

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0709**

*Affirmed*  
*Ineligible Weeks 14-16 through 17-16*

**PROCEDURAL HISTORY:** On May 10, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 115122) concluding that claimant was not available for work from April 3 through April 30, 2016 (weeks 14-16 through 17-16). Claimant filed a timely request for hearing. On June 6, 2016, ALJ Menegat conducted a hearing, and on June 9, 2016 issued Hearing Decision 16-UI-61379, affirming the administrative decision. On June 13, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) On January 29, 2016, claimant filed an initial claim for unemployment benefits.

(2) Prior to April 1, 2016, claimant was employed by Aerotek, a temporary employment agency, and assigned to work at Food Services of America.

(3) On April 1, 2016, claimant broke her left ankle. Claimant contacted Aerotek and Food Services of America and told about her injury and explained that she was unable to work. She was told she might be able to return to her assignment at Food Services of America when her ankle was healed.

(4) On April 14, 2016, claimant had surgery on her broken ankle. Claimant's doctor restricted her from working until May 1, 2016, and told her she could return to full time work on that date, if she felt able to do so.

(5) Claimant claimed benefits for weeks 14-14 through 17-16 (April 3 through 30, 2016), the weeks at issue. When she filed her claims for weeks 14-16 through 16-16, claimant indicated that she was on a temporary layoff of four weeks or less, and had performed no work seeking activities.<sup>1</sup>

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<sup>1</sup> Individuals who are "on temporary layoff of four weeks or less" from a regular employer are exempt from the work seeking requirements of ORS 657.155(1)(c), but only "if the individual had, as of the layoff date, been given a date to return to . . . work." OAR 471-030-0036(5)(b)(A). Those individuals are considered to have actively sought work just by maintaining contact with his or her regular employer.

(6) On April 17, 2016, the Department sent claimant a form to inquire about the nature of claimant's illness or injury. In response to the questions on the form, claimant stated that she had broken her left ankle, that she became unable to work on April 1, 2016, that she could possibly return to full time work on May 1, 2016, and that she had not been looking for work. Audio recording at 19:17-20:03. Claimant signed and returned the form to the Department.

(7) When claimant filed her claim for week 17-16, she indicated that she had performed five work seeking activities during the week and had been offered a job that would begin on May 16, 2016.

(8) On May 3, 2016, a Department representative contacted claimant and asked about claimant's ability to work. In response to the representative's questions, claimant stated that she had broken her ankle on April 1, that she had surgery on the ankle on April 14, and that her doctor had restricted her from working until May 1, and told her she could return to full time work on that date if she felt able to do so.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude that claimant was not able to work during the weeks 14-16 through 17-16.

To be eligible to receive benefits, unemployed individuals must be able to 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). An individual prevented from working full time or during particular shifts due to a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h) shall not be deemed unable to work solely on that basis so long as the individual remains available for some work. OAR 471-030-0036(2)(b).

Claimant asserted that despite her broken ankle, she was physically able to perform the work she had been doing prior to her injury, and was also able to perform work as clerical worker and customer service representative, work she sought during the weeks at issue -- from April 3 through 30, 2016. Audio recording at 12:00, 15:50, 16:14. The Department representative, however, testified that on two occasions -- once on an April 17 form claimant submitted to the Department and again during a May 3 conversation with a Department representative -- claimant stated that she was unable to work after she broke her ankle, and had been restricted by her doctor from returning to full time work until May 1, 2016.

Despite claimant's assertion that she was prevented from returning to work at Food Services of America because of a temporary layoff and not because of her injured ankle, she testified that because Food Services of America was "very busy," it hired someone to replace her on May 1. Audio recording at 16:14. It is implausible that the company where claimant had been working prior to her injury laid her off during the first week in April, but had so much work available that it became necessary to hire someone to replace claimant on May 1. We conclude it more likely than not that claimant notified the temporary agency and Food Services of America that she had broken her ankle, and also told them she could not return to work because of this injury. Claimant also contended that although her doctor recommended that she not return to work until May 1, claimant chose to disregard this recommendation and was able and willing to return to work immediately after the surgery. Audio recording at 14:32, 20:32. Statements claimant made to the Department on the April 17 form and in her May 3 conversation

with a Department representative – that her doctor had restricted her from working until May 1 – contradicted her testimony, however. Claimant asserted that any seeming contradiction between her testimony at the hearing and statements to the Department resulted from her confusion about the form and a misunderstanding on the part of the Department representative with whom she spoke. Audio recording at 14:32, 18:35. We find it unlikely that the April 17 form, which included questions such as what was the nature of her injury, when was she became unable to work, and what the date she would be able to return work – confused claimant. In addition, claimant’s testimony about the April 17 form was inconsistent: although she initially testified that she did not remember signing the form (Audio at 9:35), she subsequently conceded that she remembered filling out the form, but that it was “confusing” to her. Audio at 20:27. Because of the implausible and contradictory nature of claimant’s testimony, we find the Department’s evidence more credible than that of the claimant. We conclude it more likely than not that claimant was not able to work during the weeks at issue, weeks 14-16 through 17-16, because of her broken ankle. Claimant is therefore ineligible to receive unemployment benefits for these weeks.

**DECISION:** Hearing Decision 16-UI-61379 is affirmed.

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

**DATE of Service:** July 21, 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](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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