

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0893**

*Reversed*  
*Eligible*

**PROCEDURAL HISTORY:** On June 14, 2016, the Oregon Employment Department (the Department) served two notices of administrative decision, the first concluding claimant was not available for work during the weeks of September 20, 2015 through December 19, 2015 (decision # 65134) and the second concluding claimant did not actively seek work during the weeks of February 28, 2016 through March 26, 2016 (decision # 173851). Claimant filed timely requests for hearing on both administrative hearings. On July 18, 2016, ALJ Shoemake conducted a consolidated hearing, and on July 25, 2016 issued two hearing decisions, the first affirming decision # 65413 (Hearing Decision 16-UI-64415) and the second reversing decision #173851 (Hearing Decision 16-UI-64401). On July 29, 2016, claimant filed an application for review of Hearing Decision 16-UI-64415 with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Claimant was available for work during the weeks of September 20, 2015 through December 19, 2015.

(1) On September 25, 2015, claimant filed an initial claim for unemployment benefits. Claimant's claim was determined valid. Claimant claimed, and was paid benefits for the weeks of September 20, 2015 through December 19, 2015 (weeks 38-15 through 50-15), the weeks at issue.

(2) During the weeks at issue, claimant sought work as a cashier and delivery driver. Claimant's labor market was White City and Medford, Oregon and all cities in-between. The days and hours customer for a cashier in claimant's labor market were all days, all shifts. The days and hours customary for a delivery driver in claimant's labor market were all days, day and swing shifts.

(3) During the weeks at issue, claimant lived in White City. Medford is located eight miles from White City. Public transportation was available between White City and Medford during the hours of 5:00 a.m. and 8:18 p.m. on Mondays through Fridays. Claimant's car was not operable during the weeks at issue.

(4) During the weeks at issue, claimant applied for work with potential employers only in person and not online. Claimant thought that applying in person would show potential employer that she was interested in the jobs they had available and would enhance the likelihood that she would be offered a job.

Although claimant's car was not operable during the weeks at issue, three of her friends drove her to the locations of potential employers when she wanted to apply for jobs. One of claimant's friends had a car he was not using and he would allow claimant to borrow that car, keep it at her residence and use it to commute to work or for other work-related purposes whenever she needed. The friend's car would be available for claimant's use if she secured a delivery driver job while her own car was not drivable.

(5) During week 09-16, claimant visited and applied for work in White City at a Union 76 gas station, a Dollar Store, a US Cellular store, a Taco Bell and a Subway. During week 10-16, claimant visited and applied for work in Eagle Point at Dave's Market, Abby's, an AM/PM store, a Subway and one other business. During week 11-16, claimant visited and applied for work in Medford at a PetSmart, a Lowe's, a Michael's, Lava Lane and a Subway. During week 12-16, claimant again visited Medford and applied for work at a Fred Meyer, a Ross, an Ace Hardware, a Michael's and a PetSmart.

**CONCLUSIONS AND REASONS:** Claimant was available for work during weeks 09-16 through 15-16 despite her inability to use her personal vehicle. Claimant was eligible to receive benefits for 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 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 full time, part time and temporary work opportunities throughout the labor market, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.*

In Hearing Decision 16-UI-64415, the ALJ concluded claimant was not available for work during the weeks at issue. The ALJ reasoned that because claimant's car was not operable, and her transportation was limited to walking, obtaining rides from friends or using public transportation, this circumstance imposed conditions that substantially interfered with her opportunities to return to work at the earliest possible time or prevented her from accepting and reporting to all suitable work in her labor market. Hearing Decision 16-UI-64415 at 3. We disagree.

At the outset, since claimant was paid unemployment benefits during the weeks at issue, the Department has the burden of demonstrating by a preponderance of the evidence that claimant was not available for work. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). In other words, if the evidence on a disputed issue is evenly balanced, this principle for allocating the burden of persuasion, requires us to resolve that issue in claimant's favor.

In this case, claimant testified she could borrow a friend's extra car whenever she asked and had rides from friends whenever she needed them to look for work. While the Department's witness expressed doubt that this alternate transportation arrangement was truly available to claimant, she did not present any actual evidence that impeached or tending to impeach claimant's credibility, or that rebutted claimant's evidence regarding available transportation. Therefore, this disputed issue must be resolved

in claimant's favor, and we find that claimant's testimony about the types of transportation available to her in lieu of her own car was accurate. Given that claimant appeared to have ready access to a friend's car and to the cars of friends who gave her rides when she needed them, the Department did not meet its burden to prove that claimant's lack of an operable car substantially interfered with her ability to return to work or prevented her from accepting and reporting for suitable work during the weeks at issue. Accordingly, claimant's transportation limitations did not render her unavailable for work.

The Department did not show claimant was not available for work during the weeks at issue. Claimant was eligible to receive unemployment benefits during those weeks.

**DECISION:** Hearing Decision 16-UI-64415 is set aside, as outlined above

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

**DATE of Service:** August 26, 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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