

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0929

Modified
Eligible Weeks 5-16, 6-16, and 11-16 through 17-16
Ineligible Weeks 7-16 through 10-16

PROCEDURAL HISTORY: On June 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 83502) concluding that claimant was not available for work from January 31 through April 30, 2016 (weeks 5-16 through 17-16). Claimant filed a timely request for hearing. On July 25, 2016, ALJ M. Davis conducted a hearing, and on July 28, 2016, issued Hearing Decision 16-UI-64647, modifying the administrative decision and concluding claimant was not available for work from January 31 through March 19, 2016 (weeks 5-16 through 11-16), but was available for work from March 20 through April 30, 2016 (weeks 11-16 through 17-16). On August 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party requested review of the portion of Hearing Decision 16-UI-64647 that concluded that claimant was available for work during weeks 12-16 through 17-16. We therefore confined our review to the issue of claimant's availability for work during weeks 5-16 through 11-16.

FINDINGS OF FACT: (1) In December 2015, Rebound Physical Therapy hired claimant to work 10-15 hours per week as a physical therapist aide. Claimant worked briefly for the employer in December 2015 and then traveled for several weeks. On or about January 4, 2016, claimant returned to work for the employer and began working 10 to 20 hours per week. Claimant never refused any of the employer's requests to work additional hours.

(2) On January 5, 2016, claimant filed an initial claim for unemployment benefits. The Department established a weekly benefit amount of \$472 per week. Claimant claimed and was paid benefits for weeks 5-16 through 17-6 (January 31 through April 30, 2016), the weeks at issue.

(2) In the middle of February 2016, claimant asked the employer to limit her work hours to no more than 15 per week. Claimant wanted additional time to look for higher paying and more permanent work,

and believed she did not enough time to look for other jobs if she worked more than 15 hours per week. The employer agreed to claimant's request, and during weeks 7-16 through 11-16, worked no more than 15 hours per week for the employer. The employer had additional hours of work available for claimant, had she been willing to work more than 15 hours per week.

(3) From March 13 through March 23, 2016, the employer was short of staff because of school spring break periods and asked claimant to work more than 15 hours per week. During this period, claimant never refused any of the employer's requests to work extra hours.

(4) On March 23, 2016, claimant separated from her work for the employer.

CONCLUSION AND REASONS: We agree with the ALJ that claimant was not available for work during weeks 7-16 through 10-16. However, we disagree with the ALJ and conclude that claimant was available for work from January 31 through February 13, 2016 (weeks 5-16 through 6-16) and March 13 through 19, 2016 (week 11-16).

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.* When, as here, the Department originally paid claimant benefits it subsequently denied, the Department has the burden to establish by a preponderance of evidence that claimant received benefits to which she was not entitled. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In decision Hearing Decision 16-UI-64647, the ALJ concluded that claimant was not available for work from January 31 through March 19, 2016 (weeks 5-16 through 11-16) because she told the employer she wanted to work no more than 15 hours per week and therefore "placed an impermissible restriction on her availability by not working all available work for the employer." Hearing Decision 16-UI-64646 at 4. We disagree. The record shows that from January 31 until the middle of February, claimant worked all hours the employer scheduled her to work, even when those hours exceeded 15 per week. Claimant did not restrict her work hours until the middle of February 2016, when she asked to work no more than 15 hours per week. She subsequently ended this restriction and agreed to work additional hours during the week of 11-16.

The Department therefore established that claimant was not available for work during weeks 7-16 through 10-16, but failed to establish that she was unavailable for work during weeks 5-16, 6-16 and 11-16. We therefore agree with the ALJ that claimant is not eligible for benefits for weeks 7-16 through 10-16. However, we disagree with the ALJ and conclude that claimant is eligible for benefits for weeks 5-16, 6-16 and 11-16.

DECISION: Hearing Decision 16-UI-64647 is modified, as outlined above.

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

DATE of Service: August 29, 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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