

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1231

Affirmed
Eligible

PROCEDURAL HISTORY: On August 31, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work during the weeks of July 23 through August 19, 2017 (decision # 132146). Claimant filed a timely request for hearing. On October 4 and 19, 2017, ALJ Wyatt conducted a hearing, and on October 20, 2017 issued Hearing Decision 17-UI-95014, concluding claimant was not able to work during the week of July 23 through 29, 2017, and was able to work during the weeks of July 30 through August 19, 2017 and August 27 through October 7, 2017. On October 24, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument when reaching this decision. Claimant submitted a written argument which contained information that he did not offer during the hearing. Claimant did not explain why he did not present this information during the hearing or otherwise show as required by OAR 471-041-0090(2) (October 29, 2006) that he was prevented from doing so by factors or circumstances beyond his reasonable control. For this reason, EAB did not consider the new information that was contained in claimant's written argument.

FINDINGS OF FACT: (1) Beginning sometime in 2015, J & B Liquidators, Inc. employed claimant, last as a cashier and merchandise stocker.

(2) As of sometime before or around approximately early July 2017, claimant was usually scheduled to work Saturdays through Mondays, although he was scheduled to work on Friday, July 14 through Sunday, July 16, 2017. On July 14, claimant was ill with what he thought was the flu and was experiencing migraine headaches, an irregular heartbeat, dizziness and stomach issues. Claimant called in sick on July 14, 15 and 16, 2017. On July 16, 2017, the store manager who supervised the other managers at claimant's store called claimant since he had missed work on three consecutive days. The supervising manager asked claimant when he would be able to return to work. Claimant said he did not know, but was going to see a specialist physician during the upcoming week.

(3) Claimant's next scheduled block of workdays was Saturday, July 22 through Monday, July 24, 2017. Claimant called in sick to work on July 22 due to continuing to experience flu-like symptoms. Effective the week beginning July 23, claimant filed a claim for unemployment insurance benefits.¹ Claimant's claim was determined valid with a weekly benefit amount of \$172. Claimant claimed benefits for the weeks of July 23 through August 19, 2017 and August 27 through October 7, 2017 (weeks 30-17 through 33-17 and 35-17 through 40-17), the weeks at issue. Claimant was paid benefits for all of the weeks at issue except for week 32-17.²

(4) Claimant called in sick on July 23 and 24, 2017 (in week 30-17), again due to flu-like symptoms. In that call, claimant reported to a manager that he was not able to work. Unbeknownst to claimant the employer had decided not to schedule him for any additional work hours after July 24, 2017 (in week 30-17).

(5) On Saturday, July 29, 2017 (in week 30-17), claimant again called in sick. On Sunday, July 30, 2017 (in week 31-17), claimant was determined to report for work and felt well enough to do so. On that day and on Monday, July 31, 2017, claimant called in and let a manager know he was able to report for work, but was told that no work hours had been scheduled for him and that he had been removed from the employer's work schedule. Claimant told the manager he was no longer ill and wanted to be returned to the work schedule.

(6) On Wednesday, August 2, 2017, claimant went to the workplace to speak with the two owners about placing him back on the schedule and to have one of them complete some paperwork related to claimant's application for food stamps. Only one of the owners was present. That owner prefaced the meeting with claimant by telling claimant that he needed to contact the other co-owner if he had any issues relating to human resources. Claimant interpreted this comment to be about previous problems he had with the supervising manager of his store and complaints of retaliation that he had made against that manager, and not about returning him to the work schedule. Claimant then told that owner that he was no longer ill wanted to be returned to the work schedule. Claimant told the owner that he needed income to pay his expenses.

(7) Each week during the weeks at issue after August 2, 2017 (during weeks 31-17 through 40-17), claimant continued to call in and spoke to one of the two managers at the store before each Saturday to learn if he was scheduled to work his usual block of Saturday through Monday. Claimant thought by calling in and asking the managers for work, the employer would know that he was able to work. The managers with whom claimant spoke during these weeks did not tell him he needed to take any additional steps to notify the employer that he was able to work, or that he needed to contact any

¹ EAB takes notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting the basis of the objection, 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 at EAB.

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particular person to be returned to the work schedule. Each time claimant called in, the managers told him he was not scheduled for any hours.

CONCLUSIONS AND REASONS: Claimant was not able to work during the week of July 23 through July 29, 2017 and is not eligible to receive benefits for that week. Claimant was able to work and available for work during the weeks of July 30 through August 19, 2017 and August 27 through October 17, 2017, and is eligible to receive benefits for those weeks.

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 for which benefits are claimed. OAR 471-030-0036(2) (February 23, 2014). An individual occasionally and temporarily disabled for less than half of the week is not considered unable to work. OAR 471-030-0036(2)(a) (February 23, 2014). 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). 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.*

In this case, the Department paid claimant benefits for all of the weeks at issue except one - week 32-17 - when Department records show payment was not made for reasons unrelated to claimant’s ability to work or availability for work. Where the Department has paid benefits to a claimant during the weeks at issue and a determination against claimant would divest claimant of benefits already received, the Department carries the burden of proving that claimant was not eligible to receive those benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). Because claimant received benefits for all but one of the weeks at issue, and the one week he was not paid benefits was not due to his inability or unavailability to work, it is the Department that carries the burden to show claimant was not able or available to work during the weeks at issue, and is not eligible to receive benefits for those weeks.

With respect to week 30-17, neither party disputed that claimant was ill all of that week and that illness prevented him from working all of the days he was scheduled. Because this was not a temporary illness or disability of less than half the week, claimant was not able to work and is not eligible to receive benefits for that week. Claimant’s testimony that he was sufficiently recovered to work beginning in week 31-17 also was not disputed by the Department or the employer. As well, claimant’s testimony that he called the managers of the store at which he worked each week beginning in week 31-17 and met with one of the owners on August 2, 2017 about his desire to be scheduled for work gives credence to his claim that he was able to work during week 31-17 through week 40-17, including the remaining weeks at issue. The preponderance of the evidence in this record shows that claimant was not ineligible to receive benefits beginning in week 31-17 due to an inability to work. However, whether claimant was *available* for work during week 31-17 and the remaining weeks at issue also must be considered.

That claimant called the managers of the store at which he worked each week beginning in week 31-17 to learn if he was scheduled for any hours of work was not disputed. While the employer and the Department took the position that the supervising manager told claimant on July 16, 2017 that claimant

needed to let him know when he was ready to return to work and, presumably by not doing so, claimant was limiting his opportunities to return to work at the earliest opportunity, claimant disputed that the supervising manager told this to him or clearly indicated that he needed to take this step before he would be returned to the work schedule. Transcript of October 4, 2017 Hearing at 21, 22-23. In his testimony, the supervising manager did not state that he explicitly told claimant that claimant needed to speak with him before claimant would again be placed on the employer's work schedule, and stated only that he thought claimant would be aware of this need because he was the one who had called claimant to inquire about when he would return to work. Transcript of October 19, 2017 Hearing at 26. On this record, the employer did not establish that claimant was aware or reasonably should have been aware that he needed to contact the supervising manager before he would returned to the work schedule.

As well, the Department took the position that because claimant did not contact the second owner about being returned to the work schedule, as he allegedly was instructed by the first owner on August 2, 2017, claimant also limited his opportunities to return to work at the earliest opportunity. Transcript of October 4, 2017 Hearing at 37, Transcript at October 19, 2017 Hearing at 10-11. However, claimant explained that in the context of the August 2, 2017 conversation, he did not think the first owner was instructing him to speak with the second owner about getting back on the work schedule by his ambiguous reference to contacting the second owner, but was telling him to contact the second owner if he still had issues about retaliation by the supervising manager or other issues relating to matters implicating human resources. Transcript of October 4, 2017 at 37; Hearing at Transcript of October 19, 2017 Hearing at 12, 20. Claimant's first hand testimony that the first owner did not instruct him to contact the second owner as a prerequisite to returning to the work schedule is entitled to more weight than Department's contentions. Transcript of October 4, 2017 Hearing at 37; Transcript at October 19, 2017 Hearing at 10-11. The preponderance of the evidence in this record does not show either that the supervising manager made it clear to claimant that he needed to contact him before he would be returned to the work schedule or that the first manager instructed claimant that he was required to speak with the second owner before he again would be placed on the work schedule.

On the evidence in the record, it was not unreasonable for claimant to think that his store managers would infer from his phone inquiries about whether he was on the work schedule that he was able to work and wanted to be placed on the employer's work schedule. Transcript of October 4, 2017 Hearing at 21; Transcript of October 19, 2017 Hearing at 7, 8, 12, 13, 15, 19. Absent reliable evidence showing that claimant was advised or reasonably should have known that the managers he was contacting about his readiness and willingness to return to work could not effectuate that result, and that they would not contact one of the owners if they were unable to act, claimant was not imposing a condition that substantially limited his opportunities to return to work by contacting the managers as opposed to the supervising manager or the owner(s). As such, the Department did not meet its burden to show that claimant was not available to work during weeks 31-17 through 40-17 based on the manner he notified the employer that he was willing and able to return to work.

Claimant was not able to work during the week of July 23 through 29, 2017 (week 30-17) and is not eligible to receive benefits for that week. Claimant was able to work and available for work during the weeks of July 30 through August 19, 2017 (weeks 31-17 through 33-17) and August 27 through October 17, 2017 (weeks 35-17 through 40-17), and is eligible to receive benefits for those weeks.

DECISION: Hearing Decision 17-UI-95014 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: November 27, 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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