

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0599

Hearing Decision 17-UI-83169 Affirmed in Part, Reversed and Remanded in Part
Hearing Decision 17-UI-83175 Reversed and Remanded

PROCEDURAL HISTORY: On January 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 81641) concluding that claimant was not available for work from September 25, 2016 through January 7, 2017 (weeks 39-16 through 01-17). On February 8, 2017, the Department served notice of an administrative decision (decision # 193866) assessing a \$4,599 overpayment, 32 penalty weeks, and a \$1379.70 monetary penalty based on decision # 81641. Claimant filed timely hearing requests. On May 3, 2017, ALJ Frank conducted hearings, and on May 11, 2017, issued Hearing Decision 17-UI-83169, modifying decision # 81641 by concluding that claimant was not available for work from September 25 through November 19, 2016 (weeks 39-16 through 46-16) and November 27 through December 31, 2016 (weeks 48-16 through 52-16), and Hearing Decision 17-UI-83175, which affirmed decision # 193866. On May 15, 2016, claimant filed applications for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent that it was relevant and based on evidence in the record.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-83169 and 17-UI-83175. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0599 and 2017-EAB-0600).

FINDINGS OF FACT: (1) On September 28, 2016, claimant filed an initial claim for unemployment benefits. At that time, claimant was asked if there was any reason he could not immediately working full time; claimant responded that he could not immediately begin full time work because he needed to care for his infant son. A weekly benefit amount of \$385 was established. The maximum weekly benefit amount was \$590.

(2) Claimant filed online claims for benefits for weeks 39-16 through 46-16, and 48-16 through 52-16, the weeks at issue. For each week that he claimed benefits, claimant was asked if, for each day during the week, he was willing to work, and capable of accepting and reporting for full time, part time, and temporary work, while not imposing conditions that reduced his opportunities to work. Claimant

responded “yes” to this question on each of the claims he filed for the weeks at issue. The Department gave claimant waiting week credit for week 39-16, and paid him \$385 per week for weeks 40-16 through 46-16,¹ and weeks 50-16 and 51-16, and \$378 per week for weeks 48-16 and 49-16, and 52-16.

(3) From September 28 through November 14, 2016, claimant was not available for work because he was caring for his infant son. Hearing Decision 17-UI-83169, Audio recording at 23:28.

(4) On November 14, 2016, Mobile Dental Van Manufacturing, Inc., the employer, hired claimant. Although the employer had full time work available for claimant, the employer agreed to delay scheduling claimant for full time work upon claimant’s request. From November 14, 2016 through December 2016, claimant was unwilling to work full time for the employer because he wanted time to find a job that paid more and was better suited to his abilities and skills. Hearing Decision 17-UI-83169, Audio recording at 23:54. As a result, claimant worked limited hours for the employer in November and December 2016.² In January 2017, claimant began working full time for the employer.

CONCLUSION AND REASONS: **Hearing Decision 17-UI-83169** is affirmed in part, and reversed and remanded in part for further development of the record. **Hearing Decision 17-UI-83175** is reversed and remanded.

Availability for work: 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 during all of the usual days and hours customary for the work being sought in the individual’s labor market, and refrain from imposing conditions that limit the individual’s opportunities to return to work at the earliest possible time. *Id.* However, an individual who is the parent of a child under the age of 13 years who is not willing or capable of working a particular shift because of a lack of child care for that child acceptable to the individual shall be considered available for work if the work that the individual is seeking is customarily performed during other shifts in the individual’s labor market, and the individual is willing to and capable of working during such other shifts. OAR 471-030-0036(4).

Claimant claimed and was paid unemployment paid benefits for weeks 39-16 through 46-16, and 48-16 through 52-16, the weeks at issue. During weeks 39-16 through 45-16, claimant was unwilling or unable to work full time because he needed to care for his infant son. During week 48-16 through 52-16, claimant was unwilling to work full time for the employer that had hired him because he needed and wanted time to look for a better paying job that was more suited to his experience and education. We

¹ The Department initially denied claimant benefits for weeks 39-16 through 46-16 because of his lack of availability for work due to the need to provide child care. After claimant spoke with a Department representative on November 10, 2016 and told the representative that his child care issues had been resolved, the Department released his benefits for those weeks. Hearing Decision 17-UI-83175, Audio recording at 15:57.

² Claimant worked the following hours for the employer during November and December: 1 hour per day on November 14 and 16; 8 hours on November 21; 9 and one-half hours on November 28; 8 hours per day on December 5 and 12; and 6 hours on December 19. Hearing Decision 17-UI-8317, Audio recording at 22:03 through 22:43.

consider each of these reasons claimant provided for his unavailability for work to determine if they made him ineligible for unemployment benefits.

In regard to claimant's availability for work during weeks 48-16 through 52-16, we agree with the ALJ that claimant was not available for work during those weeks. By choosing to reject full time work offered by the employer on November 14 because he wanted to look for a better paying position, claimant imposed a condition that limited his opportunity to return to work at the earliest possible time. We therefore affirm the ALJ's conclusion that claimant was unavailable for work during weeks 48-16 through 52-16.

In regard to claimant's availability for work during weeks 39-16 through 46-16, the hearing record was insufficient to determine whether claimant could be considered available for work because of the work he sought and his child care responsibilities. On remand, the ALJ must ask claimant and the Department representative whether claimant was not willing or capable of working a particular shift because of a lack of acceptable child care, what was claimant's normal labor market, what work claimant was seeking, whether that work was performed during shifts other than a particular shift during which claimant needed to care for his son, and whether claimant was willing and capable of working these other shifts. The ALJ should ask any other questions necessary to determine the applicability of OAR 471-030-0036(4) to claimant's circumstances.

Overpayment, Misrepresentation and Penalties: 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.* An individual who willfully makes a false statement or misrepresentation, or willfully fails to report a material fact to obtain benefits, may be disqualified from benefits for a period not to exceed 52 weeks. ORS 657.215. The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052 (February 23, 2014). In addition, an individual who has been disqualified from benefits under ORS 657.215 for making a willful misrepresentation, and who has three or four "occurrences" within five years, is liable for a penalty in an amount equal to 20 percent of the total amount of benefits the individual received but was not entitled to receive. ORS 657.310(2); OAR 471-030-0052(7). An "occurrence" shall be counted each time an individual willfully makes a false statement or representation, or willfully fails to report a material fact to obtain benefits. OAR 471-030-0052(7).

In Hearing Decision 17-UI-83175, the ALJ concluded that claimant was overpaid benefits because he was not available for work for weeks 39-16 through 46-16 and 48-16 through 52-16, determined that claimant had misrepresented material facts concerning his availability for work during these weeks, and assessed monetary penalties and penalty weeks based on the amount of the overpayment and the number of "occurrences" of misrepresentation. Because we remanding this matter for further evidence to determine whether claimant was available for work during weeks 39-16 through 46-16, Hearing Decision 17-UI-83175 must be reversed and remanded. Depending on the findings the ALJ makes and the conclusions he reaches in his new hearing decision, the overpayment and penalties for which claimant is liable may need to be revised. On remand, the ALJ must develop a record sufficient to determine whether claimant misrepresented facts concerning his availability for work during weeks 39-

16 through 46-16, determine the amount of benefits claimant was overpaid for all of the weeks at issue, and calculate the appropriate monetary penalties and penalty weeks that must be imposed, based on the amount of the overpayment assessed and the number of “occurrences” of misrepresentation.

DECISION: Hearing Decision 17-UI-83169 is affirmed in part (as to weeks 48-16 through 52-16), and reversed and remanded in part (as to weeks 39-16 through 46-16). Hearing Decision 17-UI-83175 is reversed and remanded.

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

DATE of Service: June 6, 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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