

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0271

Affirmed
Not Eligible
Overpayment Assessed

PROCEDURAL HISTORY: On October 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the week from January 8 through January 14, 2017, and that claimant was overpaid \$336 (decision # 132239). Claimant filed a timely request for hearing. On February 26, 2018, ALJ Meerdink conducted a hearing, and on February 28, 2018 issued Hearing Decision 18-UI-104186, affirming the Department's decision. On March 13, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On December 23, 2016, claimant filed an initial claim for unemployment insurance benefits. Claimant's weekly benefit amount was \$336. Claimant claimed benefits for the week from January 8 through January 14, 2017 (week 02-17), the week at issue. To complete the claim filing process for the week at issue, claimant was required to certify that she was able work during that week. Based on claimant's certification, the Department paid, and claimant received, \$336 in benefits for the week at issue.

(2) During the week at issue, claimant sought work as a dental hygienist and her labor market was the Portland, Oregon metropolitan area. The customary hours for a dental hygienist in claimant's labor market were Monday through Saturday, from 8:00 a.m. to 5:00 p.m.

(3) In January 2017, claimant was sick with stomach flu for ten days, including on January 10, 2017. On January 10, 2017, claimant was scheduled to work for a dentist. As a courtesy, claimant called the dentist and informed him that she was sick because she felt he should know because he had many patients scheduled to see him and claimant that day, and some of the patients were elderly. Claimant told the dentist that, if she worked, she would put him behind schedule because she would not be able to keep up with the schedule of patients due to her illness. She told him that she would have to spend part of her shift in the restroom until she was well enough to see patients.

(4) Despite being ill and unable to work her entire shift, claimant was willing to report to work. However, the dentist told claimant that she should not report to work on January 10, 2017.

CONCLUSIONS AND REASONS: Claimant was not able to work during the week of January 8 through January 14, 2017 and is ineligible to receive benefits for that week. Claimant was overpaid \$336 in regular unemployment insurance benefits and must repay the Department that amount or have it deducted from future benefits otherwise payable.

Ability to 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 is considered able to work for purposes of ORS 657.155(1)(c) only if physically and mentally capable of performing the work the individual is actually seeking during all of the week. OAR 471-030-0036(2) (February 23, 2014). Where, as here, the Department paid a claimant benefits or gave waiting week credit for a week claimed, and then subsequently denied that she was eligible for those benefits, the Department has the burden to establish by a preponderance of evidence that the claimant was not entitled to the benefits paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). Here, the Department met its burden.

Based on claimant's description of the short-term stomach illness she had for ten days in January 2017, we conclude that the preponderance of the evidence shows she was suffering from what claimant characterized as a stomach flu, and probably not symptoms of another long-term medical condition. Although claimant had a stomach flu on January 10, 2017, she was willing to report to work. However, despite her willingness to work, she was not able to perform her regular duties for a portion of her shift because, as she told her employer, she would have to spend part of her shift in the restroom due to illness. It is also undisputed that claimant told the dentist that her illness would prevent her from keeping up with the employer's schedule of patients on January 10. On this record, in light of the restrictions claimant's illness placed on her ability to perform her job duties, it is more likely than not that claimant lacked the ability on January 10 to perform the dental hygienist work that she sought during the week at issue. Nor does the record show that claimant sought other work that she could physically perform with the stomach flu during that week. Because claimant was not able to work during the week at issue, she is not eligible for benefits for that week.

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.*

Based in part upon claimant's weekly certification to the Department that she was able to work during the week of January 8 through January 14, 2017, claimant received \$336 in unemployment insurance benefits to which she was not entitled. With regard to claimant's benefit claim for that week, the record shows claimant was not able to work. Claimant's certification to the Department that she was able to work during that week was, therefore, false. Regardless of claimant's knowledge or intent in making that false report to the Department, she is liable under ORS 657.310(1) to either repay \$336 in benefits or have that amount deducted from any future benefits otherwise payable to her under ORS chapter 657.

In sum, claimant was ineligible for benefits for the week of January 8 through January 14, 2017 (week 02-17). In addition, claimant was overpaid and must reimburse the Department \$336 in regular benefits either directly or through deduction from future benefits payable to her.

DECISION: Hearing Decision 18-UI-104186 is affirmed.

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

DATE of Service: April 11, 2018

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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