

FILED: January 16, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Suspension of the Driving Privileges of

SCOTT RICHARD WALKER,
Petitioner-Respondent,

v.

DRIVER AND MOTOR VEHICLE SERVICES DIVISION (DMV),
a division of the Department of Transportation,
Respondent-Appellant.

Washington County Circuit Court
C103993CV

A147095

Marco Hernandez, Judge.

Argued and submitted on May 03, 2012.

Carolyn Alexander, Senior Assistant Attorney General, argued the cause for appellant. With her on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

John Henry Hingson, III, argued the cause and filed the brief for respondent.

Before Armstrong, Presiding Judge, and Duncan, Judge, and Brewer, Judge pro tempore.

ARMSTRONG, P. J.

Judgment reversed; DMV order suspending driving privileges affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant

- No costs allowed.
 Costs allowed, payable by Respondent.
 Costs allowed, to abide the outcome on remand, payable by
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1 ARMSTRONG, P. J.

2 The Driver and Motor Vehicle Services Division (DMV) appeals a circuit
3 court judgment that set aside a DMV order that suspended petitioner's driving privileges.
4 Our task on appeal in this case is to review the underlying DMV order to determine
5 whether DMV correctly applied the law and whether the order is supported by substantial
6 evidence. *See* ORS 813.450(4); *Staglin v. DMV*, 227 Or App 240, 242, 205 P3d 90, *rev*
7 *den*, 346 Or 364 (2009). Because we conclude that DMV did not err in determining that
8 the arresting officer was unable to attend the originally scheduled suspension hearing
9 because of illness, ORS 813.440(1)(d),¹ we affirm DMV's license-suspension order. *See*
10 ORS 813.450(4), (5).

11 We take the following facts from DMV's order, supplemented by
12 undisputed facts in the record. Petitioner was arrested for driving under the influence of
13 intoxicants, and the arresting officer, Gilderson, served him with a notice of intent to
14 suspend his driving privileges for one year. Petitioner timely requested an administrative
15 hearing to challenge the suspension, ORS 813.410(3), and DMV subpoenaed Gilderson
16 to appear and testify at the hearing. On the morning of the hearing, Gilderson's
17 supervising sergeant submitted a form to DMV that stated that Gilderson was unable to
18 appear at the hearing "due to official duty conflict, illness, or vacation as provided in

¹ ORS 813.440(1)(d) provides that a suspension hearing may be rescheduled because of the "inability of a subpoenaed police officer to appear due to the officer's illness, vacation or official duty conflicts. * * * A hearing may not be rescheduled more than once for reasons described in this paragraph."

1 ORS 813.440(1)(d)." (Capitalization modified.) The sergeant checked a box on the form
2 that indicated that the reason for Gilderson's inability to attend the hearing was "officer
3 illness." DMV rescheduled the suspension hearing, pursuant to ORS 813.440(1)(d), on
4 the basis of officer illness.

5 "ORS 813.440 requires that a hearing to suspend an individual's driver's
6 license be held according to the time limits in ORS 813.410 unless one of the exceptions
7 in ORS 813.440 applies." *Blaisdell v. MVD*, 145 Or App 468, 471, 929 P2d 1073 (1996).
8 The exception at issue here allows DMV to reschedule a hearing because of the "inability
9 of a subpoenaed police officer to appear due to the officer's illness, vacation or official
10 duty conflicts." ORS 813.440(1)(d).

11 At the rescheduled hearing, petitioner asked Gilderson when he became ill.
12 Gilderson explained that he had requested that the hearing be rescheduled because he had
13 not felt well enough to drive to the hearing due to his having worked 14 hours straight
14 after fewer than four hours of sleep. He further explained that his request to have the
15 hearing rescheduled was based on exhaustion rather than on an ailment that required him
16 to seek medical treatment.

17 Petitioner contended that the hearing should not have been rescheduled
18 under ORS 813.440(1)(d) because Gilderson had not been suffering from an illness that
19 would support a postponement under the statute. DMV rejected that contention and
20 issued a final order suspending petitioner's driving privileges. DMV concluded that the
21 hearing had been properly rescheduled due to officer illness, explaining that Gilderson

1 had been suffering from extreme exhaustion, which caused him to be in an impaired and
2 unhealthy condition. DMV further explained that Gilderson had been physically unable
3 to appear at the originally scheduled hearing because of his impaired condition. As an
4 alternative basis for its decision, DMV also concluded that the hearing had properly been
5 rescheduled as a result of an "official duty conflict," specifically a duty-related physical
6 incapacity.

7 Petitioner sought circuit court review of DMV's order, ORS 813.410(8),
8 and the circuit court entered a judgment that set the order aside, concluding that
9 Gilderson had not been suffering from an illness. DMV now appeals, ORS 813.450(3),
10 contending that it properly rescheduled petitioner's suspension hearing because Gilderson
11 had been unable to attend it due to illness or, in the alternative, due to a duty-related
12 physical incapacity.

13 Petitioner makes two interrelated challenges to DMV's order. He contends
14 that DMV erred as a matter of law in concluding that "extreme exhaustion" could
15 constitute illness for purposes of ORS 813.440(1)(d), and he contends that DMV's order
16 is not supported by substantial evidence. Petitioner's substantial evidence argument is
17 essentially an argument that the record does not contain evidence to support a conclusion
18 that Gilderson was suffering from an illness because the evidence established only that he
19 was exhausted from working 14 hours straight after four hours of sleep. At oral argument
20 before us, petitioner conceded that there was substantial evidence in the record to support
21 DMV's finding that Gilderson was suffering from extreme exhaustion. We agree with

1 that concession and focus, therefore, on whether extreme exhaustion can constitute an
2 illness for purposes of ORS 813.440(1)(d).

3 The word "illness" is not defined in the statute; accordingly, we look to its
4 ordinary meaning. The ordinary meaning of "illness" is "'an unhealthy condition of the
5 body or mind.'" *Mathel v. Josephine County*, 319 Or 235, 240, 875 P2d 455 (1994)
6 (quoting *Webster's Third New Int'l Dictionary* 1164 (unabridged ed 1993)).

7 Although petitioner acknowledges that definition of illness, he relies on the
8 definitions of related words to conclude that the word "illness," as used in the statute,
9 should be understood to mean a disease or other condition that requires medical attention.
10 We reject that understanding because nothing in the statute or its legislative history leads
11 us to conclude that the legislature intended illness to be limited to conditions that require
12 medical attention. Rather, in the context in which the word is used in ORS
13 813.440(1)(d), we conclude that illness is an unhealthy condition of the body or mind that
14 impedes an officer's attendance at a suspension hearing. We further conclude that
15 exhaustion may constitute illness under the statute when, as DMV found here, it causes
16 an officer to believe that he is not well enough to drive to a hearing.

17 DMV concluded that Gilderson's extreme exhaustion constituted an
18 impaired and unhealthy condition of his body and made him physically unable to appear
19 at the originally scheduled hearing. Thus, DMV concluded that Gilderson was suffering
20 from illness, which is a permissible basis under ORS 813.440(1)(d) to reschedule a
21 suspension hearing. It follows that the trial court erred in setting aside DMV's order

1 suspending petitioner's driving privileges.

2 Judgment reversed; DMV order suspending driving privileges affirmed.