

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0233

Affirmed
Eligible

PROCEDURAL HISTORY: On January 12, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was available for work during the weeks of September 28, 2014 through January 3, 2015 (decision # 83714). The employer filed a timely request for hearing. On February 12, 2015, ALJ R. Davis conducted a hearing, and on February 17, 2015 issued Hearing Decision 15-UI-33585, affirming the Department's decision. On March 5, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On August 29, 2014, claimant filed an initial claim for unemployment benefits. The claimant was determined valid. Claimant claimed and was paid benefits for the weeks of September 28, 2014 through January 3, 2015 (weeks 40-14 through 53-14), the weeks at issue.

(2) During the weeks at issue, claimant sought work as a transportation maintenance manager, a construction consultant and a construction inspector, project manager and superintendent. Claimant had a bachelor's degree with a major in construction management and a minor in business. Claimant also had a juris doctor degree.

(3) On approximately October 2, 2014, Professional Transportation, Inc. hired claimant to work part-time as a driver transporting railroad workers to various job sites. When claimant was hired, the employer's branch manager told her that she was not guaranteed a particular number of work hours per week but could expect between ten and thirty hours. The employer paid claimant based on the miles that she drove rather than the hours that she worked.

(4) The employer used a computerized system to assign drivers to jobs transporting railroad workers twenty-four hours per day. Drivers could log into the system under a code 1 status, which indicated that they would not turn down any assignments and were available to report to work within 20 minutes of

being called. The employer assigned jobs to drivers showing a code 1 status in the order in which they logged into the system as code 1. Drivers could log into the system under a code 3 status, which indicated that they were available but should only be called for an assignment if there were no available drivers in code 1 status to take the job. Drivers could log into the system under a code 4 status, which indicated that they should not be assigned jobs because they were on rest periods or otherwise not available for assignments.

(5) When the employer first hired claimant, she was in training and rode along with an experienced driver who was assigned to transport railroad workers. Claimant completed her training sometime around approximately the end of October 2014. When claimant's training ended, the employer did not schedule any of its drivers for mandatory code 1 status and relied on its drivers to select their own statuses. Until November 20, 2014, claimant tried to indicate a code 1 status as often as possible, but because the need for drivers was very unpredictable, as was the length of the assigned trips, claimant sometimes had to remain awake for thirty to thirty-six hours after she initially woke up to complete an assigned job. Audio at ~34:40. Recognizing the dangers of driving when she was fatigued, and because spending such long hours awake made claimant sick, claimant indicated her status as code 3 when she was thought she was too tired to drive safely.

(6) On November 20, 2014, the employer began issuing schedules for its drivers. The employer assigned claimant to take calls for work on Sundays and Mondays from 10:00 p.m. until 10:00 a.m. During those scheduled hours after November 20, 2014, claimant logged into the employer's system under code 1 status. For the following three days of the work week, claimant logged into the system under code 3 status.

(7) During the weeks at issue, when claimant was under a code 3 status, she was looking for work as a consultant or seeking managerial work in the fields of construction and transportation.

CONCLUSIONS AND REASONS: Claimant was available for work during the weeks of September 28, 2014 through January 3, 2015 (weeks 40-14 through 53-14).

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.* Because the Department paid claimant benefits during the weeks at issue, it is the Department's and the employer's burden to demonstrate, more likely than not, that claimant was not available for work and not entitled to those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

At hearing, the Department took the position that claimant was available for work during the weeks at issue because when she changed from a code 1 status to a code 3 status for purposes of accepting assignments from the employer it was for safety reasons and not the result of an unreasonable restriction on her opportunities to return to work. Audio at ~10:38. It appeared to be the employer's contention that, to establish her availability to work, claimant needed to maintain a code 1 status for more days per

week than she did. Audio at ~20:00. However, the employer did not dispute that its drivers needed to rest for safety reasons and that drivers legitimately used either a code 3 or a code 4 status to obtain that respite. Audio at ~ 23:07, ~23:46. It obviously was unreasonable for the employer to expect claimant to maintain a code 1 status twenty-four hours a day seven days a week to preserve her availability for work despite the safety consequences of doing so. Furthermore, the employer did not challenge claimant's testimony that she consistently used a code 1 status whenever the employer scheduled her for work and that she used a code 3 status for any additional days needed to complete a five day work week even though she was not scheduled for work on those days. Audio at ~35:44. On its face, absent persuasive rebuttal evidence, claimant's coding approach does not appear unreasonable. While the employer's witness generally contended that claimant was not available for all work, he was unable to provide specific testimony about the days or weeks claimant was unwilling to work, the proportion of time that she was unwilling to work, or why her method of coding her status substantially interfered with her ability to work when it was safe for her to do so Audio at ~19:40, ~20:00, ~20:46, ~21:08. On this record the employer did not meet its burden to establish that claimant was not available for work during the weeks at issue.

Claimant was available for work during weeks 40-14 through 53-14. She is not ineligible to receive benefits for those weeks based on her availability for work.

DECISION: Hearing Decision 15-UI-33585 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: April 20, 2015

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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