

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0029**

*Hearing Decision 16-UI-72893 Affirmed in Part,  
Reversed and Remanded in Part*

*Hearing Decision 16-UI-72892  
Reversed and Remanded*

**PROCEDURAL HISTORY:** On October 31, 2016, the Department served notice of two administrative decisions concluding that claimant was not able to work or available for work from September 4 through October 1, 2016 (decision # 111912) and October 2 through October 22, 2016 (decision # 142742). Claimant filed timely requests for hearing on the two decisions. On December 13, 2016, ALJ Seideman conducted hearings, and on December 14, 2016 issued Hearing Decision 16-UI-72893, affirming decision # 111912, and Hearing Decision 16-UI-72892, modifying decision # 142742 and concluding claimant was not available for work from October 2 through December 10, 2016. On January 3, 2017, claimant filed applications for review of Hearing Decisions 16-UI-72893 and 16-UI-72892 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-72893 and 16-UI-72892. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0029 and 2017-EAB-0030).

Claimant submitted written argument to EAB, but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

**FINDINGS OF FACT:** (1) Claimant was employed by Lucky Vacation Rental as a reservationist and customer service representative. Claimant normally worked remotely from her home while working for Lucky Vacation Rental. Her regularly scheduled days to work for Lucky Vacation Rental were Thursday through Monday.

(2) In August 2016, claimant suffered a broken shoulder and leg, and a shattered ankle from a non-work related accident. Claimant was hospitalized until September 3, 2016.

(3) Claimant claimed unemployment insurance benefits for the weeks from September 4, 2016 through December 10, 2016 (weeks 36-16 through 49-16), the weeks at issue. The Department initially paid claimant benefits for weeks 36-16 and 37-16.<sup>1</sup>

(4) During the weeks from September 4 through 17, 2016 (weeks 36-16 and 37-16), claimant's labor market was Bend, Oregon, and claimant sought work performing administrative work. The customary days and hours for administrative work in Bend, Oregon were all days of the week, day and swing shifts.

(5) Claimant was on medical leave and unable to work from the date of her accident until September 10, 2016. On September 11, 2016, claimant returned to work for Lucky Vacation Rental but was unable to work the last hour of her shift that day due to her injuries and the effects of the medication she used for her injuries.

(6) On Monday, September 12, 2016, Lucky Vacation Rental's owner asked claimant to report to the employer's office to discuss claimant's dissatisfaction with a reduction in her hours. Claimant was unwilling to report to work at the employer's office on September 12 because she was dissatisfied that the employer had reduced her hours.

**CONCLUSIONS AND REASONS:** Hearing Decision 16-UI-72893 is affirmed to the extent that it concluded that claimant was not able or available for work during weeks 36-16 and 37-16. To the extent that Hearing Decisions 16-UI-72893 and 16-UI-72892 concluded that claimant was not able or available for work during weeks 38-16 through 49-16, they are reversed, and this matter remanded for further development of the record.

**Weeks 36-16 through 37-16.** To be eligible to receive benefits, unemployed individuals must be able to work and available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). Where, as it did for weeks 36-16 and 37-16, the Department paid a claimant benefits, the Department carries the burden to show that claimant is ineligible for those benefits and that the benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). The record is sufficient to determine whether claimant was eligible for benefits under ORS 657.155(1)(c) during the first two weeks at issue, weeks 36-16 and 37-16.

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 occasionally and temporarily disabled for less than half of the week is not considered unable to work. OAR 471-030-0036(2)(a). 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).

From September 4 through September 10, 2016 (week 36-16), claimant was on medical leave and not able to work due to her injuries. The record does not show that claimant's injuries amounted to a

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<sup>1</sup> We take notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so must submit its objection to this office, explaining in writing the basis for its objection, within ten days of the date on which this decision was mailed. OAR 471-041-0090(3) (October 29, 3006). Unless such an objection is received and sustained, the noticed fact will remain part of the record.

permanent or long-term impairment. Therefore, we do not apply the provisions of OAR 471-030-0036(2)(b). Because claimant's injuries rendered her temporarily disabled for more than half of week 36-16, she is considered to have been unable to work during that week and is ineligible for unemployment benefits for that week.

The record contains insufficient information to determine if claimant was unable to work during week 37-16. However, an individual must also meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3). 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.* Administrative work was performed all days of the week in claimant's labor market during week 37-16. On September 12, 2016, claimant was unwilling to report to work at the employer's office for her normally scheduled shift due to her dissatisfaction with the employer's decision to reduce her hours. Because claimant refused to work on September 12 because she preferred not to discuss the reduction in hours with the owner, the preponderance of the evidence shows claimant was not willing to work on all of the usual days of the week customary within her labor market for the administrative work she sought. Claimant was therefore not available for work during week 37-16.

**Weeks 38-16 through 49-16.** In Hearing Decisions 16-UI-72893 and 16-UI-72892, the ALJ affirmed the Department's conclusion regarding claimant's availability for work. The ALJ concluded that claimant was not able or available for work because, after the "initial stages," of her recovery, claimant was "still in substantial pain," could not drive, and did not have a car.<sup>2</sup> The ALJ also concluded that claimant's distance from a city center, physical condition, and practice of informing employers of her condition imposed conditions that substantially reduced her opportunity to return to work at the earliest possible time.<sup>3</sup> The ALJ's conclusions regarding claimant's ability to work and drive, her access to a car, and the conditions she imposed on her availability to work are not supported by evidence in the record, however.

At hearing, claimant testified that she moved to Salton, California on October 13, 2016, and to Foresthill, California on October 28, 2016. Transcript at 14, 34. The Department initially identified claimant's labor market as Bend, Oregon. However, the ALJ failed to ask the Department if it changed the definition of claimant's labor market when claimant moved. Moreover, the ALJ concluded that the isolated nature of the two towns where claimant lived in California acted as a condition to limit her availability to work and implied that claimant's physical condition limited her ability to drive to all parts of her labor market. We cannot determine if claimant was able to work and available for work without knowing the geographic area of her labor market for each week at issue, and if claimant had transportation and was able to travel within that area. On remand, the ALJ must ask the Department representative to define claimant's labor market for each week at issue, and explain how it determined claimant's labor market each time it identified a new labor market. The ALJ must ask claimant what work she was seeking during the weeks at issue, and the Department representative what days and shifts that work was customarily performed in each labor market. The ALJ must ask claimant, for each week at issue, what transportation she had available at that time and to explain her ability to use the

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<sup>2</sup> Hearing Decision 16-UI-72893 at 3.

<sup>3</sup> Hearing Decision 16-UI-72892 at 3.

transportation with her injuries, including limitations such as distance or duration of driving time. The ALJ must ask claimant what restrictions or releases she received from her doctors, and when. The ALJ must ask claimant what her work-seeking activities were during each of the weeks at issue and the location of the employer contacts to determine if they were within her market and if claimant had transportation and the physical ability to commute to those locations. The ALJ should also ask the Department what work search activities claimant reported for each week at issue. The ALJ should ask if claimant's employer contacts were for "work at home" jobs.

Claimant testified generally that she sought work in the three areas where she lived during the weeks at issue. Transcript at 9, 13, 14-15. The record also shows that claimant made plans to leave Bend, Oregon and Salton, California before she left each location. Claimant's unwillingness to remain in each location might constitute a condition that substantially reduced her opportunities to return to work at the earliest possible time, depending on what she disclosed to potential employers about her plans to leave each respective location. Claimant's travel time and preparations may also have affected her availability for work during the weeks those activities occurred. On remand, the ALJ should, as previously noted, ask the Department representative and claimant what her work seeking activities were during each of the weeks at issue, and the type of work, including if it was "work at home" work. The ALJ should also ask claimant what she told employers about her plans, for example, whether she disclosed to potential employers that, if hired, she planned to end any employment to leave Bend, Oregon or Salton, California. The ALJ should ask claimant what days, if any, claimant was unavailable for work due to travel or travel preparation.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant was able to work and available for work after week 37-16, Hearing Decision 16-UI-72893 is affirmed in part, and set aside in part, and remanded for development of the record. Hearing Decision 16-UI-72892 is set aside and remanded for development of the record.

**DECISION:** Hearing Decision 16-UI-72893 is affirmed as to weeks 36-17 and 46-17, and is otherwise set aside and remanded for further proceedings consistent with this order. Hearing Decision 16-UI-72892 is set aside and remanded for further proceedings consistent with this order.

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

**DATE of Service: February 2, 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](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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