

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0914

Affirmed
Not Available Weeks 6-16 to 19-16
Overpayment Assessed

PROCEDURAL HISTORY: On May 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from February 7, 2016 through May 7, 2016 (weeks 6-16 to 18-16) (decision # 120415). On June 15, 2016, the Department served notice of an administrative decision assessing a \$2,390 overpayment (decision # 114357). On June 28, 2016, claimant filed requests for hearing by telephone.¹ On July 20, 2016, ALJ S. Lee conducted two hearings, and on July 27, 2016 issued Hearing Decision 16-UI-64531, concluding claimant was not available for work from February 7, 2016 to May 14, 2016 (weeks 6-16 to 19-16), and Hearing Decision 16-UI-64532, affirming decision # 114357. On August 4, 2016, claimant filed application for review of both decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-64531 and 16-UI-64532. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0914 and 2016-EAB-0915).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) On January 25, 2016, claimant filed an initial claim for unemployment insurance benefits. Her weekly benefit amount was \$239.

(2) Claimant filed weekly claims for benefits from February 7, 2016 to May 14, 2016 (weeks 6-16 to 19-16), the weeks at issue. The Department paid claimant benefits for weeks 6-16 to 18-16, and did not pay benefits for week 19-16. She received \$2,390 in unemployment insurance benefits during the weeks at issue.

¹ A timely request for hearing on decision # 120415 had to be filed on or before June 2, 2016 to be timely. As it appears claimant's request for hearing was not filed until June 28, 2016, her request for hearing on decision # 120415 was, likely, late. However, as the ALJ did not develop that issue at the hearing and no adversely affected party has assigned error to the ALJ's failure to do so we confine our analysis on claimant's availability for work during the weeks at issue.

(3) Claimant's labor market included Vancouver, Washington and Portland, Oregon. During the weeks at issue, claimant sought production and restaurant work. The customary days and hours for production and restaurant work in claimant's labor market included all days and hours.

(4) Between February 7, 2016 and February 22, 2016, claimant was medically restricted from performing standing work for more than a few hours at a time due to a recent knee surgery. On February 9, 2016, claimant declined an offer of temporary work from Express Services because she was unable to stand for a full shift due to a recent knee surgery.

(5) Each week claimant claimed unemployment insurance benefits, she reported to the Department that she was available for work. Between February 7, 2016 and May 14, 2016, however, claimant was not willing to work graveyard shift or after midnight. During the weeks at issue, claimant had notified Express Services, a temporary agency she registered with for work opportunities, that she wanted to work day and swing shift work. On May 3, 2016, claimant notified the Department that she would not work graveyard shifts.

(6) Claimant did not want to work graveyard shifts because she did not sleep well during the day. Claimant was also prescribed oxycodone for surgery-related pain, was instructed by her physician to take the medication at night, and was unable to safely drive or work while taking oxycodone.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ that claimant was not available for work during weeks 6-16 through 19-16 and was overpaid and must repay \$2,390 in overpaid benefits for those weeks.

Available for work. To be eligible to receive benefits, unemployed individuals must be available for suitable work during each week claimed. ORS 657.155(1)(c). OAR 471-030-0036(3)(a) provides, in pertinent part, that an individual is considered available for work "if, at a minimum, he or she is" "[w]illing to work . . . during all of the usual hours and days of the week customary for the work being sought . . ."

There is no dispute in this record that the usual hours and days of the week customary for production and restaurant work in claimant's labor market included all shifts, including the graveyard shift. Likewise, there is no real dispute in this record that, during the weeks at issue, claimant was not willing to work during the graveyard shift. Because claimant was not willing to work during the graveyard shift, she was not available for work during all the customary hours for the type of work she sought.

Claimant testified that she was unable to work graveyard shift for medical reasons, specifically, her use of pain medication at night and her inability to sleep well during the day. Claimant's argument is, in essence, that she is only required to be available for "suitable" work, and graveyard shift work is not suitable for her for the reasons she explained.

ORS 657.190 defines "suitable work" for purposes of this case, providing that factors to consider when determining whether work is suitable include the degree of risk involved to claimant's health and safety. Working graveyard shift does not appear to have posed a significant risk to claimant's health and safety because of her knee surgery and inability to work while using pain medication. Those conditions would necessarily have affected claimant the same during the day and swing shifts as during the graveyard

shift, and it was not her health that is the basis of the denial of benefits in this case, it was her unwillingness to work graveyard shifts.

To the extent claimant was prescribed pain medication to take "at night," it is just as likely as not that the intent of the instruction was for claimant to take the medication when she was going to sleep, not that she had to take it at a particular time of day or night, and, therefore, taking pain medication would not have affected claimant's ability to work graveyard shifts. Likewise, working graveyard shift does not appear to have posed a significant risk to claimant's health and safety because of her inability to sleep well during the day. Although it is undisputed that claimant had difficulty sleeping during the day or was unable to sleep well during the day, the record fails to show that the effects of working graveyard had such a significant effect on her health and safety that she was medically incapable of working that shift, or that the risk to her should she work one or more graveyard shifts was so great that it rendered it unreasonable to expect claimant to work during that shift.

Overpayment. ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.*

As previously stated, claimant was not eligible for benefits during the weeks at issue. The Department paid claimant \$2,390 in benefits for the weeks at issue that she was not entitled to receive. Claimant was, therefore, overpaid.

Claimant was overpaid benefits because, each week she claimed benefits during the weeks at issue, she reported to the Department that she was available for work despite her unwillingness to work during all of the customary hours or shifts associated with the types of work she sought. Regardless of claimant's knowledge or intent in making those false reports to the Department about her availability, because her false reports of a material fact caused the overpayment, she is liable to either repay the benefits or have the amount of the benefits deducted from future benefits otherwise payable.

In sum, claimant was not "available for work" from February 7, 2016 to May 14, 2016 (weeks 6-16 to 19-16), and, therefore, was not eligible for benefits during those weeks. She was overpaid \$2,390 in benefits that she is liable to repay.

DECISION: Hearing Decisions 16-UI-64531 and 16-UI-64532 are affirmed.

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

DATE of Service: August 25, 2016

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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