

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1058

Affirmed

Order No. 18-UI-118993 - Request To Backdate Not Allowed
Order No. 18-UI-118997 - Ineligible Weeks 33-18 Through 42-18

PROCEDURAL HISTORY: On October 3, 2018, the Oregon Employment Department (the Department) served notice of two administrative decisions, the first concluding that claimant's request to backdate his claim to August 5, 2018 was not allowed (decision # 103826) and the second concluding that claimant was not able to work during the weeks of August 12, 2018 through September 29, 2018 (decision # 104146). Claimant filed timely requests for hearing on both decisions. On October 23, 2018, ALJ Frank conducted a consolidated hearing, and on October 31, 2018 issued two orders, the first affirming decision # 103826 (Order No. 18-UI-118993) and the second modifying decision # 104146 and concluding claimant was not able to work during the weeks of August 12, 2018 through October 20, 2018 (Order No. 18-UI-118997). On November 9, 2018, claimant filed applications for review of both hearing orders with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders 18-UI-118993 and 18-UI-118997. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-1058 and 2018-EAB-1059).

FINDINGS OF FACT: (1) Sometime before August 5, 2018, claimant was separated from employment. Before the separation, claimant sustained a workplace injury to his hip and rotator cuff. As of the date of separation, claimant's physician had restricted him from all lifting in excess of five pounds.

(2) On August 14, 2018, claimant filed an initial claim for unemployment insurance benefits. In addition to claiming benefits for the week in which he filed the claim, the week of August 12, 2018 through August 18, 2018 (week 33-18), claimant requested that his claim be backdated to include the week of August 5, 2018 through August 11, 2018 (week 32-18).

(3) Claimant claimed, but was not paid benefits for the weeks of August 12, 2018 through October 20, 2018 (weeks 33-18 through 42-18), the weeks at issue. During the weeks at issue, claimant was still

recovering from is workplace injury and remained restricted from lifting weights in excess of five pounds.

(4) During the weeks at issue, claimant sought warehouse work, office services work, store room work, delivery work, power washing, supervisory work, safety coordinator work, supervisory custodian work, safety auditor work, store manager work, bus driver work and foreman work. At the time claimant was sought these jobs, he was aware that many of them would require him to lift in excess of five pounds.

CONCLUSIONS AND REASONS: Claimant's request to backdate his claim to week 32-18 is not allowed. Claimant was not physically able to perform the work he sought during weeks 33-18 through 42-18 and is not eligible to receive benefits for those weeks.

Request to Backdate. ORS 657.260(1) provides that claims for benefits shall be filed in accordance with such regulations as the Director of the Employment Department may prescribe. OAR 471-030-0040(1)(e) (January 11, 2018) defines "backdating" to mean when a Department representative corrects, adjusts, resets or otherwise changes the effective date of an initial, additional or reopened claim to reflect filing in a prior week. OAR 471-030-0040(3) provides that an initial claim is effective the Sunday of the week in which it is filed, and further states that *an authorized representative may backdate an additional or reopened claim* to the calendar week immediately preceding the week in which the request to backdate was made when a claimant requests *backdating of the additional or reopened claim* (emphasis added).

OAR 471-030-1140(3) sets out the circumstances in which a claim may be backdated, and it allows a representative to backdate only additional and reopened claims earlier than the Sunday of the week in which they are filed. That regulatory provision does not state that an initial claim, like that filed by claimant on Tuesday, August 14, may be backdated to reflect an effective date earlier than the Sunday of the week in which it is filed, which in this case would be August 12. In addition, there is no regulatory provision that authorizes a representative to backdate an initial claim to any week earlier than that in which it is filed under any circumstances, even if a claimant shows good cause for doing so. Because there is no statutory or regulatory authority allowing it, claimant's request to backdate his claim is denied.

Able 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) (April 1, 2018).

The Department withheld benefits from claimant for the weeks at issue, so claimant has the burden of establishing that benefits should have been paid. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). In other words, claimant has the burden to show that he was physically able to work during the weeks at issue and that he was eligible to receive the benefits that were not paid to him.

During all of the weeks at issue, claimant was medically restricted from lifting weights in excess of five pounds. As a matter of common sense, such a restriction would seriously limit the types of work that claimant could perform. Claimant admitted that many of the jobs he sought during the weeks at issue would, if not modified, have required him to lift more than five pounds. Audio at ~22:50. While

claimant did not describe the specific duties of the work for which he applied, it may be presumed by their very nature that warehouse work, delivery work, power washing work, store room work and school bus driver would likely have required him to lift in excess of five pounds. With respect to the supervisory and foreman work that claimant sought during the weeks at issue, claimant broadly contended that it “was not really physical work” and he thought that the work would mostly have required him to complete paperwork and reports. Audio at ~23:26. However, the issue is not what those jobs would usually have required of him, but whether those supervisory positions would on occasion have necessitated that he lift weights in excess of five pounds. Claimant did not demonstrate that the supervisory positions would never had required him to exceed the weight restriction to which he was subject or would have required him to do so only very rarely. On this record, claimant did not show that he was physically able to perform the work he sought during the weeks at issue. Claimant was not eligible to receive benefits for the weeks at issue.

DECISION: Orders No. 18-UI-118993 and No. 18-UI-118997 are affirmed.

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

DATE of Service: December 13, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.



Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية محكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.