

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0400**

*Affirmed*  
*Ineligible*

**PROCEDURAL HISTORY:** On March 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks of January 15, 2017 through February 11, 2017 (decision # 111114). Claimant filed a timely request for hearing. On March 29, 2017, ALJ S. Lee conducted a hearing, and on March 31, 2017 issued Hearing Decision 17-UI-80073, concluding claimant was not available for work during the weeks of January 15, 2017 through March 18, 2017. On April 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Claimant had a three year-old daughter. In January 2017, claimant ceased working for Armstrong World Industries as a production worker because she was unable to continue working an overnight shift due to her inability to secure suitable child care and Armstrong's refusal to transfer her to a day shift.

(2) On January 17, 2017, claimant filed an initial claim for unemployment insurance benefits. That claim was determined valid with a weekly benefit amount of \$590. In the application for employment benefits, claimant was asked, "Are you willing to work during all the days and hours normal for your occupation?", to which claimant responded, "No. I can't find suitable overnight child care." Audio at ~10:11. In the application, claimant was also asked, "Have you turned down any work since you last worked?", to which claimant responded she had asked her employer "to switch to day shift until suitable overnight child care could be found and the employer said 'no'." Audio at ~10:29. Claimant claimed but was denied benefits for the weeks of January 15, 2017 through March 18, 2017 (weeks 03-17 through 11-17), the weeks at issue.

(3) Claimant's labor market was St. Helens, Northwest Portland, Rainier and Scappoose, Oregon and Longview and Kelso, Washington. During the weeks at issue, claimant sought work as a production worker, a child care kitchen helper, a sales representative, an office specialist, a clinical services worker and a medical records worker. With the exception of production work, the hours customary for these

types of work were day shifts. The customary hours that production work was performed in claimant's labor market were all hours of the day and comprised day, swing and overnight shifts.

(4) During the weeks at issue, claimant was unable to locate child care for her daughter that she thought would be reliable for the hours that constituted swing and overnight shifts. Learning center facilities in claimant's geographic area that provided child care and most providers of child care in private homes did so only between the hours of approximately 6:00 a.m. through 6:30 p.m., and did not provide that care during all of the hours that constituted swing shift and any hours that constituted night shift. Claimant contacted the Oregon Department of Human Services to obtain recommendations for suitable child care providers in her area, and the list they gave claimant only included people who provided child care in their private homes. Claimant had previously arranged for child care with such child care providers, but the care provided to her daughter was not suitable and claimant was not willing to place her daughter in the care of such providers during the weeks at issue. Claimant had no family or friends that were able to provide care for her daughter during swing or night shifts.

(5) During the weeks at issue, claimant applied for work with employers that operated production facilities. Due claimant's inability to locate child care for her daughter that was acceptable to her, she would not accept any employment that required her to work the hours that constituted swing or night shifts. Claimant was willing to accept work that required her to work between the hours of 6:00 a.m. to 6:30 p.m., or during day shifts.

**CONCLUSIONS AND REASONS:** Claimant was not available for work during the weeks of January 15, 2017 through March 18, 2017.

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 during all of the usual days and hours customary for the work being sought in the individual's labor market, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.* However, an individual who is the parent of a child under the age of 13 years who is not willing or capable of working a particular shift because of a lack of child care for that child acceptable to the individual shall be considered available for work if the work that the individual is seeking is customarily performed during other shifts in the individual's labor market, and the individual is willing to and capable of working during such other shifts. OAR 471-030-0036(4)

Claimant readily admitted that during the weeks at issue she was unwilling to work shifts other than day shifts because of her child care concerns and, specifically, her inability to locate child care for her daughter that she considered suitable during swing shift and night shift hours. Audio at ~29:22. Production work, one of the types of work that claimant was seeking during the weeks at issue, was performed during day, swing and night shifts in claimant's labor market. By her own testimony, claimant was not willing to work during all of the usual hours customary for production work due to her child care duties. Although the age of claimant's daughter fell within range that would allow claimant to take advantage of the exception for parents who care for young children set out at OAR 471-030-0036(4), claimant did not meet the other requirements of that regulatory. Specifically, claimant was

unwilling to work either swing shifts or night shifts. Since the regulation states that to be considered available a claimant must be willing and capable of working all of the shifts that the work is performed in the labor market other than one “particular shift” that child care responsibilities prevented her from working, and claimant was not willing or capable of working two of the three shifts that production work was performed, the exception provided by OAR 471-030-0036(4) is not, by its terms, applicable to claimant’s circumstances. While claimant’s unwillingness to work other than the day shift appears to have been sincerely motivated by concerns for her daughter’s well-being, EAB has no authority to engraft exceptions to the operation of OAR 471-0030-0036(3), whatever good cause might exist.

On claimant’s application for review received by EAB on April 5, 2017, claimant noted, “I found someone who can watch my daughter on all shifts.” That claimant found suitable child care after the hearing does not disturb EAB’s decision as to whether claimant was available for work during the weeks at issue, January 15, 2017 through March 18, 2017. However, it may end the denial of benefits to claimant for some of the weeks subsequent to March 18, 2017. EAB urges claimant to continue claiming benefits contact the Department to report this change in circumstances, as the Department representative stated at hearing she should do so if and when her child care issues were resolved. Audio at ~18:10.

**DECISION:** Hearing Decision 17-UI-80073 is affirmed.

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

**DATE of Service:** April 25, 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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