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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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<p>EMPLOYMENT APPEALS BOARD DECISION 2017-EAB-0292</p>
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Hearing Decision 17-UI-77151 Affirmed ~ Not Eligible May 15, 2016 to October 8, 2016
Hearing Decision 17-UI-77154 Affirmed ~ Late Request for Hearing Dismissed
Hearing Decision 17-UI-77162 Affirmed ~ Overpaid \$333

PROCEDURAL HISTORY: On October 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from July 24, 2016 to July 30, 2016 (decision # 92516). On October 31, 2016, decision # 92516 became final without claimant having filed a request for hearing. On November 14, 2016, the Department served notice of another administrative decision, based on decision # 92516, concluding claimant was liable to repay a \$333 overpayment (decision # 155250). On November 17, 2016, the Department served notice of a third administrative decision concluding claimant was not able to work or available to work from May 15, 2016 to October 8, 2016 (decision # 93838). On November 21, 2016, claimant filed timely requests for hearing on decisions # 155250 and # 93838, and a late request for hearing on decision # 92516. On February 16, 2017, ALJ M. Davis conducted three hearings, and issued Hearing Decision 17-UI-77151, affirming decision # 93838, Hearing Decision 17-UI-77154, dismissing claimant's late request for hearing on decision # 92516, and Hearing Decision 17-UI-77162, affirming decision # 155250. On March 7, 2017, claimant filed timely applications for review of all three decisions with the Employment Appeals Board (EAB).¹

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-77151, 17-UI-77154 and 17-UI-77162. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2017-EAB-0291, 2017-EAB-0292 and 2017-EAB-0293).

¹ Although claimant applied for review using only the form attached to Hearing Decision 17-UI-77154, EAB construed the application for review as applying to all three matters since the hearings were held on the same day by the same ALJ, the decisions were adverse to claimant's interests and all issued the same day, they were likely received by claimant at the same time, the variations between the application for review forms attached to each decisions were subtle enough that an individual might not realize he needed to file all three forms to have all three hearing decisions reviewed by EAB, and, in his written argument, claimant referenced a desire to review the decision "dated February 16, 2017," which would apply to all three hearing decisions at issue. Given those circumstances, we have concluded that claimant's submission of one application for review form was likely an expression of his intent to appeal all three decisions issued February 16, 2017.

FINDINGS OF FACT: (1) On March 8, 2016, claimant filed an initial claim for unemployment insurance benefits. His weekly benefit amount was \$466. Claimant filed weekly claims for benefits for the weeks of May 15, 2016 to October 8, 2016, the weeks at issue. The Department paid benefits to claimant each week except the week ending October 1, 2016.² Claimant's benefit payments included \$333 for the week of July 24, 2016 to July 30, 2016.³

(2) Prior to the weeks at issue, claimant had worked in a management position for a large "box store." Claimant's position was full time, and required that he work approximately 60 hours per week. Claimant was reticent to work full time in a box store environment again and "was not prepared to fall back into that environment." Audio recording, 8:15 a.m. hearing, at ~ 21:30.

(3) During the weeks at issue, Carefree Buffalo, LLC employed claimant as a part time sales associate. During claimant's pre-employment interview the employer made it clear to claimant that the job he was interviewing for was part time. Claimant told the employer he would like to work three days per week. Audio recording, 8:15 a.m. hearing, at ~ 21:10, 28:00, 29:45.

(4) After the weeks at issue, Carefree Buffalo reported to the Department that claimant wanted to be on the schedule to work no more than three days each week but was willing to fill in at other times. Audio recording, 8:15 a.m. hearing, at ~ 10:00, 10:45, 28:00. A Department employee subsequently interviewed claimant about his willingness to work, during which claimant reported to the Department that he was concerned working "full time could cause problems" and he "thought it would be better" to work three days per week. Audio recording, 8:15 a.m. hearing, at ~ 12:15, 12:45.

(5) Claimant likely received notice of decision # 92516 shortly after the Department mailed it to him on October 11, 2016. Around that time, claimant was in communication with the Department about an earnings issue that was causing the Department to believe he had been overpaid just under \$200 around the same period of time covered in that decision. Claimant and the Department resolved the earnings issue, with the Department concluding that claimant had not been overpaid because of that issue. The deadline for requesting a hearing on decision # 92516 expired on October 31, 2016 without claimant having requested a hearing on it.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's late request for hearing on decision # 92516 is subject to dismissal, that he is liable to repay a \$333 overpayment based on decision # 92516 and that he was not available for work from May 15, 2016 to October 8, 2016.

Late request for hearing. ORS 657.269 provides that an administrative decision becomes final unless a party requests a hearing within 20 days of the date it was issued. Under ORS 657.875 the deadline for filing a request for hearing may be extended "a reasonable time" upon a showing of "good cause,"

² We take notice that claimant was paid benefits during each week at issue except week 39-16, facts which are contained in Employment Department records. Any party that 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. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

³ Claimant received reduced benefits for the week ending July 30, 2016 because he had earnings during that week which reduced his weekly benefit amount.

which is “when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant’s reasonable control.” OAR 471-040-0010(1) (February 10, 2012). The definition of good cause states that “[g]ood cause does not include” “[n]ot understanding the implications of a decision or notice when it is received.” OAR 471-040-0010(1)(b)(B).

In this case, the deadline for claimant to file a timely request for hearing on decision # 92516 expired on October 31, 2016; claimant did not file his request for hearing until several weeks later, on November 21, 2016, making his request late. Although claimant did not identify the specific reason he did not timely request a hearing on decision # 92516, it appears the most likely reason that he was confused between that decision and another issue related to his earnings that arose during the same period, and he likely failed to understand that even though the earnings issue was resolved in his favor decision # 92516 remained in effect and continued to deny him benefits. Although claimant’s confusion was understandable given the number of issues the Department identified in his claim, including many issues covering the same period of time, the definition of “good cause” specifically excludes an individual’s failure to understand a decision from being included in the definition; it is considered within an individual’s reasonable control to contact the Department to resolve any confusion or get help to understand the Department’s decisions, and an individual’s failure to do so is not an excusable mistake. For those reasons, we agree with the ALJ that claimant’s late request for hearing on decision # 92516 must be dismissed.

Overpayment. Hearing Decision 17-UI-77162 affirmed the assessment of a \$333 overpayment claimant is liable to repay, which was based on decision # 92516. EAB reviewed the entire hearing record in that matter. On *de novo* review and pursuant to ORS 657.275(2), Hearing Decision 17-UI-77162 is **adopted**.

Availability for work. 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), the individual must, among other things, 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 substantially limit the individual’s opportunities to return to work at the earliest possible time. OAR 471-030-0036(3) (February 23, 2014). Because the Department initially paid benefits to claimant, the Department has the burden of proving that benefits should not have been paid. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Claimant testified that he was willing to work full time, sought full time work with other businesses during the weeks at issue, and worked only part time for Carefree Buffalo, LLC because that is all the employer offered him. *See e.g.* Audio recording, 8:15 a.m. hearing at ~ 15:15, 17:15, 17:30, 29:45. He also testified, however, that he “did not care to work full time at a big box store,” “remember[ed] the possibility of saying” to a Department employee that he had “opted” for part time work to see if he was able to work full time “eventually,” was “reticent” to work full time in a box store environment, and “was not prepared to fall back into that environment.” Audio recording, 8:15 a.m. hearing at ~ 15:30, 21:10, 21:30. Additionally, claimant’s employer reported to the Department that claimant wanted to work a maximum of three days, claimant admitted at the hearing he said he would “like” three days per week, he did not dispute that he told the Department that he was concerned working “full time could cause problems,” and he did not dispute that he reported to the Department he “thought it would be better” to work three days per week. Audio recording, 8:15 a.m. hearing at ~10:00, 12:15, 28:00, 29:45.

In this case, it is immaterial that the particular business for which claimant worked during the weeks at issue did not offer its employees full time employment, and immaterial that claimant sometimes agreed to work more hours than his three scheduled days. Claimant's testimony, considered as a whole, demonstrates that while he was willing to work for some retail sales employers on a more-than-part-time basis, he was also unwilling to work full time in all retail environments, such as box stores. It also demonstrates the likelihood that claimant was reluctant to work full time for any employer unless he first ascertained that the environment was not akin to that of a box store environment. In order for claimant to be considered "available for work" during the weeks at issue, however, the record must show not only that he was willing to work and was capable of working full time in retail sales for his then-employer, but that he was also generally willing to work and capable of working full time in retail sales without placing substantial limitations on his availability. His admitted reluctance to work in a box store or environment similar to a box store, and statements to the employer that he wanted to be scheduled only for three days of work a week, coupled with his report to the Department that he opted for part time employment and see if he was able to work full time eventually, demonstrate it is more likely than not that he was unwilling to work full time in all types of retail sales environment during the weeks at issue, was possibly not capable of full time work in any retail sales environments, and that he placed some limitations on his availability for work that more likely than not substantially reduced his opportunities to work. Claimant was not "available for work" as a retail salesperson during the weeks at issue, and, therefore, was not eligible for benefit payments during those weeks.⁴

DECISION: Hearing Decisions 17-UI-77151, 17-UI-77154 and 17-UI-77162 are affirmed.

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

DATE of Service: March 14, 2017

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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⁴ Given that claimant was paid benefits for all the weeks at issue we conclude it is likely that claimant was overpaid benefits; the amount or existence of an overpayment is not before EAB at this time, however, and will likely be the subject of another, separate, Department decision. If the Department issues such a decision and claimant disagrees with it, claimant should follow instructions accompanying the decision to request a hearing.