

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1321

*Hearing Decision 14-UI-21059 Reversed
No Disqualification*

*Hearing Decision 14-UI-22398 Affirmed
No Disqualification*

PROCEDURAL HISTORY: On June 12, 2014, the Oregon Employment Department (the Department) served notice of two administrative decisions, one concluding that claimant Paine quit working for the employer with good cause (decision # 114759), and the other concluding that claimant Neil quit working for the employer with good cause (decision # 125503). The employer filed timely requests for hearing on both decisions. On June 30, 2014, ALJ Triana conducted a hearing on decision # 114759, and ALJ Vincent conducted a hearing on decision # 125503. On July 8, 2014, ALJ Tirana issued Hearing Decision 14-UI-21059, concluding that claimant Paine quit working for the employer without good cause. On July 29, 2014, ALJ Vincent issued Hearing Decision 14-UI-22398, concluding that claimant Neil quit working for the employer with good cause. On July 18, 2014, claimant Paine filed an application for review of Hearing Decision 14-UI-21059 with the Employment Appeals Board (EAB). On August 5, 2014, the employer filed an application for review of Hearing Decision 14-UI-22398 with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-21059 and 14-UI-22398. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2014-EAB-1241 and 2014-EAB-1321). EAB considered the hearing records and claimant Paine's written argument, in which she asked EAB to consider a written statement from claimant Neil. However, claimant Neil's written statement was not part of either hearing record, and claimant Paine failed show that factors or circumstances beyond her reasonable control prevented her from offering the statement into evidence at her hearing. EAB therefore did not consider claimant

Neil's written statement when reaching this decision. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Miracle Workers Inc. employed claimant Paine as a house cleaner from May 1, 2011 to May 21, 2014. It employed claimant Neil from February 8, 2008 to May 21, 2014, last as a lead house cleaner.

(2) Prior to May 1, 2014, the employer paid its house cleaners \$10 per hour. It paid them for 15 minutes to load their vehicle at the employer's central office, and the estimated time needed to drive to the house they were assigned to clean first. It also paid them for the estimated time needed to clean the houses they were assigned, which the employer refused to as "house hours," and the estimated time needed to travel between the houses. It also paid them for the estimated time needed to drive from the house they were assigned to clean last to the employer's central location, and 15 minutes to unload their vehicle. If claimant's worked more than 6 hours during their shift, the employer required them to take a 30 minute unpaid lunch break.

(2) On April 16, 2014, claimants clocked into work at the employer's central location at 7:21 a.m., loaded their vehicle, and drove to the house they were assigned to clean first. The estimated time needed to clean the house was 1 hour 30 minutes. Claimants cleaned the house in 1 hour 15 minutes. They arrived at the house they were assigned to clean second 10 minutes later. The estimated time needed to clean the house was 2 hours 30 minutes. They cleaned the house in 2 hours 25 minutes. They arrived at the house they were assigned to clean last 15 minutes later. The estimated time needed to clean the house was 2 hours. They cleaned the house in 1 hour 30 minutes, drove back to the employer's central location, and unloaded their vehicle. Claimant Paine clocked out of work at 2:57 pm. Claimant Neil clocked out of work at 3:30 p.m.

(3) On April 17, 2014, claimants clocked into work at the employer's central location at 7:21 a.m., loaded their vehicle, and drove to the house they were assigned to clean first. The estimated time needed to clean the house was 2 hours. Claimants cleaned the house in 1 hour 55 minutes. They arrived at the house they were assigned to clean second 15 minutes later. The estimated time needed to clean the house was 1 hour 30 minutes. Claimants cleaned the house in 1 hour 25 minutes. They arrived at the house they were assigned to clean last 45 minutes later. The estimated time needed to clean the house was 4 hours. Claimants cleaned the house in 3 hours 30 minutes, drove back to the employer's central location, and unloaded their vehicle. Claimant Neil clocked out of work at 5:08 p.m.

(4) On April 18, 2014, claimant Neil clocked into work at the employer's central location at 7:19 a.m., and claimant Paine clocked into work at the employer's central location at 7:20 a.m. Claimants loaded their vehicle and drove to the house they were assigned to clean first. The estimated time needed to clean the house was 2 hours 30 minutes. Claimants cleaned the house in 2 hours 30 minutes. They arrived at the house they were assigned to clean second 15 minutes later. The estimated time needed to clean the house was 2 hours 30 minutes. Claimants cleaned the house in 2 hours 30 minutes. They arrived at the house they were assigned to clean last 10 minutes later. The estimated to clean the house was 1 hour 30 minutes. Claimants cleaned the house in 1 hour 25 minutes, drove back to the employer's central location, and unloaded their vehicle. Claimant Neil clocked out of work at 4:43 p.m.

(5) On April 22, 2014 claimant Paine clocked into work at the employer's central location at 7:20 a.m., and claimant Neil clocked into work at the employer's central location at 7:25 a.m. Claimants loaded their vehicle and drove to the house they were assigned to clean first. The estimated time needed to clean the house was 1 hour 30 minutes. Claimants cleaned the house in 1 hour 25 minutes. They arrived at the house they were assigned to clean second 10 minutes later. The estimated time needed to clean the house was 1 hour 30 minutes. Claimants cleaned the house in 1 hour 30 minutes. They arrived at the house they were assigned to clean last 15 minutes later. The estimated time needed to clean the house was 2 hours. Claimants cleaned the house in 2 hours, drove back to the employer's central location, and unloaded their vehicle. Claimant Neil clocked out of work at 2:05 p.m.

(6) On April 23, 2014, claimants clocked into work at the employer's central location at 7:20 a.m., loaded their vehicle, and drove to the house they were assigned to clean first. The estimated time needed to clean the house was 2 hours 30 minutes. Claimants cleaned the house in 2 hours 30 minutes. They arrived at the house they were assigned to clean second 30 minutes later. The estimated time needed to clean the house was 2 hours 30 minutes. Claimants cleaned the house in 2 hours 10 minutes. They arrived at the house they were assigned to clean last 15 later. The estimated time needed to clean the house was 1 hour 30 minutes. Claimants cleaned the house in 1 hour 15 minutes, drove back to the employer's central location, and unloaded their vehicle. Claimant Neil clocked out of work at 4:49 p.m.

(7) On April 24, 2014, claimant Neil clocked into work at the employer's central location at 7:18 a.m., and claimant Paine clocked into work at the employer's central location at 7:19 a.m. Claimants loaded their vehicle and drove to the house they were assigned to clean first. The estimated time needed to clean the house was 1 hour 45 minutes. Claimants cleaned the house in 1 hour 45 minutes. Claimants arrived at the house they were assigned to drive second 25 minutes later. The estimated time needed to clean the house was 1 hour 45 minutes. It took claimants 1 hour 50 minutes to clean the house because they were interrupted by a 20 minute telephone call from the employer's manager. Claimants arrived at the house they were assigned to clean third 40 minutes later. The estimated time needed to clean the house was 1 hour 30 minutes. Claimants cleaned the house in 1 hour 30 minutes. Claimant arrived at the house they were assigned to clean last 20 minutes later. The estimated time needed to clean the house was 1 hour 30 minutes. Claimants cleaned the house in 1 hour 20 minutes, drove back to the employer's central location, and unloaded their vehicle. Neil clocked out of work at 5:05 p.m.

(8) On April 25, 2014, claimants clocked into work at the employer's central location at 7:21 a.m., loaded their vehicle, and drove the house they were assigned to clean first. The estimated time needed to clean the house was 2 hours 30 minutes. It took claimants 2 hours 45 minutes to clean the house because they were interrupted by a telephone call from the employer. They arrived at the house they were assigned to clean second 10 minutes later. The house was locked and no one home. Claimants waited for 15 minutes for someone to arrive before driving to the house they were assigned to clean last, arriving 10 minutes later. The estimated time needed to clean the house was 2 hours. Claimants cleaned the house in 1 hour 30 minutes, drove back to the employers' central location, and unloaded their vehicle. Claimant Paine clocked out of work at 2:17 p.m. Claimant Neil clocked out of work at 2:29 p.m.

(9) On April 30, 2014, claimants clocked into work at the employer's central location at 7:01 a.m., loaded their vehicle, and drove to the first house they were assigned to clean. The estimated time needed to clean the house was 1 hour 30 minutes. Claimants cleaned the house in 1 hour. They arrived

at the house they were assigned to clean second 10 minutes later. The estimated time needed to clean the house was 3 hours. Claimants cleaned the house in 3 hours. They arrived at the house they were assigned to clean third 20 minutes later. Claimants cleaned the house in 1 hour 30 minutes. Claimants did not drive to the house they were assigned last because claimant Neil was ill. They instead drove to the employer's central office and unloaded their vehicle. Claimants clocked out of work at 3:52 p.m.

(10) Claimants reported working 48.5 house hours and 15.75 travel hours from April 16 through 30, 2014. Claimant's reported in their daily logs the times they arrived at, and left the houses they cleaned. The logs showed that Claimants worked approximately 45 hours 30 minutes cleaning houses from April 16 through 30, 2014.

(11) On April 30, 2014, the employer notified its house cleaners that it no longer would pay them for time spent traveling between the houses they were assigned to clean, in addition to their estimated house hours. The employer reasoned that the house cleaners could clean one house and travel to the next house within the estimated time needed to clean the first house, and therefore would be compensated for the time they spent cleaning the houses, and the time they spent traveling between houses. The employer also notified the house cleaners that it was increasing their pay to \$11 per hour. Claimants complained about the employer's decision to stop paying them for all their travel time, in addition to house hours.

(12) The employer made the changes retroactive to April 16, 2014, and on May 5, 2014 paid its housekeepers for the April 16 through 30, 2014 pay period. The employer paid claimants for 53 hours of work during that period. On May 7, 2014, claimants notified the employer in writing that they had contacted the Oregon Bureau of Labor and Industries Wage and Hour Division (BOLI), and learned that the employer was not exempt from paying travel time, and that it was a violation of Oregon law not to pay for all hours worked in a day, including travel time. Claimants stated that if the matter was not resolved immediately, they would file a complaint with BOLI.

(13) The employer did not change, or agree to change, the manner in which it calculated its house cleaners' compensable hours worked. Claimants filed complaints with BOLI. BOLI accepted their complaints. Claimants repeatedly asked the employer to pay them for all their travel time. The repeatedly refused to change the manner in which it calculated its house cleaners' compensable hours worked. Claimants quit because the employer refused to pay them for all their travel time.

(14) On June 16, 2014, the employer resolved claimant Paine's BOLI complaint by paying her disputed wages for time spent traveling between the houses she was assigned to clean from April 16 through 30, 2014. However, the employer did not believe it owed claimant wages for travel time, and did not change the manner in which it calculated its house cleaners' compensable hours worked.

CONCLUSIONS AND REASONS: Claimants quit work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work.

OAR 471-030-0038(4) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

OAR 839-020-0045(3) (January 9, 2002) states that time spent by an employee in travel as part of the employee's principal activity must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there or to pick up and carry tools, the travel from the designated place to the work place is part of the day's work and must be counted as hours worked regardless of any contract, custom or practice. *Id.* In Hearing Decisions 14-UI-21059 and 14-UI-22398, the ALJs found that the employer failed to pay claimants for all of their travel time during the April 16 through 30, 2014 pay period.¹ ALJ Vincent concluded that claimant Neil quit work with good cause because the employer likely would have continued failing to pay her for all her travel time, and continuing to work for the employer while her BOLI complaint was pending therefore was not a reasonable alternative to quitting.² ALJ Triana concluded that claimant Paine quit work without good cause because she failed show that the issue was ongoing, and continuing to work for the employer while her BOLI complaint was pending therefore was a reasonable alternative to quitting.³

We agree with the ALJs that the employer failed to pay claimants for all of their travel time during the April 16 through 30, 2014 pay period. The employer paid claimant's for 53 hours of work during that pay period. The record shows claimants actually worked approximately 61 hours 15 minutes, including approximately 45 hours 30 minutes cleaning houses, and 15 hours 45 minutes travel time. At claimant Paine's hearing, asserted that the discrepancy was due to claimant Neil's failure to notify the employer of the times claimants arrived at, and left, the houses they cleaned, and claimants' including personal time in their travel time records. Transcript at 40-45. However, claimants recorded in their daily logs the times they arrived at, and left the houses they cleaned, and reported their travel time to the employer. The employer presented only vague circumstantial evidence to support its assertion that claimants included personal time in their travel time records, which claimant Paine categorically denied under oath. Transcript at 42, 45-46. Absent a reasonable basis for finding that claimants falsified the times they recorded arriving at, and leaving, the houses they cleaned, or for concluding that was not a credible witness, the record shows, more likely than not, that the employer failed to pay claimants for approximately 8 hours 15 minutes of their travel time from April 16 through 30, 2014.

We also agree with ALJ Vincent that the employer's failure to pay claimants for all of their travel time was likely to continue. The employer refused to change the manner in which it calculated its house cleaners' compensable hours worked despite claimants' complaints to the repeated complaints to the employer, their BOLI complaints, and BOLI's indication that the complaints were warranted. Although the employer resolved claimant Paine's BOLI complaint by paying her disputed wages for travel time, the employer did not believe it owed claimant the wages, and did not change the manner in which it calculated its house cleaners' hours. Indeed, at claimant Neil's hearing, the employer's owner stated

¹ Hearing Decision 14-UI-21059 at 3; Hearing Decision 14-UI-22398 at 1.

² Hearing Decision 14-UI-22398 at 2-3, citing *Nielsen v. Employment Dept.*, 263 Or App 274 (2014).

³ Hearing Decision 14-UI-21059 at 3, citing *Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999).

that the employer still had not changed the manner in which it calculated those hours. Transcript at 30. We therefore disagree with ALJ Triana's assertion that the employer's violation of OAR 839-020-0045(3) was not an ongoing issue.

No reasonable and prudent person would continue to work for an employer that violated the law by failing to pay the person for all time worked, and that refused to do so in the future. Claimants therefore quit work with good cause, and are not disqualified from receiving benefits based on their work separation from the employer.

DECISION: Hearing Decision 14-UI-21059 is set aside, as outlined above. Hearing Decision 14-UI-22398 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: August 21, 2014

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 website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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