

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0570

Affirmed
Ineligible Weeks 45-15 to 1-16

PROCEDURAL HISTORY: On February 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from November 8, 2015 to January 9, 2016 (decision # 114758). Claimant filed a timely request for hearing. On February 29, 2016, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for March 15, 2016, at which claimant failed to appear. On March 18, 2016, ALJ Logan issued Hearing Decision 16-UI-55369, dismissing claimant's hearing request for failure to appear. On March 24, 2016, claimant filed a timely request to reopen. On April 8, 2016, the Department issued notice that it had amended decision # 114758.¹ Also on April 8, 2016, OAH mailed notice of a hearing on decision # 114758 scheduled for April 26, 2016. On April 26, 2016, ALJ Holmes-Swanson conducted a hearing, and on May 4, 2016 issued Hearing Decision 16-UI-58860, allowing claimant's request to reopen and affirming the Department's decision that claimant was not available for work from November 8, 2015 to January 9, 2016. On May 13, 2016, claimant filed an application for review of Hearing Decision 16-UI-58860 with the Employment Appeals Board (EAB).

No adversely affected party requested review of the portion of Hearing Decision 16-UI-58860 that allowed claimant's request to reopen. We therefore confined this decision to the issue of claimant's availability for work from November 8, 2015 to January 9, 2016.

FINDINGS OF FACT: (1) On November 13, 2015, claimant filed an initial claim for unemployment insurance benefits. Claimant filed weekly claims for and was paid benefits from November 8, 2015 to January 9, 2016, the weeks at issue.

¹ Notice of amended decision # 114758 stated that it canceled and superseded the original decision # 114758. According to the Department's findings in amended decision # 114758, however, the decision was amended only because the February 1st version was returned by the US Postal Service because the copy sent to the employer was "undeliverable." The result of the amended decision still denied claimant benefits for the same weeks and for the same reason as the original, and none of the issues addressed therein were resolved or altered by the amendment.

(2) During the weeks at issue, claimant sought barber and receptionist work. Claimant's labor market included Oregon City, Clackamas, Milwaukie, Lake Oswego and the surrounding areas. In claimant's labor market, the customary days and hours for those types of work included all days, day and swing shifts.

(3) Claimant was unemployed at the time of her initial claim filing because, during a maternity leave from J Bell, that employer eliminated her position. After filing her initial claim, claimant accepted a position working Mondays and part of Wednesdays with The Barber. Approximately one week later, J Bell's owner asked claimant if she was interested in resuming full time receptionist work with J Bell. Claimant said she was not willing to return to full time work with J Bell because she had committed to working part time at The Barber. Claimant said she could return to J Bell on a part time basis, but the owner decided he only wanted to recreate her position for a full time receptionist.

(4) During all of the weeks at issue, claimant had an infant. Claimant's mother, step-father and husband were available to provide child care seven days a week during the day and swing shifts.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was not 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). To be considered "available for work" for purposes of ORS 657.155(1)(c), claimant must have been willing to accept full time, part time and temporary work opportunities, and refrain from imposing conditions that substantially reduce her opportunities to return to work at the earliest possible time. OAR 471-030-0036(3) (February 23, 2014). The Department initially paid claimant benefits for each of the weeks at issue. Therefore, the Department has the burden to establish that benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

The Department alleged that claimant cannot be considered available for work during the weeks claimed because she lacked childcare for her infant. The Department witness testified that claimant reported to the Department that she did not have childcare 40 hours per week, and would have to "try and see" if her babysitter could provide that level of care for her child. Claimant denied having reported that, and claimed that she had childcare the entire time she claimed benefits. We have no reason to doubt the credibility of either witness. Absent a reason to disbelieve either witness, the evidence of whether claimant had adequate childcare during the weeks at issue is no better than equally balanced, and the Department, which had the burden of persuasion, has failed to establish that it is more likely than not that claimant lacked adequate childcare.

The Department also alleged, however, that claimant was not available for work because she was unwilling to accept full time work when offered by J Bell. The Department's witness testified, and claimant agreed, that claimant had rejected J Bell's owner's offer to recreate her full time receptionist position because she was working Mondays and part of Wednesdays for The Barber. Claimant testified that she had committed to working Mondays and part of Wednesdays for The Barber, and was not willing to leave her part time work there to take full time work with J Bell. Claimant had logical personal reasons for making the decision to continue working part time for The Barber instead of returning to full time work with J Bell. For purposes of her eligibility for unemployment insurance

benefits, however, claimant's decision to refuse a potential offer of full time work based on her commitment to part time work demonstrated that she was not willing to work full time, and imposed a condition on her availability for work that substantially reduced her opportunities to return to work at the earliest possible time.² Therefore, for purposes of determining claimant's eligibility for unemployment insurance benefits during the weeks of November 8, 2015 to January 9, 2016, claimant was not available for work. She is, therefore, ineligible to receive unemployment insurance benefits during those weeks.

DECISION: Hearing Decision 16-UI-58860 is affirmed.

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

DATE of Service: June 14, 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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² It is irrelevant that, at the time claimant accepted part time work at The Barbers and refused to return to full time work with J Bell, the Department had not yet made any benefit payments. Claimant is required under ORS 657.155 and OAR 471-030-0036 to be available for work for every week she *claims* benefits, without respect to the timing of the Department's benefit payment decisions.