

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0094

Affirmed
Eligible

PROCEDURAL HISTORY: On December 1, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was available and actively sought work during the weeks of November 5, 2017 through November 25, 2017 (decision # 152210). The employer filed a timely request for hearing. On January 8, 2018, ALJ S. Lee conducted a hearing, and on January 10, 2018 issued Hearing Decision 18-UI-100644, affirming the Department's decision. On January 29, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Beginning sometime in 2014, Red Tail Golf LLC employed claimant as a starter-marshal at a golf course. A starter-marshal assisted and oversaw players on the course.

(2) In the winter months, from approximately November through February, the employer's golfing business significantly slowed down due to the weather. Since starter-marshals were not needed unless there were players on the golf course, the hours of starter-marshals greatly declined during the winter months. While some starter-marshals chose not to work at all during the winter, others continued working reduced hours. It was customary for the employer to schedule starter-marshals for shifts during the winter to ensure that they would be available and then to contact them and tell them not to report for work if their services were not needed.

(3) On November 2, 2017, claimant filed an initial claim for benefits due to working reduced hours. Claimant's claim was determined valid with a weekly benefit amount of \$141. Claimant claimed and was paid benefits for the weeks of November 5 through 25, 2017 (weeks 45-17 through 47-17), the weeks at issue.

(4) During the weeks at issue, although the employer initially scheduled claimant for some hours of work, the employer later told claimant not to report as scheduled and did not have claimant work those hours. Claimant never turned down any work that the employer offered him during the weeks at issue.

Although claimant could potentially have worked for the employer performing duties other than those of starter-marshall during the weeks at issue, such as working in the pro shop, on the driving range and in golf cart maintenance, the employer did not assign claimant to those duties since it thought claimant did not want to work during the winter months. Claimant was not aware that the employer could or would assign him to other duties if he asked.

(5) Sometime after November 2, 2017, the employer's general manager was notified that claimant had filed a claim for unemployment insurance benefits. On approximately November 8, 2017, the employer's general manager spoke with claimant about the unemployment insurance claim he had filed. The general manager expressed displeasure that claimant had filed a claim for benefits. The general manager did not tell claimant at that time that the employer had work other than as a starter-marshall available to him.

(6) Sometime around approximately November 22, 2017, the general manager received notice that the Department had found claimant eligible to receive benefits on his claim. On approximately November 22, 2017, the general manager again spoke with claimant about his claim and again expressed displeasure. At that time, the general manager told claimant that the employer had work that he could perform picking up golf balls on the driving range. Claimant agreed to that work and began performing it on approximately Monday, November 27, 2017.

(7) During the weeks at issue, claimant applied for many jobs in management, sales and marketing, including in the golf industry. Claimant was not hired for any of the jobs for he applied for.

CONCLUSIONS AND REASONS: Claimant was available for work during the weeks at issue.

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.* Where, as here, a claimant has been paid benefits, the Department or the employer has the burden to demonstrate that claimant was not eligible to receive those benefits during the weeks at issue because he was not available for work. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

The issue with respect to whether claimant was available for work during the weeks at issue is whether claimant limited his opportunities for work by not seeking work with the employer other than as a starter-marshall. Claimant testified at hearing that he thought that his position as a starter-marshall was separate from other positions that the employer had and, specifically, that he was never informed before November 22, 2017, and had no reason to know, that the employer would have assigned him to perform other work duties had he requested that, and when he was told that he could work on the driving range he readily accepted that work. Audio at ~28:18, ~29:44, ~32:09 ~33:10. By contrast, the employer's general manager testified that claimant was aware before the weeks at issue that the employer had positions other than as starter-marshall that claimant could have performed during the winter and that he reminded claimant on November 8 and November 22, 2017 that such positions were available. Audio at

~19:20, ~21:00, ~21:37, ~25:00, ~41:00, ~43:14. Where, as here, the testimony is in conflict and there is no reason to doubt the credibility of either witness, the uncertainty in the evidence must be resolved in claimant's favor since claimant was paid benefits, and the employer therefore had the burden of proof this matter. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). On this record, claimant was not aware, and had no reason to be aware, that the employer had positions at which he could have worked during the weeks at issue other than as a starter-marshal. This conclusion is supported by the fact that when the general manager told claimant that he could work picking up golf balls on the driving range on November 22, 2017, claimant immediately accepted that assignment and was scheduled thereafter for it. Because claimant was not aware during the weeks at issue¹ that there were work opportunities open to him with the employer other than as starter-marshal, he did not impose conditions on the work he was willing to accept during the weeks at issue by not inquiring into other suitable work that the employer might have had. Accordingly, it was not demonstrated that claimant was unavailable for work during the weeks at issue, or therefore ineligible for benefits for those weeks.

With respect to whether claimant actively sought work during the weeks at issue, neither the employer nor the Department challenged the adequacy of claimant's work search activities or contended that claimant did not actively seek work. As such, we do not reach that issue.

DECISION: Hearing Decision 18-UI-100644 is affirmed.

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

DATE of Service: February 27, 2018

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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¹ While claimant became aware of these additional work opportunities on November 22, 2017, which was in week 45-17, he agreed at that time to accept that work and performed it when the employer first scheduled him for it on approximately November 27, 2017. As such, claimant did not impose a condition that limited his opportunity to return to work in week 45-17.