

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1945

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 122124). Claimant filed a timely request for hearing. On December 15, 2014, ALJ Dorr conducted a hearing, and on December 16, 2014 issued Hearing Decision 14-UI-30476, affirming the Department's decision. On December 26, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Cravenho Construction employed claimant as a roofer from July 21, 2014 until September 10, 2014. The employer was a roofing contractor and subcontracted its services to general construction contractors.

(2) The employer paid its employees on a piece-rate basis according to the number of roofing "squares" that each employee installed. Audio at ~14:42. The employer required each employee to keep a daily record of the number of squares that the employee installed and to turn that record in every two weeks. The employer paid its employees based on their daily production every two weeks.

(3) For August 2014, claimant kept daily track of the number of roofing squares that he installed. Claimant's first payday was in mid-August 2014. The employer paid claimant three days after the scheduled payday.

(4) During the latter part of August 2014, claimant worked on multiple roofing jobs that Hayden Homes had subcontracted to the employer. The number of roofing squares that claimant installed each day varied widely and depended on the characteristics of the particular roofs on which he had worked that day. Those characteristics included, for example, whether a roof had long open runs, whether claimant's

pace in installing squares was slowed down by the need to cut in valleys, walls, skylights and dormers and whether the roof was hipped.

(5) On September 3, 2014, claimant was due to submit to the employer his daily records of the roofing squares he had installed during the latter two weeks of August 2014. Claimant took those records with him to the worksite. Later that day, claimant was in a car accident and sustained a serious concussion. As a result of this concussion, claimant's physician excused him from work until September 10, 2014 to recover.

(6) After September 3, 2014, claimant contacted the employer's owner to ask about his paycheck for the work he performed in the final two weeks of August 2014. The owner told claimant that claimant would not be paid until he submitted his records of the number of squares he had installed for that pay period. Claimant thought that he had turned in his pay records but, due to his concussion, was unable to remember with certainty doing so. As a result of the concussion, claimant lost most of his memory for events occurring during the three weeks preceding his accident, or for the period August 13, 2014 through September 3, 2014. Audio at ~13:23. Claimant told the owner that his concussion had eliminated his ability to remember his work during the pay period, including the number of roofing squares he had installed or the characteristics of the roofs on which he had worked. He told the owner he did not have access to the memories that would allow him to formulate an estimate of the number of roofing squares he had installed. The owner insisted he was not able to pay claimant until he submitted his daily records of the number squares that he had installed. Claimant told the owner that he thought he would be able to estimate the number of roofing squares he had installed if the owner gave him information about the total number of roofing squares ordered for each job, the number of squares left over after the roof was completed and the daily work records from the two other employees on the same crew showing the number of squares that each of them had installed on each job. The owner told claimant that he "couldn't do that." Audio at ~11:31. The owner told claimant that he would try to obtain information about the total roofing squares installed on each job from the contractor, Hayden Homes. Audio at ~16:17. The owner told claimant to contact the other two employees on the same crew to get the information about the number of roofing squares that they had installed. Audio at ~15:22.

(7) After September 3, 2014, the owner did not contact claimant with information from Hayden Homes or from the employer's records that would allow claimant to calculate the total number of roofing squares installed on the jobs on which claimant worked during the last two weeks in August 2014. The other employees working on claimant's crew did not respond to his calls requesting information about the number of squares that they had installed on those jobs. Audio at ~15:22. Claimant was unable to determine an alternate way to estimate the number of squares that he had installed since no one knew his productivity in installing roofing squares on those jobs and other employees could only tell him the hours that he might have worked. When claimant told the owner that the other crew members did not respond to his repeated inquiries, the owner said, "That's not [my] fault." Audio at ~15:50.

(8) Sometime before September 10, 2014, claimant again discussed with the owner how he might receive his paycheck for the work he had performed during the final two weeks in August 2014. Claimant again told the owner that he was unable to obtain the information to reconstruct his pay records for that period, or to formulate an estimate of the roofing squares that he installed, and again repeated why. The owner told claimant that if he could not reconstruct his daily work records, "there's

no way I'm gonna give you a paycheck and just estimate what you get." Audio at ~18:08. Claimant thought that the employer had in its possession the records that would allow a calculation of the number of roofing squares he installed, and the amount of pay to which he was entitled during the pay period at issue and that the employer was, for some reason, unwilling to release those records to him. Claimant concluded that the employer intended to avoid paying him for his work during that pay period.

(9) On September 10, 2014, claimant told the owner that he was quitting work because he had not been paid for his work during the latter two weeks in August 2014, and the employer refused to assist him in providing the information needed to allow him to accurately reconstruct his pay records for that period.

**CONCLUSIONS AND REASONS:** Claimant voluntarily left work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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 his employer for an additional period of time.

In Hearing Decision 14-UI-30476, the ALJ concluded that claimant left work without good cause because he did not present evidence showing that, at the time he quit, there was a "substantial risk" that the employer's failure to pay his wages would recur in the future. Hearing Decision 14-UI-30476 at 2. The ALJ also reasoned that claimant's refusal to formulate the "best guess" that he could, based on the information available to him, about the number of roofing squares that he installed was unreasonable and that, if he had been willing to do so, he had a reasonable alternative to obtain the payment of his wages from the employer. Hearing Decision 14-UI-30476 at 2. We disagree.

In the absence of contrary evidence, claimant's plausible, un rebutted testimony that the employer had in its possession all of the necessary information to reconstruct his pay records must be accepted. Audio at ~10:54, ~11:36, ~28:34. ORS 652.120(1) required the employer to pay claimant all wages due and owing to him on each regularly established payday. *See also* ORS 652.110(4) (employer shall pay wages due an employee upon employee's written or oral request). OAR 839-020-0080(1) (January 1, 2008) required the employer to maintain records showing how the wages due to claimant were calculated even if they were determined on a piece-rate basis, such as the number of roofing squares that claimant installed. The Oregon Bureau of Labor and Industries (BOLI) has interpreted these responsibilities to further require employers to "track" the work of employees and to pay to pay each employee on time even if the particular employee has not submitted any required work or pay records. [http://www.oregon.gov/BOLI/ta/pages/T\\_FAQ\\_Tafinpay.aspx](http://www.oregon.gov/BOLI/ta/pages/T_FAQ_Tafinpay.aspx). Based on these requirements, it appears that the employer arguably acted illegally when the owner refused to assist claimant to reconstruct his pay records while simultaneously requiring him to submit pay records, when he could not do so, before the employer would pay him.

Although the ALJ determined that claimant had the "reasonable alternative" of "guessing" as to the number of roofing squares that he installed during the pay period at issue, claimant's testimony that his

brother or others who saw him on the job were unable or unwilling to assist him in providing useful information to him about his productivity was un rebutted. Hearing Decision 14-UI-30476 at 3; Audio at ~14:28; ~15:38. The ALJ's sweeping conclusion that there was "reliable information" available to claimant from these sources disregards this testimony and disregards the specific piece-rate manner, based on the number of installed roofing squares, by which the employer calculated claimant's productivity and determined the wages to which he was entitled. Hearing Decision 14-UI-30476 at 3. Given claimant's loss of memory, his unsuccessful efforts to obtain the information necessary to recreate his productivity records, the fact that the employer had the means to assist claimant to reconstruct his daily work records but refused to do so, and the fact that the employer persisted in arguably unlawful behavior by not paying claimant his wages, a reasonable and prudent employee, exercising ordinary common sense, would have objectively concluded that there was a substantial risk that the employer did not intend ever to pay him the wages owed to him for his work during the latter two weeks of August 2014. Considering that claimant had worked for the employer for only one month and his first paycheck was late, a reasonable and prudent employee, exercising ordinary common sense, would have concluded that the employer would not reliably pay claimant wages owing on regular paydays, and that, under the circumstances, it was not reasonable for him to continue working for that employer.

Claimant demonstrated good cause for leaving work when he did. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-30476 is set aside, as outlined above.

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

**DATE of Service:** February 18, 2015

**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](http://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,

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