

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1377

*Hearing Decisions 16-UI-72200 and 16-UI-72211 Affirmed
Ineligible Weeks 29-16 through 38-16*

PROCEDURAL HISTORY: On October 28, 2016, the Oregon Employment Department (the Department) served notice of two administrative decisions, one concluding claimant was not available for work from July 17, 2016 to September 24, 2016 (decision # 110856), and another concluding claimant was not available for work from September 4 through 10, 2016 (decision # 113234). Claimant filed a timely request for hearing. On December 1, 2016, ALJ S. Lee conducted two hearings and on December 2, 2016, issued Hearing Decision 16-UI-72211, affirming decision # 110856 and Hearing Decision 16-UI-72200, affirming decision # 113234. On December 6, 2016, claimant filed applications for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-72211 and 16-UI-72200. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 16-AB-1376 and 16-AB-1377).

Claimant submitted written argument to EAB that contained new information, but did not address why she failed to offer the information at hearing. Because claimant's argument failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing, we considered only information received into evidence at hearing when reaching this decision. ORS 657.275(2); OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) On May 24, 2016, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks from July 17, 2016 through September 24, 2016 (weeks 29-16 through 38-16). The Department initially paid, and subsequently denied, benefits for weeks 29-16 through 33-16 and week 35-16. The Department denied benefits for weeks 34-16, and 36-16 through 38-16 and did not pay her benefits for those weeks.¹

¹ We take notice of these facts, which are contained in Employment Department records. Any party that objects to our doing so must submit such objection to EAB in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record.

(2) During the weeks at issue, claimant sought work as a massage therapist and office assistant. Her labor market was Ashland to Medford, Oregon. The customary work days and hours for office assistant work in claimant's labor market were Monday through Friday, 8:00 a.m. to 5:00 p.m. For massage therapists, the customary work days and hours in claimant's labor market were all days, day and swing shifts.

(3) During the weeks at issue, claimant was employed as a massage therapist at both Mark Antony Historic and Zagorska Oasis Spa. During all the weeks at issue, claimant was pregnant and experienced high blood pressure due to her pregnancy. During all the weeks at issue, claimant's doctor had restricted claimant from standing for more than four hours per day because standing for longer periods could elevate claimant's blood pressure. Claimant had to stand to perform massage therapy.

(4) From May 2016 until August 9, 2016, claimant had a regular part-time schedule performing four-hour massage therapy shifts at Zagorska Oasis Spa on Mondays, Tuesdays, Thursdays, and Fridays.

(5) From May 2016 until July 20, 2016, claimant had a regular schedule performing massage therapy at Mark Antony Historic on Wednesdays and Sundays.

(6) On July 20, 2016, claimant sent an email to her manager at Mark Antony Historic asking to work as "back up" six days per week, instead of being on the schedule Wednesdays and Sundays. As "back up," claimant had the option to take an occasional shift offered to her from a coworker, such as if a coworker went on vacation.

(7) On September 8, 2016, Mark Antony Historic offered claimant one hour of work as a massage therapist. Claimant refused the offer of work because she believed the massage work would elevate her blood pressure.

CONCLUSION AND REASONS: We agree with the Department and the ALJ. Claimant was not available for work during weeks 29-16 through 38-16.

The Department initially paid claimant benefits for weeks 29-16 through 33-16 and week 35-16. Therefore, the Department has the burden to establish that benefits should not have been paid for those weeks. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). Because the Department initially denied benefits for weeks 34-16, and 36-16 through 38-16, claimant has the burden to establish that benefits should have been paid for those weeks. *Id.*

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.*

On July 20, 2016, claimant asked Mark Antony Historic to change her schedule from regularly working a shift on Wednesday and Sunday doing massage therapy, to only working on a back-up basis. Claimant testified that she limited her availability at Mark Antony Historic to “accommodate hours at [Zagorska Oasis Spa].” Audio Record (decision # 110856) at 21:04 to 21:28. However, the record shows that claimant’s part time work schedule at Zagorska Oasis Spa did not conflict with her schedule at Mark Antony Historic because she did not work at Zagorska Oasis Spa on Wednesdays or Sundays. Claimant did not allege that Mark Antony Historic required her to exceed her doctor’s limit of four hours per day on her feet. Nor is there evidence to show that Mark Antony Historic would have discontinued scheduling claimant for two regular shifts per week as it had been since May 2016. Absent evidence to the contrary, by limiting her availability to back-up only, claimant imposed a condition that unreasonably limited her opportunities to work. Since claimant limited her availability starting on July 20, 2016, claimant was not available for work during the weeks of 29-16 through 38-16, all the weeks at issue.

The Department also denied claimant benefits for week 36-16 because it determined claimant was not available for work during that week because she refused suitable work on September 8, 2016. Administrative Decision # 113234. Whether a person has substantially reduced her opportunities to return to work at the earliest possible time by limiting the work that she will accept depends on whether that limitation operates to exclude “suitable” work opportunities. *See* ORS 657.155(1)(c). Claimant asserted that she was not willing to perform the massage work for Mark Antony Historic on September 8, 2016 because the work might elevate her blood pressure, she was sensitive to the iodine in the products used for the massage, and because she believed the employer was offering her massage work instead of her previous managerial work, to retaliate against claimant for having filed a BOLI civil rights complaint against the employer. Audio Record (decision # 113234) at 19:42 to 20:18.

ORS 657.190 states that, among the factors the Department must consider to determine whether work is “suitable” for a claimant, are the degree of risk involved to the health and safety of the individual, and the physical fitness and prior training and experience of the individual. The record does not show by a preponderance of the evidence that working for one hour doing massage therapy, where there is no evidence that claimant had already worked four hours on September 8, exceeded her doctor’s limitations or posed a risk to her health and safety. Nor did the record show that the massage work was unsuitable because claimant was sensitive to the products. She testified that she had worked with the products containing iodine before, and that the primary reason she refused the offer of work was not the iodine, but her concern about her blood pressure. Audio Record (decision # 113234) at 20:19 to 20:36. Nor does the record establish that the employer was retaliating against claimant or otherwise engaged in employment discrimination by offering her only massage therapist work.

Claimant argued in her written argument that she remained eligible for benefits because she remained available for office work. OAR 471-030-0036(2)(b) provides that 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. However, claimant did not limit her availability to part time or particular shifts due to her medical condition. Nor was claimant’s high blood pressure a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). Rather, it was a transitory impairment, caused by the temporary condition of pregnancy. Claimant was thus not considered “able to work” pursuant to the exception provided by OAR 471-030-0036(2)(b).

Accordingly, claimant's unwillingness to accept massage work from Mark Antony Historic on September 8 rendered her not available to work and not eligible to receive benefits for week 36-16.

Claimant was not available for work from July 17, 2016 to September 24, 2016, comprising weeks 29-16 through 38-16. Claimant is ineligible to receive unemployment insurance benefits during this period.

DECISION: Hearing Decisions 16-UI-72200 and 16-UI-72211 are affirmed.

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

DATE of Service: January 13, 2017

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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