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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0992

On Remand from the Oregon Court of Appeals
Re-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 because she imposed a condition that substantially reduced her opportunities to return to work at the earliest possible time (decision # 110856), and another concluding claimant was not available for work from September 4 through 10, 2016 because she missed an opportunity to work (decision # 113234).[1] Claimant filed a timely request for hearing on both decisions. 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). On January 13, 2017, EAB issued Appeals Board Decisions 2016-EAB-1376 and 2016-EAB-1377, affirming the hearing decisions.

On or before February 13, 2017, claimant filed Petitions for Judicial Review of Appeals Board Decisions 2016-EAB-1376 and 2016-EAB-1377 with the Oregon Court of Appeals. On April 20, 2017, claimant filed with the Court a Motion to Correct the Record. On April 23, 2017, claimant filed with the Court a Motion to Submit Additional Evidence. On June 16, 2017, the Oregon Court of Appeals issued an Order Remanding to Take Additional Evidence.[2]

[1] The Department issued notice of a third administrative decision on October 28, 2016 in which it concluded claimant was available for work during the week of September 4, 2016 to September 10, 2016 on the basis of her search for work as an office assistant (decision # 114151). On November 17, 2016, the employer in that case filed a timely request for hearing on that decision. On January 20, 2017, OAH mailed notice of a hearing scheduled for February 3, 2017; ALJ Meerdink conducted the hearing and, on February 7, 2017, issued Hearing Decision 17-UI-76351, affirming decision # 114151. On February 27, 2017, Hearing Decision 17-UI-76351 became final without any party having filed an application for review of that decision with EAB.

[2] The Court's Order stated, "The court expects that, within 60 days of the date of this order, the Employment Appeals Board will arrange for the administrative law judge to receive the additional evidence, together with any material evidence respondents may offer, and submit its modified findings and order or its certificate that the Board stands on its original findings and order."

On June 28, 2017, the Department referred the matter to the Office of Administrative Hearings (OAH) "to conduct a hearing on decisions 16-UI-72200 and 16-UI-72211, regarding availability for work." On July 19, 2017, OAH mailed notice of two hearings, one scheduled for August 2, 2017 at 1:30 p.m. and the other scheduled for August 2, 2017 at 2:30 p.m. On August 2, 2017, ALJ S. Lee convened two hearings, at both of which claimant failed to appear. On August 10, 2017, the ALJ issued Hearing Decision 17-UI-90134 re-affirming decision # 110856, and Hearing Decision 17-UI-90137 re-affirming decision # 113234.[3] On August 15, 2017, claimant filed applications for review of Hearing Decisions 17-UI-90134 and 17-UI-90137 with EAB.[4] On August 25, 2017, the Department, by and through its representative, filed with the Court a Motion for Relief from Default and Motion for Extension of Time for EAB to submit to the Court its modified findings and order, or its certificate that the Board stands on its original findings and order. On August 30, 2017, the Court granted the motion and allowed EAB an extension of time to September 26, 2017.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-90134 and 17-UI-90137. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0992 and 2017-EAB-0993).

EVIDENTIARY MATTERS: The Court's Order Remanding to Take Additional Evidence states, "Petitioner moves, presumably under ORS 183.482(5), for leave to present additional evidence . . . The motion is granted and this matter is remanded to take additional evidence."

The ALJ wrote in each decision, "Claimant's Exhibit 1 was marked and admitted in evidence without legal objection from the Employment Department. While claimant did not formally offer the documents, as she had previously appeared and having no objection from the Employment Department, I considered the documents as [in] support in her case in lieu of appearance." Hearing Decision 17-UI-90134 at 2; Hearing Decision 17-UI-90137 at 1-2. Although the ALJ described claimant's additional documents to include Bureau of Labor and Industries (BOLI) filings, work search records, a separation statement and medical restrictions, the ALJ failed to mark any of those documents as Exhibit 1 in either record, and made no ruling on their admissibility, asking the Department's witness only if he had any objection to their admission "if those are determined to be admissible." August 2, 2017 2:30 p.m. hearing, Audio recording at 17:00-18:10. Additionally, it appears that the documents the ALJ purported to admit into evidence as Exhibit 1 are not inclusive of all the evidence claimant petitioned the Court to have admitted in these cases. Claimant's Motion to Correct the Record cited as error the Department's failure to include claimant's written argument as part of the agency record, and she requested in her Motion for Additional Evidence that the following materials be added to the record: proof of the BOLI civil rights investigation and corresponding FMLA paperwork; evidence that claimant was granted benefits after initial review of her case and later challenged by the employer after the BOLI

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[3] In Hearing Decisions 17-UI-90134 and 17-UI-90137, the ALJ wrote that, "On June 28, 2017, the Employment Appeals Board remanded the matter back to the Office of Administrative Hearings" pursuant to the Oregon Court of Appeals' order. However, the Department, not EAB, ordered OAH to hold remand hearings in these matters.

[4] For unknown reasons, claimant's applications for review, received by EAB on August 17, 2017, were the first point in time at which EAB learned of the Court's June 16th Order remanding these matters to EAB.

investigation; evidence that BOLI opened a new, current pending claim investigating a retaliation claim; and proof that a separate judge in a separate hearing determined claimant was eligible for benefits for the time frame at issue in these cases. We will therefore address the admissibility of claimant's offered evidence.

Claimant's written argument, mailed December 10, 2016, consists of: a July 21, 2016, 3:49 p.m. email from claimant to Michele Zagorski; and a July 21, 2016, 4:03 p.m. email from Michele Zagorski to claimant. The emails pertain to claimant's availability for work during the weeks at issue, are therefore relevant and material to EAB's determination, and it appears probable that factors or circumstances beyond claimant's reasonable control (her reported postpartum depression[5] and a failure to understand that evidence corroborating her testimony was necessary) prevented her from offering the information during the hearing. *See* OAR 471-041-0090(2). The emails are therefore admitted into evidence as EAB Exhibit 1.[6]

Claimant's written argument, mailed December 9, 2016, consists of: a 2-page narrative authored by claimant; a 2-page email chain dated March 1, 2016 with a subject line of "Sorry"; a 1-page email chain dated May 12, 2016, subject "Ordering"; a 2-page email chain dated October 27, 2016, subject "Meeting dates and spa closures"; an 8-page email chain dated May 11-12, 2016, subject "FW: New spa keys please"; a 1-page email dated May 16, 2016, subject "today"; a 2-page email dated June 8, 2016, subject "Front Desk"; and a 1-page email dated August 9, 2016, subject "On call." The March 1st, May 12th, October 27th, May 11-12th, May 16th, and June 8th emails either pre- or post-date the weeks at issue in these cases, and claimant did not appear at the August 2nd hearings or otherwise explain why emails she sent and received outside the weeks at issue are relevant or material to her availability for work within those weeks. The March 1st, May 12th, October 27th, May 11-12th, May 16th, and June 8th emails are, therefore, excluded from evidence. Claimant's 2-page narrative and the August 9th "On call" email appear to include information relevant and material to these matters, and, per OAR 471-041-0090(2), they are therefore admitted into evidence as EAB Exhibit 2.

Pursuant to claimant's request, we have also admitted into evidence as EAB Exhibit 3 the following documents: administrative decision # 114151, in which the Department concluded that claimant was able to work, available for work and actively sought work from September 4, 2016 to September 10, 2015 based on a finding that she "is seeking work as an office assistant"; and Hearing Decision 17-UI-76351, affirming claimant's eligibility for benefits. The information contained therein is potentially relevant and material to claimant's availability for work during one of the weeks at issue, and she was

[5] Claimant stated in her Motion to the Court that "brain fog" associated with the third trimester of her pregnancy and postpartum depression affected her ability to submit the evidence in time for the December 1, 2016 hearings in these matters. We note that it is unlikely that third-trimester "brain fog" affected her actions on or around December 1st given that the record shows she gave birth in September. Although claimant did not appear at the hearing to explain how postpartum depression affected her, or what her symptoms were, we infer that her actions in November and December 2016 were or might have been affected by postpartum depression, and assumed for the sake of argument that the effect on her was such that it amounted to a legally significant factor or circumstance outside her control that prevented her from submitting evidence into the records of the December 1st hearings.

[6] Any party that objects to our admitting this, or the other exhibits, into evidence must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. Unless such objection is received and sustained, the exhibits will remain in the record.

unable to submit the information into evidence during the hearing because at least a portion of it did not exist at the time of the hearings in these matters.

The remaining additional documents claimant sought to have admitted include: a 4-page U.S. Department of Labor Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) dated May 20, 2016 setting forth restrictions against lifting 25 pounds or more and limiting massage to 4 hours per day, and stating that claimant may work at a desk job or managerial work without restrictions; one page of a BOLI Civil Rights complaint dated June 22, 2016 alleging unlawful employment practices on the basis of her pregnancy; a September 29, 2016 letter from BOLI dismissing claimant's June 22, 2016 complaint because BOLI had insufficient evidence to continue an investigation; one page of a BOLI Civil Rights complaint dated March 20, 2017 alleging retaliation against her for the June 23, 2016 complaint; a May 3, 2017 letter from BOLI dismissing claimant's March 20, 2017 complaint because BOLI had insufficient evidence to continue an investigation; a 3-page list of claimant's office work search activities (about 50% illegible) between July 21, 2016 and September 21, 2016; and a 1-page document dated September 16, 2016 that appears to be an Employment Department "separation statement" form upon which the employer stated that claimant was separated due to lack of work, a "voluntary request to go on-call vs. on schedule regularly," and "[claimant] asked to be taken off regular schedule due to other job." Although many of the documents pre- and post-date the weeks at issue, they appear arguably relevant to EAB's determination in these matters. The ALJ's failure to mark or properly admit them into evidence means we must admit them to complete the record pursuant to OAR 471-041-0090(1). The listed documents are therefore marked as EAB Exhibit 4 and admitted into evidence.

Copies of EAB Exhibits 1, 2, 3 and 4 have been included with the copies of this decision mailed to the parties and filed with the Court of Appeals.

WRITTEN ARGUMENT: In the narrative portion of EAB Exhibit 2, claimant cited to ORS 657.155(3)(e) and ORS 657.155(5)(f) as being pertinent to her cases. However, ORS 657.155 does not have a subsection (3)(e) or (5)(f). Based upon the context of her argument, we infer that claimant actually meant OAR 471-030-0036(3)(e) and OAR 471-030-0038(5)(b)(F); claimant also referenced OAR 471-030-0038(5)(a) and what we infer is likely OAR 471-030-0038(5)(g). OAR 471-030-0038 implements ORS 657.176, which pertains to an otherwise-eligible individual's disqualification from benefits; because it does not apply to or implement eligibility provisions, it is inapplicable to the matters before us. Therefore, claimant's argument that those rules should have an effect on her eligibility for benefits under ORS 657.155 and OAR 471-030-0036 is incorrect. We address claimant's argument regarding the applicability of OAR 471-030-0036(3)(e) in our decision, below.

Claimant argued that her BOLI claims against the employer were legally significant to the availability issue before EAB, but the record does not support her assertion. Claimant submitted only the first page of her BOLI complaints, each of which barely outlined the basis upon which she made the complaints, and she failed to appear at the August 2nd hearings in these matters or otherwise explain the legal significance of the complaints to her availability for work during the weeks at issue except to imply that it was Waterstone's allegedly unlawful practices that reduced her hours during the weeks at issue, which appears true to the extent that Waterstone did, in fact, eliminate claimant's spa management duties, but untrue to the extent that claimant limited her own availability to work as a massage therapist by asking for a change in how the employer scheduled her to work. It is also notable that the claimant submitted

letters from BOLI in response to her complaints, each of which stated that her complaints were dismissed because BOLI found insufficient evidence to continue its investigations, which further suggests that neither the complaints nor their resolution were legally significant to claimant's availability for work during the weeks at issue.

Finally, claimant argued that reducing her hours and taking maternity leave did not "impose a condition on the employer." We infer that claimant's argument referenced OAR 471-030-0036(3)(c), which states, in pertinent part, that an individual is considered "available for work" if, among other things, she is "Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time." The applicable standard under the referenced rule is not whether claimant's restrictions imposed a condition on the employer, Waterstone, that reduced her opportunities to work, but whether the conditions she imposed caused a substantial reduction of her own opportunities to return to work – for any employer – at the earliest possible time. To the extent claimant's remaining arguments needed to be addressed, we have done so in our decision, below.

CREDIBILITY: In reaching this decision and considering the new evidence claimant has asked to have admitted into evidence, we have noticed several inconsistencies between claimant's testimony, her argument, and/or the evidence she has submitted into evidence. For example, claimant wrote in her argument that the Department advised her to seek only office work. *See* Exhibit 2. However, she contradicted that claim in testimony, stating that she only sought office work because the Department "I *felt* directed me to search *mainly* for office work since that was just a half of my position I was demoted from, and so I was seeking only office work during this time period." December 1, 2016 2:30 p.m. hearing, Audio recording at ~ 28:25 (emphasis added).

Claimant also wrote in her argument that Zagorska laid claimant off work on August 8, 2016; however, the record does not establish that that is actually the case. Claimant's evidence shows that, on August 8, 2016, she and Zagorska's owner agreed it would be mutually beneficial for claimant to switch her availability to "on call from now on," not that Zagorska laid her off work. *See* EAB Exhibit 2. Claimant's testimony also suggested the likelihood that claimant went to "on call" status with Zagorska because she requested to do so due to her own concerns about Zagorska's pay structure, not because Zagorska had decided to lay her off work. December 1, 2016 2:30 p.m. hearing, Audio recording at ~ 27:00, 27:25, 37:10. Whether claimant opted for on call work, Zagorska assigned her on call work, or they mutually agreed that claimant would perform on call work, the record fails to show that Zagorska laid claimant off work as claimant alleged.

Finally, we note that claimant testified she did not notify Waterstone of her doctor's June 17, 2016 medical restrictions because she "kind of considered myself not really working there anymore," but she otherwise established that she was continually employed by Waterstone and kept working for Waterstone, at least as a backup, until August 24, 2016. *Compare* EAB Exhibit 2, page 1; December 1, 2016 2:30 p.m. hearing, Audio recording at ~ 23:20. Because of claimant's demonstrated lack of reliable evidence about the matters at issue in these cases, where claimant's evidence was internally inconsistent or contradictory, we found facts in accordance with what we could substantiate through other evidence, specifically, the Department's or the employer's testimony and the exhibits.

FINDINGS OF FACT: (1) At all relevant times, claimant was a licensed massage therapist. Prior to May 23, 2016, claimant worked for Mark Antony Historic, d.b.a. Waterstone Spa, as a combination spa

manager and massage therapist. On May 23, 2016, the employer demoted claimant by relieving her of her spa management duties. Thereafter, claimant worked for the employer solely as a massage therapist.

(2) 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 weeks at issue. 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 for those weeks.[7]

(3) Claimant's 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.

(4) During all the weeks at issue, claimant was pregnant and experienced high blood pressure due to her pregnancy. On May 20, 2016, claimant's doctor completed medical leave paperwork restricting claimant from doing massage work for more than four hours per day for the duration of her pregnancy. Claimant was not restricted from performing full time work in other types of jobs.

(5) During claimant's unemployment insurance claim waiting week, the week of May 22, 2016 to May 28, 2016, claimant contacted Zagorska Oasis Spa seeking massage therapist work. Zagorska hired claimant to work in that capacity. During the remaining weeks at issue, claimant restricted her work search to office work and did not seek other massage therapy work. Claimant's reason for seeking only office work was that she had two part time massage therapist jobs, had to balance her need to limit her massage work to four hours per day with the needs of both employers, and because she wanted to make up for the office work she lost when the employer demoted her and eliminated her spa manager duties.

(6) Beginning late May 2016, claimant had a regular schedule as a massage therapist for the employer on Wednesdays and Sundays. Claimant also worked as a massage therapist for Zagorska for regular four-hour shifts on Mondays, Tuesdays, Thursdays and Fridays.

(7) On June 17, 2016, claimant's doctor again issued restrictions prohibiting claimant from working more than four hours a day as a massage therapist. Claimant notified Zagorska of the restriction, but did not notify the employer.

(8) On July 20, 2016, claimant sent an email to the employer asking to be relieved from her regular schedule and instead to work only as a "backup" for the other massage therapists. As a backup, claimant would pick up shifts for employees, for example, while they were on vacation. Backup was the most sporadic type of work schedule the employer's massage therapists could have.

[7] 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.

(9) On August 9, 2016, claimant asked or agreed with Zagorska's owner to switch from a regular four-hour a day, four-days a week schedule to on call status, whereby she would only work when she received calls from employees. As of that date, claimant no longer had regularly scheduled work hours as a massage therapist for any employer. She continued seeking only office work.

(10) On September 7, 2016, claimant began maternity leave from her job with Zagorska. Her original plan was to take a three-month long maternity leave. She told Zagorska she was not available for any work during her maternity leave period.

(11) On September 8, 2016, the employer offered claimant one hour of work as a massage therapist. Claimant had not performed other massage therapy work that day and she was not medically restricted because of her pregnancy or blood pressure from performing an hour of massage therapy work or using products the employer used in massages. Claimant refused the offered work.

(12) Thereafter, claimant considered herself on maternity leave from work as a massage therapist and did not seek or accept that type of work from either of her employers or elsewhere, but continued seeking office work. At all relevant times, claimant was not restricted from all massage therapy work and was not restricted from using any particular products or types of massage therapy products.

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

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.* For purposes of ORS 657.155(1)(c), an individual is not available for work if she has an opportunity to perform suitable work during the week and fails to accept or report for work due to illness, injury or other temporary physical or mental incapacity. OAR 471-030-0036(3)(f). 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). By extension of that principle, 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.*

On July 20, 2016, claimant asked the employer 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 the employer to "accommodate hours at [Zagorska]." December 1, 2016 2:30 p.m. hearing, Audio recording at ~ 21:04 to 21:28. However, the record shows that claimant's part time work schedule at Zagorska did not conflict with her schedule at the employer because she did not work at Zagorska on Wednesdays or Sundays, nor did working a two-day per week schedule at the employer's spa require or result in claimant being scheduled to work more than four hours a day as a massage therapist. Claimant did not allege that the employer required her to exceed her doctor's limit of four hours per day on her feet. Nor is there evidence to show that the employer would

have discontinued scheduling claimant for two regular shifts per week as it had been since May 2016. Absent evidence to the contrary, claimant's choice to limit her availability to back-up only, the most sporadic type of shift the employer had for its massage therapists, suggested claimant's unwillingness to be available for that work. Moreover, replacing two guaranteed weekly shifts with the most sporadic type of work schedule possible, under circumstances where her medical restrictions did not necessitate that limitation, amounted to imposition of a condition that substantially limited her opportunities to work.[8] Since claimant limited her availability with the employer starting on July 20, 2016, and the limitations she imposed continued September 24, 2016, we conclude that claimant was not available for work during all the weeks at issue.

Although we note that the Department issued separate decisions both denying (decisions #110856 and 113234) and allowing (decision # 114151) claimant benefits for week 36-16, the Department's decisions appear to have been based upon separate aspects of the availability rules. In our view, the principles of issue and claim preclusion do not bar us from deciding these cases in a manner contrary to other decisions the Department has reached about the same period.[9] In fact, decision # 114151 states that benefits are only allowed "if otherwise eligible." One basis for the Department's determination was that claimant missed an opportunity for suitable work with the employer on September 8, 2016.[10] Additionally, during the same week, claimant told Zagorska she was on maternity leave and planned to take approximately three months off work. There is no factual dispute that the employer offered to assign claimant a one-hour spa treatment on September 8, 2016, nor is there any dispute that claimant turned down the offer, and told Zagorska she was on maternity leave. The question is whether, in doing so, she substantially reduced her opportunities to return to work at the earliest possible time by missing opportunities to work between week 36-16 and week 38-16. Whether the limitations she imposed on her availability affected her eligibility for benefits depends on whether the limitations operated to exclude "suitable" work opportunities. *See* ORS 657.155(1)(c).

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, as well as the physical fitness and prior training and experience of the individual. As noted, above, claimant was not told by a Department employee not to seek massage therapy work. She was also a licensed massage therapist who, at all relevant times, worked for two businesses as a massage therapist, had customarily been employed to do massage therapy work even when she worked as a spa manager, and sought office work primarily to replace the spa manager work from which she had been demoted, not

[8] The Department has not defined the term "substantial" for purposes of OAR 471-030-0036(3). Common usage definitions of the term include, in pertinent part, "Of considerable importance, size, or worth," "Important in material or social terms; wealthy," or "Concerning the essentials of something." *See* https://en.oxforddictionaries.com/definition/substantial. Voluntarily reducing one's work schedule from two guaranteed weekly shifts to a sporadic vacation-coverage shift amounts to a considerable and important reduction as compared to claimant's previous availability for work, and was therefore "substantial" limitation.

[9] *See* ORS 657.155, OAR 471-030-0036(3) (setting forth an array of benefit eligibility conditions and rules); ORS 657.267 (claims are examined and, on the basis of facts available, are allowed or denied). *See also* ORS 657.273 (final orders and judgments arising out of hearings under ORS 657.270 and review proceedings under ORS 657.275 may only be used for purposes of issue or claim preclusion in an administrative proceeding under ORS chapter 657).

[10] Administrative Decision # 113234.

because she did not consider massage therapy to be at least a portion of her occupation. Massage therapy was, therefore, claimant's occupation, not her avocation.[11] Claimant asserted that she was not willing to perform the massage work for the employer on September 8, 2016 because the work might elevate her blood pressure and she was sensitive to the iodine in the products used for the massage.[12] December 1, 2016 1:30 p.m. hearing, Audio recording at ~ 19:42 to 20:18. However, the record does not show by a preponderance of the evidence that working for one hour doing massage therapy was unsuitable, where there is no evidence suggesting that claimant had already worked four hours on September 8 or would otherwise exceed her doctor's restrictions by doing the work. 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 potential exposure to iodine, but her concern about her blood pressure. December 1, 2016 1:30 p.m. hearing, Audio recording at ~ 20:19 to 20:36. Notably, claimant had last worked for the employer fewer than two weeks earlier without expressing concern about using iodine or any other products, and, during the weeks at issue, claimant's physician had not restricted her from working with iodine or other products claimant had customarily used to perform massages. Additionally, although claimant had already begun a maternity leave with Zagorska, she had not notified the employer she was on maternity leave and the record fails to suggest that her maternity leave began when it did because her physician deemed it unhealthy for her pregnancy and general health to continue working as a massage therapist.

In sum, it appears more likely than not that the employer extended claimant a genuine offer for one hour of work as a backup massage therapist on September 8th, the work was of a type that she had continually sought until that point, and it was consistent with her medical restrictions. The offered work was therefore suitable for her, notwithstanding her pregnancy and associated health concerns, and claimant refused the offer. That refusal and claimant's decision to begin maternity leave when she did resulted in claimant missing available work between weeks 36-16 and 38-16, and amounted to conditions that substantially reduced claimant's opportunities to return to work at the earliest possible time during those weeks. Therefore, claimant was not available for work during those weeks based upon those missed opportunities to perform work.

[11] In *Crothers v. Employment Dep't.*, 250 Or. App. 62, 279 P.3d 304 (2012), the Court held that the claimant, who customarily worked as a construction supervisor, was not required to be available for work during the customary days and hours of his *avocation*, CPR instruction. The record in this case establishes more likely than not that massage therapy work comprised at least a portion of claimant's regular occupation and was not merely an avocation; moreover, she sought and obtained massage therapy work during at least one week at issue and thereafter continually sought massage therapy work through week 35-16 by making herself available for backup and on call massage therapy shifts for two employers. Put another way, claimant did not work as a massage therapist merely to supplement her income while seeking office work; rather, she customarily was employed to perform a combination of massage therapy and office work.

[12] Claimant also said that she believed the employer was offering her massage work instead of her previous managerial work for the purpose of retaliating against claimant for having filed a BOLI civil rights complaint against the employer and to give her work that no one else wanted to do in order to cause her unemployment benefits to be denied. December 1, 2016 1:30 p.m. hearing, Audio recording at ~ 19:42 to 20:18. However, claimant's BOLI claim for retaliation was dismissed for lack of sufficient evidence, and claimant testified, "I have no proof" that the employer offered her work on September 8th for the purpose of affecting her eligibility for benefits. *Id.* The record therefore fails to show that the offers of work were not genuine.

Finally, claimant asserted in her written argument that, notwithstanding her failure to be available for massage therapy work and her refusal of a massage therapy assignment, she nevertheless remained eligible for benefits because her unavailability for massage therapy work was due to a medical condition and she was at all times willing to accept office work. OAR 471-030-0036(2)(b) and (3)(e) provide 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 or unavailable for work solely on that basis so long as the individual remains available for some work. However, claimant has not been deemed ineligible for benefits because she limited her availability to part time work, and she did not limit her availability for massage work to "particular shifts" due to her medical condition. Nor was claimant's pregnancy or pregnancy-related high blood pressure a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h), but, rather, appear to have been transitory conditions, caused by the temporary condition of pregnancy, that did not change how the availability requirement applied to claimant's situation. For those reasons, OAR 471-030-0036(2)(b) and (3)(e) are not applicable to the issue of claimant's availability for massage therapy work during the weeks at issue.

For the reasons explained, claimant was not available for work from July 17, 2016 to September 24, 2016, weeks 29-16 through 38-16. Claimant is therefore ineligible to receive unemployment insurance benefits for that period.

DECISION: Hearing Decisions 17-UI-90134 and 17-UI-90137 are affirmed.

NOTE: Copies of these modified orders on reconsideration will be filed with the Oregon Court of Appeals in accordance with the Court's June 16, 2017 order, and as required by ORS 183.482 and ORAP 4.35.

J. S. Cromwell and D. P. Hettle.

DATE of Service: <u>September 8, 2017</u>

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.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.