

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1366

Reversed & Remanded

PROCEDURAL HISTORY: On September 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 83108). Claimant filed a timely request for hearing. On October 23, 2015, ALJ Vincent conducted a hearing, and on October 29, 2015 issued Hearing Decision 15-UI-46798, affirming the Department's decision. On November 18, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision to the extent it was based on evidence in the hearing record.

EVIDENTIARY MATTER. While the ALJ stated in Hearing Decision 15-UI-46798 that he did not admit any exhibits into evidence during the hearing, he in fact admitted Exhibit 1, which claimant had offered. Audio at ~ 3:55, ~10:38. However, the ALJ failed to mark those documents as a hearing exhibit. Since those documents were readily identifiable from their description at hearing, EAB has corrected the ALJ's ministerial oversight and marked them collectively as Exhibit 1. Audio at ~3:55. In accordance with the ALJ's actual ruling, EAB hereby corrects Hearing Decision 15-UI-46798 to state that Exhibit 1 was admitted into evidence and entered into the record.

CONCLUSIONS AND REASONS: Hearing Decision 15-UI-46798 is reversed and this matter is remanded for further proceedings.

Claimant testified at hearing that he left work for two principal reasons: his pay was reduced from the \$22 per hour rate he received when operating heavy equipment to \$15 per hour when he was performing fire watch duties, and the employer's owner allegedly told him that his fire watch hours would be

“separated out” from his regular hours operating equipment and he would not receive overtime pay if he exceeded forty hours per week due to fire watch duties. Transcript at 5-11, 13, 14-19. In Hearing Decision 15-UI-46798, the ALJ focused on the reduction in claimant’s rate of pay in determining that he did not have good cause to leave work, and did not appropriately consider claimant’s contention about the employer’s allegedly unlawful wage practice in failing to include claimant’s time spent on fire watch in calculating the overtime pay to which he was entitled. Hearing Decision 15-UI-46798 at 2; OAR 839-020-0030(1) (January 1, 2004) (all work performed for an employer in excess of 40 hours per week must be paid at the rate of not less than one and one-half times the employee’s regular rate of pay). The ALJ reasoned that if claimant had “payroll problems,” he did not demonstrate good cause to leave work because “reporting the behavior [i.e., the payroll problems] to the employer’s owner or the appropriate state agency ha[s] not been shown to be futile options.” Hearing Decision 15-UI-46798 at 2. However, the ALJ’s reasoning is contrary to established EAB precedent. EAB has held that where a claimant is subjected to an employer’s ongoing violations of state wage and hour laws, his or her failure to file a complaint with the Oregon Bureau of Labor and Industries (BOLI) or to continue to register objections with the employer is not dispositive of whether he quit work with good cause¹. EAB has consistently held that, if a claimant experienced unlawful wage and hour or employment practices on an ongoing basis that caused him to leave work, it may constitute good cause for quitting work.²

The ALJ failed to conduct a sufficient inquiry to determine whether the employer intended to and was violating state wage and hour laws when it calculated the pay claimant received during the month of August 2015. While no time cards were entered into evidence, the employer’s breakdown of claimant’s pay for the period of August 10, 2015 through August 15, 2015 showed that claimant worked 40 hours at his regular pay, 9.5 overtime hours, and 4 fire watch hours, and received total pay of \$1,253.50. Exhibit 1 at 6. From this breakdown, claimant worked 53.5 hours in that week and the employer was required to compensate him for 13.5 of these hours at an overtime rate of one and one-half times his regular pay rate. Dividing the gross pay amount listed for that week by claimant’s applicable wage rates for machine operation and fire watch, it appears that claimant may have been paid for 40 hours at his regular machine operation rate of \$22 per hour, 4 hours at his regular fire watch rate of \$15 per hour and 9.5 hours at time and one-half of his machine operation rate or \$33 per hour. However, on this record, the actual breakdown between the hours for which claimant received overtime pay or regular pay cannot be reliably determined. The ALJ should conduct a further inquiry about claimant’s pay during the period August 10, 2015 through August 15, 2015 to determine the number of machine operator hours

¹ See *Appeals Board Decision* 12-AB-0380, February 8, 2009 (claimant had good cause to leave work due to employer’s violation of state wage laws because it was not reasonable to expect claimant to file a wage and hour claim with BOLI, to continue complaining to the employer and to continue working for an indefinite period despite the employer’s unlawful practices); see and compare *J. Clancy Bedspreads and Draperies v. Wheeler*, 153 Or App 646, 954 P2d 1265 (1998) (claimant had good cause to leave work when a wage dispute with the employer was ongoing); *Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (where wage dispute not ongoing, claimant did not have good cause to leave work).

² *Appeals Board Decision* 2015-EAB-1244, November 13, 2015 (good cause to leave work when employer took unlawful deductions from claimant’s pay and did not provide the rest and meal breaks required by law); *Appeal Board Decision* 2015-EAB-0758, August 10, 2015 (good cause to leave work when employer did not provide lawfully require breaks); *Appeals Board Decision* 2014-EAB-0614, May 12, 2014 (good cause to leave work when employer failed to pay claimant in compliance with state law); *Appeals Board Decision* 12-AB-2132, August 30, 2012 (good cause to leave work when employer did not pay claimant overtime pay or other pay in compliance with state law); *Appeals Board Decision* 12-AB-0380, February 8, 2012 (good cause to leave work when employer did not pay claimant state required minimum wage and unlawfully deducted cash shortages from claimant’s pay).

and the number of fire watch hours, if any, that were included in the pay calculations set out at Exhibit 1 at 6, the number of such hours that were paid at regular and overtime rates and to confirm the wage rate for each type of paid hour. The ALJ should also inquire about any hours that claimant listed on any time cards he completed for that same week and whether those hours were machine operator hours, fire watch hours or other hours and whether they were at regular pay rates or overtime rates. As the evidence develops about the hours for which claimant was or was not paid overtime rates, it may be appropriate for the ALJ to inquire about the employer's practices in determining the overtime pay to which claimant was entitled during any week, and, if the employer erroneously calculated claimant's overtime pay during the week of August 10, 2015, whether those errors were deliberate or due to mere mistakes. Finally, as appropriate, the ALJ should develop the evidence about whether any problems with the employer's pay practices were ongoing or likely to recur at the time claimant left work, and the information on which the employer based its contention that the fire season (and claimant's fire duties) ended around August 30, 2015 and how, when he quit work, claimant might have been aware of the date on which the fire season likely would end. Absent such an inquiries, EAB cannot determine whether claimant left work with or without good cause.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant left work with or without good cause, Hearing Decision 15-UI-46789 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 15-UI-46798 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 29, 2015

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-46798 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

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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