeks 31-15, 33-15, 34-15 and 35-15, and is eligible to receive benefits for those weeks. Claimant was not able to perform the work he was seeking during weeks 27-15, 30-15, 32-15, 36-15 and 37-15 and is not eligible to receive benefits for those weeks. Hearing Decision 15-UI-46085 is so modified.

Actively Seeking Work. For purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a) (February 23, 2014). With few exceptions, none of which apply here, individuals are "required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual." *Id.* "Direct contact" means "making contact with an employer . . . to inquire about a job opening or applying for job openings in the manner required by the hiring employer." OAR 471-030-0036(5)(a)(B).

EAB reviewed the entire hearing record underlying Hearing Decision 15-UI-46050. On *de novo* review and pursuant to ORS 657.275(2), Hearing Decision 15-UI-46050 is **adopted**.

DECISION: Hearing Decision 15-UI-46085 is modified, as outlined above.
Hearing Decision 15-UI-46050 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 4, 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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