EO: 040
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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0522

Reversed
Eligible

PROCEDURAL HISTORY: On December 7, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from July 19, 2020 through July 25, 2020 (week 30-20), and therefore is not eligible for benefits for that week (decision # 135211). Claimant filed a timely request for hearing. On March 21 and April 8, 2022, ALJ L. Lee conducted a hearing, and on April 15, 2022 issued Order No. 22-UI-191451, affirming decision # 135211. On April 28, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) City of Portland Bureau employed claimant during the time period relevant to this decision as a "40-hour employee." Transcript at 17.

(2) On or about June 2020, the employer decided to participate in the Department's Work Share benefits program[1] due to revenue losses related to the COVID-19 pandemic and the potential prospect of employee layoffs. As per the rules related to the program, claimant had the option to participate in the program, and claimant agreed to do so. Pursuant to the employer's shared work plan, claimant's work hours were reduced to 32 hours per week (four eight-hour days), from Monday through Thursday.

(3) In early June 2020, the employer decided to institute four mandatory, unpaid furlough days for certain employees, including claimant. Claimant selected the four days he would be furloughed, which included Thursday, July 23, 2020.

[1] *See* ORS 657.370 to ORS 657.390.

(4) On July 3, 2020, claimant was involved in an automobile accident and suffered injuries that included broken ribs and a partially collapsed lung. Claimant's medical provider scheduled claimant for follow-up office visits to monitor his medical condition. When claimant scheduled his office visits, he took the first one available on the provider's schedule. One of these office visits was scheduled for Wednesday, July 22, 2020. Claimant took four hours of sick leave for that appointment.

(5) On July 15, 2020, the employer filed an initial claim for work share benefits on claimant's behalf. The Department determined that claimant's weekly benefit amount was $648.

(6) Although pursuant to the employer's shared work plan, claimant's work hours were normally reduced to 32 hours per week, for the week of July 19, 2020 to July 25, 2020 (week 30-20) the employer only had 24 hours of work available for claimant due to claimant's mandatory furlough day on July 23, 2020. In addition, because of claimant's doctor's appointment on July 22, 2020, for which he took four hours of sick leave, claimant missed four additional hours of scheduled work during week 30-20. As a result, claimant only performed 20 hours of work during week 30-20.

(7) The employer claimed work share benefits on claimant's behalf for week 30-20. This is the week at issue. The Department paid claimant $246 for week 30-20, which reflected a percentage of his $648 weekly benefit amount.

CONCLUSIONS AND REASONS: Claimant is eligible for Work Share benefits for week 30-20.

ORS 657.380(1)(b) provides, in pertinent part, that an individual is unemployed and eligible to receive shared work benefits with respect to any week if, in addition to meeting all other eligibility requirements of Chapter 657, the Department finds that "[d]uring the week the individual's normal weekly hours of work were reduced, in accordance with an approved plan, at least 20 percent but not more than 40 percent, with a corresponding reduction in wages." Pursuant to OAR 471-030-0079 (January 11, 2018):

> (4) If an employee's work schedule is reduced by more than 40% in a week covered by a shared work plan, the employee may use hours from other paid time, such as vacation time, to bring the work hour reduction within the 20% to 40% range required to receive shared work benefits. However, this does not apply if the reduction in work hours was due to the employee missing an opportunity to work for their shared employer;
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> * * *
>
> (b) Example 2: An employer's shared work plan reduces regular working hours from 40 hours to 24 hours per week (a reduction of 40%). The employer has 24 hours of work available but the employee does not work some of the available hours because they are ill, have an appointment, or miss scheduled work for any other reason. The employee missed an opportunity to work and cannot use other paid time to bring their work hour reduction within the 20% to 40% required to receive shared work benefits.

The Department has the burden to show that claimant should not have been paid Work Share benefits for the week at issue. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the

Department has paid benefits it has the burden to prove benefits should not have been paid; by logical extension of that principle, where benefits have not been paid claimant has the burden to prove that the Department should have paid benefits).

The Department's Temporary Rule. In the summer of 2020, the Department instituted a temporary rule to provide more flexibility in adjudicating Work Share benefits claims. At the March 21, 2022 hearing, the Department's representative testified that the temporary rule was the result of "September 7th of 2020 guidance" and allowed a claimant to substitute accrued sick leave time in place of hours worked for Work Share benefits eligibility purposes. March 21, 2022 Transcript at 6. Furthermore, the Department's representative testified that the temporary rule's applicability "was retroactive to [week 30-20]." March 21, 2022 Transcript at 6.

Between the March 21, 2022 hearing and the continued April 8, 2022 hearing, the Department provided two evidentiary submissions in preparation for the April 8, 2022 hearing. The first of these evidentiary submissions, later admitted into evidence as Exhibit 1, was an undated document, whose source was unidentified, which stated:

> **Temporary rule**
> *For the weeks of July 19 through December 26, 2020*, and notwithstanding OAR 471-030-0076(4) (sic), for purposes of determining whether an employee can receive Work Share benefits in a week, if the employee uses approved, accrued leave during a week, those leave hours count as hours worked during the week. This applies to leave taken because the employee is sick, to care for someone else who is sick, or because of COVID-19 related reasons. It does not apply to leave taken for vacation.

Exhibit 1 at 1. (emphasis added). By its express language, the substance of Exhibit 1 appears to be consistent with the testimony provided by the Department's witness at the March 21, 2022 hearing regarding the temporary rule, including that the temporary rule applied retroactively to week 30-20.

After the April 8, 2022 hearing, the Department's provided a third evidentiary submission, later admitted into evidence as Exhibit 3. Exhibit 3 included a copy of a July 31, 2020 email from the Department's Benefits Services Manager, which stated the following:

> Hello everyone;
>
> I just want to confirm that this temporary rule has been filed *and will be in effect beginning next week, Week 32*. …
>
> *For the weeks of August 02, 2020 through December 26, 2020*, and notwithstanding OAR 471-030-0079(4), for purposes of determining whether an employee can receive Work Share benefits in a week, if the employee uses approved, accrued leave during a week, those leave hours count as hours worked during the week. This does not apply to leave taken for vacation purposes. It does apply to leave taken for other reasons, including because the employee is sick, is caring for someone else who is sick, is on jury duty, or because of COVID-19 reasons.

Exhibit 3 at 3. (emphasis added). Although the substance of the two temporary rule exhibits is largely identical, one key difference between the two was the retroactive effective date of the temporary rule reflected in each exhibit. In the context of this case, the difference between the effective dates reflected in both versions of the temporary rule is the difference between the temporary rule applying in claimant's case (if Exhibit 1 reflects the correct effective date) or not applying in claimant's case (if the email in Exhibit 3 reflects the correct effective date).

Compounding the difficulty created by the differing retroactivity dates was the fact that at the April 8, 2022 hearing, a different witness from the Department appeared and testified that she was neither aware of the September 7, 2020 guidance referenced by the Department's original witness, nor the week 30-20 effective date that the original witness testified to. April 8, 2022 Transcript at 6-8. Instead, the Department's witness at the April 8, 2022 hearing testified that the only effective date of the temporary rule she was aware of was August 2, 2020 (week 32-20). April 8, 2022, Transcript at 5-8. This latter effective date would make the temporary rule inapplicable to the week at issue.

The Department has failed to show that claimant was not entitled to the benefit of the retroactive application of the temporary rule reflected in Exhibit 1. During the March 21, 2022 hearing, the Department's witness did not dispute the applicability of the temporary rule to the week at issue. Instead, the Department's witness argued that notwithstanding the retroactive applicability of the temporary rule to claimant's case, the temporary rule offered no benefit to claimant because claimant's doctor's appointment to treat his car accident injuries "did not qualify as being sick" for purposes of the temporary rule. March 21, 2022 Transcript at 6. Meanwhile, a different witness from the Department testified at the April 8, 2022 hearing that the temporary rule was only retroactive to week 32-20 and therefore not applicable to the week at issue. April 8, 2022, Transcript at 5-8. The result of this conflicting evidence is ambiguity as to the effective date of the temporary rule. Under these circumstances, this ambiguity must be resolved in claimant's favor, particularly given that the Department has already paid claimant benefits for the week at issue. As such, claimant is entitled to the benefit of the temporary rule for the week at issue.

Work Share benefits eligibility. The order under review concluded that even if the temporary rule applied to claimant's circumstances, he would still not be eligible for Work Share benefits for week 30-20. Order No. 22-UI-191451 at 6. The order found that "the reason why claimant missed work and used paid sick leave was not because he was sick and unable to work, but was because he had an appointment that could have been scheduled to avoid having to miss work." Order No. 22-UI-191451 at 6. As such, the order concluded that claimant missed an opportunity to work, making him unavailable for work and therefore not eligible for Work Share benefits for the week at issue. Order No. 22-UI-191451 at 6. Although the order under review correctly determined that claimant's use of four hours of sick leave caused him to miss an opportunity to work during week 30-20, the record does not support the order's conclusion that claimant was not entitled to Work Share benefits for week 30-20 in light of the applicability of the temporary rule to the week at issue.

As an initial matter, the record shows that claimant's situation during week 30-20 was nearly identical to "Example B" found in OAR 471-030-0079(4)(b). Claimant was "a 40-hour employee" who elected to participate in the employer's Work Share plan. Although as part of the plan claimant's hours were normally reduced to 32 hours a week, during week 30-20 the record shows that the employer only had

24 hours of work available for claimant due to the mandatory furlough day claimant took on Thursday, July 23, 2020 (a reduction of 40%). While the reduction to 24 hours still kept claimant within the 20% to 40% threshold requirement imposed by ORS 657.380(1)(b), the additional four hours of sick leave claimant also took during week 30-20 resulted in claimant exceeding the 20% to 40% threshold and not working "some of the available hours because . . . [he had] an appointment. . . ." OAR 471-030-0079(4)(b).[2] As a result, without the benefit of the temporary rule, claimant would not be eligible for work share benefits for week 30-20 because he would have "missed an opportunity to work and [could not] use other paid time to bring their work hour reduction within the 20% to 40% required to receive shared work benefits." OAR 471-030-0079(4)(b).

As discussed above, the record fails to show that claimant was not entitled to the benefit of the temporary rule. However, in applying the temporary rule at the March 21, 2022 hearing, the Department's representative drew a distinction between the type of car accident injuries suffered by claimant that precipitated his need for a doctor's appointment, and being "sick" as that term is used in the temporary rule. March 21, 2022 Transcript at 6. The Department's representative stated that "although the car accident and hospitalization were a serious matter, they did not qualify as being sick" for purposes of the rule, and the temporary rule therefore did not apply to claimant's situation. March 21, 2022 Transcript at 6. Notably, although the order under review did not use this rationale as a basis for affirming decision # 135211, the order nevertheless stated that "there was sufficient evidence to show [claimant] did not seek medical attention because he was sick[.]" Order No. 22-UI-191451 at 5.

However, as was the case with the effective date of the temporary rule discussed above, whether the approved sick leave claimant took to address his car accident injuries should qualify him as being "sick" for purposes of the temporary rule, such that his sick leave hours could be counted as hours worked in week 30-21, is ambiguous from the record. First, the temporary rule does not define the term "sick," a point acknowledged by the Department's witness at the April 8, 2022 hearing. April 8, 2022 Transcript at 8-9. In addition, the Department's witness at the April 8, 2022 hearing, testified that not only was she an adjudicator for the Department, but that "[I]f this were my decision as the adjudicator I would . . . consider a doctor's appointment . . . as sick. But . . . the adjudicator who wrote [decision # 135211], . . . did not view it that way." April 8, 2022 Transcript at 9. This testimony suggests that there was uncertainty within the Department regarding how to determine when a given claimant was or was not "sick" for purposes of the rule.

Finally, the version of the temporary rule provided in Exhibit 3 includes language indicating that leave taken for "other reasons" can count as hours worked during the operative week. Exhibit 3 at 3. As such, this "other reasons" language can reasonably be viewed as allowing claimant to benefit from the temporary rule even if his leave to attend the doctor's appointment was not considered to be leave "because the employee is sick."[3] Thus, in light of the record ambiguity in defining the term "sick" for purposes of the temporary rule, claimant is again entitled to have the ambiguity resolved in his favor,

[2] The additional four sick leave hours meant that claimant only worked 20 hours during week 30-20 instead of the 24 hours that were available. As a result of these four sick leave hours, claimant's reduction went from 40% to 50%, which was outside of the 20% to 40% threshold allowed by ORS 657.380(1)(b).

[3] It is noted that the version of the temporary rule in Exhibit 1 does not include this "other reasons" language, which only contributes to the ambiguity surrounding the temporary rule. Exhibit 1 at 1.

such that the accrued leave he used during week 30-20 should count toward his hours worked for that week. As such, the record shows that claimant worked a total of 24 hours during week 30-20 (a reduction of 40%), which was within the 20% to 40% range required to be eligible for Work Share benefits.

To the extent the order under review concluded that claimant's four hours of sick leave to attend the doctor's appointment during week 30-20 constituted a missed opportunity for work because claimant could have scheduled the appointment so it did not conflict with work, the record does not support this conclusion. By its text, the temporary rule does not require an employee to schedule their sick leave so that it does not interfere with their work schedule.[4]

Accordingly, the record the record fails to show that claimant did not meet the requirements for Work Share benefits eligibility during week 30-20. Claimant therefore is eligible for benefits for that week.

DECISION: Order No. 22-UI-191451 is set aside, as outlined above.

D. Hettle and A. Steger-Bentz;
S. Serres, not participating.

DATE of Service: July 21, 2022

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] To the extent the order under review also determined that claimant was not available for purposes of a claim for regular unemployment insurance benefits (i.e., pursuant to an alternate claim for regular UI benefits that might be filed had claimant not been eligible for Work Share benefits), EAB takes no position as the issue. Here, the record shows that claimant was eligible for Work Share benefits for week 30-20. Notwithstanding, claimant testified that he had never previously applied for regular UI benefits and there is otherwise nothing in the record to suggest that claimant had a pending regular UI claim before the Department. March 21, 2022 Transcript at 37.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 desisyon.

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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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