

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0261

Affirmed
Ineligible

PROCEDURAL HISTORY: On January 15, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks of November 29, 2015 through January 2, 2016 (decision # 121742). Claimant filed a timely request for hearing. On February 17, 2016, ALJ Vincent conducted a hearing, and on February 19, 2016 issued Hearing Decision 16-UI-53387, affirming the Department's decision. On March 4, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On December 3, 2015, claimant filed an initial claim for unemployment insurance benefits. That claim was determined valid. Claimant claimed but was not paid benefits during the weeks of November 29, 2015 through January 2, 2016 (weeks 48-15 through 52-15), the weeks at issue.

(2) During the weeks at issue, claimant's labor market was Salem and Keizer, Oregon and the surrounding areas. Claimant sought work as a construction laborer. The customary days and hours for construction laborer work in claimant's labor market was all days, day shift.

(3) Sometime before the weeks at issue, a court ordered claimant to attend classes once a week in a court sponsored domestic violence program. During the weeks at issue, these court-mandated classes were offered on Thursdays, Fridays and Saturdays. Claimant was unable to take the Saturday classes because of child-care responsibilities. The classes offered on Thursdays took place from 11:00 a.m. until 1:30 p.m. The classes on Fridays took place from 2:00 p.m. until 4:30 p.m. Claimant attended the Friday classes.

(4) Claimant completed the court-ordered classes sometime around February 17, 2016.

CONCLUSIONS AND REASONS: Claimant was not available for work during the weeks of November 29, 2015 through January 2, 2016.

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 all full time, part time and temporary work opportunities throughout the labor market during the days and hours customary for the type of work sought, and refrain from imposing conditions that limit the individual’s opportunities to return to work at the earliest possible time. *Id.* Where, as here, the Department did not pay benefits to an individual during the period at issue, the individual has the burden to demonstrate by a preponderance of the evidence that the individual was eligible to receive benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (when the Department has paid benefits, the Department carries the burden of persuasion; by logical extension, claimant carries the burden when the Department has not paid benefits).

The classes claimant was court ordered to attend were available on Saturdays, other than during the customary hours for the work he was seeking, but, as a result of caring for his children, claimant was able to attend only the Thursday or Friday classes, which took place within those customary hours. Although OAR 471-030-0036(4)(a) sets out certain circumstances in which an individual will be considered available for work despite his unwillingness to work a particular shift due to child care responsibilities, that exception is applicable only if, among other things, the work the individual is seeking is customarily performed during at least one other shift in the individual’s labor market. Here, it was not disputed that the work claimant sought was only available in his labor market during one shift – the day shift – and no others. Claimant therefore falls outside this exception.

To show that he was available for work each week, claimant needed to be capable and willing to report to all work opportunities during all of the days and hours customary for a construction laborer. Since claimant was court-ordered to attend classes each week, and he could only take those classes on Thursdays and Fridays during the hours customary for construction laborer work, it is obvious that he was unwilling or unable to report for any work opportunities that might become available in his labor market during the hours of 11:00 a.m. through 1:30 p.m. on Thursdays or 2:00 p.m. through 4:30 p.m. on Fridays. While it is understandable that claimant decided to attend the court ordered classes, OAR 471-030-0036(3) does not allow any exceptions to its requirements of across-the-board availability. Therefore, the fact that claimant might have had good reasons for limiting his capacity to report for work during all the customary hours of the type of work he sought to attend a court-required class, or even that he might have faced legal penalties if he failed to attend the class in order to accept work, cannot change the outcome of this decision. Because claimant was not willing or capable of reporting for work opportunities during *all* the hours customary for the type of work he sought during the weeks at issue, he was not available for work during the weeks of November 29, 2015 through January 2, 2016. Claimant is not eligible to receive benefits during those weeks.

DECISION: Hearing Decision 16-UI-53387 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: April 4, 2016

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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