

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0539

PROCEDURAL HISTORY: On February 10, 2017, the Oregon Employment Department (the Department) served notice of four administrative decisions: decision # 154027, concluding claimant was not available for work from October 2, 2016 to October 8, 2016; decision # 161822, concluding claimant was not available for work from October 23, 2016 to October 29, 2017; decision # 162352, concluding claimant was not available for work from November 13, 2016 to November 19, 2016; and decision # 162824, concluding claimant was not available for work from November 27, 2016 to December 3, 2016. On February 24, 2017, the Department served notice of administrative decision # 171909, concluding claimant was not available for work from January 22, 2017 to January 28, 2017. Claimant filed timely requests for hearing on all five administrative decisions. On April 12, 2017, ALJ Wyatt conducted a consolidated hearing,¹ and on April 14, 2017 issued the following: Hearing Decision 17-UI-81092 affirmed decision # 154027; Hearing Decision 17-UI-81044 affirmed decision # 161822; Hearing Decision 17-UI-81064 affirmed decision # 162352; Hearing Decision 17-UI-81046 affirmed decision # 162824; and Hearing Decision 17-UI-81045 affirmed decision # 171909. On May 3, 2017, claimant filed applications for review of all five hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-81044, 17-UI-81045, 17-UI-81046, 17-UI-81064, and 17-UI-81092. For case-tracking purposes, this decision is being issued in quintuplicate (EAB Decisions 2017-EAB-0536, 2017-EAB-0537, 2017-EAB-0538, 2017-EAB-0539 and 2017-EAB-0540).

Claimant submitted a written argument to EAB, which was received on May 31, 2017. EAB may consider a party's written argument, but only if it "received" "within 20 days of the date" EAB mailed the parties notice that an application for review was received by EAB. See OAR 471-041-0080(1) and (2)(b) (October 29, 2006). If the 20th day falls on a weekend or holiday, the deadline is deferred to the next regular business day. ORS 187.010(3). In these cases, the aforementioned notice was mailed to the parties on May 8, 2017. The 20th day after May 8th was Sunday, May 28th, and Monday, May 29th was a holiday; accordingly, the deadline for claimant's written argument to be received by EAB was Tuesday, May 30th. As stated above, EAB received claimant's written argument on May 31st, making it late.

¹ The hearing consolidated ten administrative decisions; five of the decisions were in claimant's favor and were not appealed to EAB. We therefore make no further mention of them.

Because claimant's written argument was received after the 20th day, in accordance with OAR 471-041-0080, it "will not be considered."

Even if EAB had extended the deadline and considered claimant's argument, the outcome of these decisions would remain the same. Claimant argued that the ALJ should have postponed her hearing in accordance with the request she made during the hearing. EAB reviews denials of postponement requests for abuse of discretion. OAR 471-040-0021 (August 1, 2004) allows the Office of Administrative Hearings (OAH) to postpone a hearing if, among other things, the request is made promptly after the party becomes aware of the need for postponement, and the circumstances causing the request are beyond the reasonable control of the requesting party. In this case, claimant made ten requests for hearing on March 2, 2017, indicating that she was not available for a hearing on several specific days within the 60 day period following her request. She knew, having filed ten requests for hearing and specifying dates she would not be available, that OAH would be scheduling her hearing and that it was likely to be scheduled within the 60 days following her requests. On March 31, 2017, OAH mailed notice of the hearings to claimant at the address she had provided in order for the Department and OAH to conduct business with her, and the hearing was scheduled for almost two weeks after the date of the notice. According to the record, despite that amount of notice and time to prepare for the hearing, claimant did not prepare for the hearing, nor did she collect the mail sent to her at her address of record until the weekend prior to the April 12th hearing. She called OAH two days prior to the hearing to initially request postponement of the hearing hearings, and, per instructions, renewed her request at the time of the hearings. Under those circumstances, claimant's request cannot be said to have been made "promptly" after becoming aware of the need for postponement. Having requested hearings on 10 administrative decisions denying her claims for benefits for specific weeks for specific reasons, having had from at least March 2, 2017 through April 12, 2017 to gather any information she needed to prove that she was entitled to benefits for those specific weeks or otherwise prepare for the hearing, and having been given almost two weeks notice that a date for her hearings had been scheduled – which is over a week more notice than OAH is required to give parties to unemployment insurance hearings, claimant's requests to postpone the hearing made April 10th and April 12th were not made promptly, and the circumstances that caused her request were certainly within her reasonable control. Neither OAH nor the ALJ abused their discretion in denying claimant's request for postponement.

Claimant also argued that the ALJ applied the wrong standard in judging her availability for work during weeks in which she missed work for medical reasons, arguing that she missed work for reasons that "was/is related to treatment for long-term physical care that is defined by 29CFR1630.2(h)" and therefore cannot be denied benefits since she still remained available for some work. Claimant did not specify what her long-term medical issue was during the hearing, nor in her request to submit additional information to EAB. We therefore cannot make an independent determination that any impairment she had was a long-term one or that 29 CFR §1630.2(h) applies. We also note that, although claimant offered to provide even more additional information than she already has, the time for making that argument is now past.² The appropriate standard to apply is therefore that of an individual with an

² Claimant's request to submit new information – the information she included with her written argument and the information she offered to provide to EAB at a later date – is denied. EAB may only review new information offered by a party if the party offering it establishes that factors or circumstances beyond the party's reasonable control caused the party to be unable to submit it during the hearing. OAR 471-041-0090(2)(b) (October 29, 2006). Claimant's failure to adequately prepare for the hearings, when she is the party requested the hearings and she had over a month between the date of her request and the date of the hearing to prepare for them, was not outside her reasonable control.

“illness, injury or other temporary physical or mental incapacity,” and OAR 471-030-0036(3)(f)(A) specifically provides that such “an individual is *not available for work in any week claimed* if . . . [t]he individual has an opportunity to perform suitable work during the week and fails to accept or report for such work.” (Emphasis added.) Therefore, in the three weeks at issue in which claimant missed work for medical reasons, she is not available for work.

Finally, claimant argued that she should not be denied benefits for the week in which she attended a lecture because, although it was an unpaid event, it was sponsored by her employer and helped her perform her job. Generally speaking, the unemployment insurance program was designed to provide a safety net for workers who become *involuntarily* unemployed by replacing a portion of the income they would have earned from work had work been available.³ By choosing to attend an unpaid event, regardless of who sponsored it or that she found it helpful to her work, claimant voluntarily forfeited a day of paid work when paid work was available to her. The unemployment insurance program is not intended to replace claimant’s income under those circumstances. By choosing to miss a shift of paid work, when paid work was available to her, claimant demonstrated that she was, for that shift, unwilling to work. Individuals who are unwilling to work, and miss suitable work, are not eligible for unemployment insurance benefits. ORS 657.155(1)(c); OAR 471-030-0036(3)(a) and (3)(f)(A).

EAB reviewed the entire hearing record. On de novo review and pursuant to ORS 657.275(2), the five hearing decisions under review are **adopted**.

DECISION: Hearing Decisions 17-UI-81044, 17-UI-81045, 17-UI-81046, 17-UI-81064, and 17-UI-81092 are affirmed.

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

DATE of Service: May 31, 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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³ *See generally* Federal Unemployment Tax Act (FUTA), 26 USC §§ 3301 to 3311 and *Unemployment Compensation, Federal – State Partnership*, US Department of Labor, Office of Workforce Security, Division of Legislation, April 2005.