

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1288**

*Modified*  
*Ineligible Week 31-17*  
*Eligible Weeks 32-17 through 38-17 and Week 40-17*

**PROCEDURAL HISTORY:** On September 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from July 30 through August 26, 2017 (decision # 133506). Claimant filed a timely request for hearing. On October 16, 2017, ALJ Seideman conducted a hearing, and on October 20, 2017 issued Hearing Decision 17-UI-95027, modifying the Department's decision to conclude that claimant was not available for work from July 30 through September 23, 2017 and October 1 through October 7, 2017. On November 7, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB and new information, including five declarations: one from claimant and one from each of four individuals who declared they were willing since July 2017 to provide childcare for claimant while she worked. EAB may consider new information when the party offering the information establishes that the new information is relevant and material to EAB's determination, and that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. OAR 471-041-0090(2) (October 29, 2006). EAB did not consider claimant's declaration because claimant could have provided that information at hearing. The declarations from the four child care providers provide information that is relevant and material to EAB's determination because it relevant to whether claimant had childcare during the weeks at issue and was thus available for work, and to corroborate claimant's testimony at hearing where the ALJ has questioned the credibility of her testimony.<sup>1</sup> Claimant could not reasonably

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<sup>1</sup> See Hearing Decision 17-UI-95027 at 3.

have anticipated that corroborating evidence from other witnesses would be necessary at the hearing, which was a factor beyond claimant's reasonable control that prevented her from offering the information at hearing. Thus, EAB considered the declarations from the four individuals other than claimant, and the entire hearing record, in reaching this decision. The four declarations are therefore marked as EAB Exhibit 1 and admitted into the record. Any party who objects to our doing so 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 declarations will remain in the record at EAB Exhibit 1.

**FINDINGS OF FACT:** (1) Claimant filed an initial claim for unemployment insurance benefits on August 4, 2017. Claimant claimed and was denied benefits for the weeks from July 30 through September 23, 2017 and October 1 through October 7, 2017 (weeks 31-17 through 38-17 and 40-17), the weeks at issue.

(2) During the weeks at issue, claimant sought work as a business office manager. Claimant's labor market was Hillsboro, Aloha, Banks, Beaverton, Forest Grove, McMinnville and the southwest Portland area. In claimant's labor market, the customary days and hours for work as a business office manager are Monday through Friday, 8:00 a.m. to 6:00 p.m.

(3) During all the weeks at issue, claimant was the parent of an infant. Until August 1, 2017, claimant did not have childcare for her infant. On August 4, 2017, the infant's pediatrician told claimant the infant could go to private daycare, such as a nanny or babysitter, but could not go to a regular daycare facility due to the infant's medical needs.

(4) Claimant's mother took family medical leave from her job to care for claimant's infant during August 2017, until August 27, 2017. By the afternoon of August 25, 2017, claimant had arranged other private sources of daycare that were suitable for her infant's medical needs.

(5) During mid-August 2017, claimant was the final candidate for a position, had childcare available, and was ready to accept the job if the employer offered her the position. The employer did not offer claimant the position.

(6) Claimant forgot to give the Department information about her infant's daycare providers when she spoke to a Department representative on August 24, 2017 because she was experiencing postpartum depression and was upset due to personal matters that occurred before the telephone call.

**CONCLUSIONS AND REASONS:** We agree that claimant was not available for work during week 31-17. We disagree with the ALJ and conclude that claimant was available for work during weeks 32-17 through 38-17 and week 40-17.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). To be considered "available for work" for purposes of ORS 657.155(1)(c), a claimant must be willing to accept full time, part time and temporary work opportunities during all of the usual hours and days of the week customary for the work being sought, be capable of accepting and reporting for any suitable work opportunities within his or her labor market and refrain from imposing conditions that substantially reduce his or her opportunities to return to work at

the earliest possible time. OAR 471-030-0036(3) (February 23, 2014). Here, the Department did not pay claimant benefits for the weeks at issue. Therefore, claimant had the burden to establish by a preponderance of the evidence that benefits should have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

At issue is claimant's availability for work during weeks 31-17 through 38-17, and week 40-17. We agree with the ALJ that claimant was not available for work during the week of July 30 through August 5, 2017 (week 31-17).<sup>2</sup> Claimant testified that she had no childcare before August 1, 2017. Claimant therefore did not have childcare on Monday, July 31, 2017 of week 31-17, and was not willing to accept work that week during all of the usual days of the week customary for a business office manager to work.

We disagree with the ALJ that claimant was not available for work during the weeks following August 4, which include the remaining weeks at issue, weeks 32-17 through 38-17 and week 40-17. In Hearing Decision 17-UI-95027, the ALJ found claimant's testimony "questionable" that her pediatrician had released claimant's infant to the care of a nanny or other private daycare as of August 4, 2017 and found facts in accordance with the Department representative's hearsay testimony about claimant's statements to the Department on August 24, 2017.<sup>3</sup> Specifically, the ALJ concluded that claimant did not have childcare for her infant from her parents and others during August 2017.<sup>4</sup> However, the preponderance of the evidence shows claimant did have childcare available from her parents and others if she were offered work, and that she had a variety of daycare providers suitable for her infant's medical needs on the occasions her parents had to work, and after her mother ended her family medical leave. See EAB Exhibit 1. Claimant plausibly explained that she was in distress due to her health and other personal matters when she spoke with the Department representative on August 24, 2017, and we are persuaded that her statements to the Department at that time were less reliable than her testimony at hearing and the contents of EAB Exhibit 1.

For the foregoing reasons, we conclude that claimant was not available for work during the week of July 30, 2017 through August 5, 2017 (week 31-17). Claimant is ineligible to receive benefits during that week. Claimant was available for work during the weeks of August 6, 2017 through September 23, 2017 (weeks 32-17 through 38-17), and October 1, 2017 through October 7, 2017 (week 40-17). Claimant is eligible to receive benefits during those weeks.

**DECISION:** Hearing Decision 17-UI-95027 is modified, as outlined above.

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

**DATE of Service: December 6, 2017**

**NOTE:** This decision modifies a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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<sup>2</sup> Hearing Decision 17-UI-95027 at 3.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

**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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