

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0745

Reversed
Eligible Weeks 16-21 through 21-21

PROCEDURAL HISTORY: On April 29, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work during the weeks including April 18, 2021 through May 29, 2021 (weeks 16-21 through 21-21) and therefore was ineligible to receive benefits during those weeks (decision # 65918). Claimant filed a timely request for hearing. On June 22, 2022, ALJ Demarest conducted a hearing at which the employer failed to appear, and on June 23, 2022 issued Order No. 22-UI-196713, affirming decision # 65918. On June 30, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) On April 28, 2021, claimant filed an initial claim for benefits. Claimant subsequently claimed benefits for the weeks including April 18, 2021 through May 29, 2021 (weeks 16-21 through 21-21). These are the weeks at issue. The Department paid claimant benefits for the weeks at issue.

(2) Prior to the weeks at issue, Swag Enterprises LLC employed claimant as a driver. Claimant worked for the employer Monday through Friday.

(3) Claimant last worked for the employer on April 16, 2021. Shortly after his last day of work, claimant injured his shoulder at home. On the date of his injury, claimant was in too much pain to work. Despite the injury, claimant was able to work the following day, and was willing to do so. However, the employer would not permit claimant to return to work without a release from a physician.

(4) On or around May 28, 2021, after waiting several weeks for an appointment, claimant was able to attend an appointment with his physician. Claimant's physician provided him with a note indicating that he was cleared to return to work on June 2, 2022.

CONCLUSIONS AND REASONS: Claimant was able to work during the weeks at issue.

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) (December 8, 2019). 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).

The order under review concluded that claimant was unable to work during the weeks at issue because claimant was "off work due to an injury." Order No. 22-UI-196713 at 2. The record does not support this conclusion.

As a preliminary matter, the record contains inconsistencies regarding the dates at issue in this case. The Department's witness testified that the employer had provided documentation indicating that claimant's last day of work was either April 18, 2021 or April 21, 2021, and that claimant had sent a text message to the employer on April 25, 2021 indicating that he had gotten hurt. Transcript at 5, 17–18. By contrast, claimant reported on his initial claim that his last day of work was April 16, 2021. Transcript at 18. At hearing, claimant testified that he did not recall exactly when he was injured, but that the injury occurred on a Sunday and that he was in too much pain to work on the day of the injury. Transcript at 9, 10. Because claimant's provided last day of work was not internally inconsistent, as was the employer's report, claimant's account is afforded more weight, and the facts have been found accordingly. Regardless of the specific date of the injury or his last day of work, however, the record nevertheless shows that claimant was actually able to work during the weeks at issue.

Neither the Department nor the employer offered evidence to show that claimant was actually unable to work as a result of the injury, other than being unable to work on the date of the injury itself. With the exception of the date of the injury, the record does not show that claimant's injury constituted an impairment to his ability to work. In fact, the record shows that claimant was only off of work during the weeks at issue because the employer would not permit him to return to work without a doctor's note, which took claimant several weeks to obtain, and that claimant was otherwise willing to work during that time. Further, while the doctor's note indicated that claimant was released to work on June 2, 2021, the note, without more information, is not proof that claimant was either unable to work prior to June 2, 2021 or able to work after that date. Because the Department initially paid benefits for the weeks at issue, it bears the burden of proof¹ to show that claimant was unable to work during those weeks. For the above reasons, the Department has not met its burden. Thus, the record shows that claimant was only unable to work for a single Sunday during the weeks at issue, which constituted a temporary disability lasting less than half the week under OAR 471-030-0036(2)(a). Therefore, claimant was able to work during the weeks at issue.

¹ See *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).

DECISION: Order No. 22-UI-196713 is set aside, as outlined above.

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

DATE of Service: September 29, 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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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 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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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.

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