

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0290

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 6, 2016 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 120458). Claimant filed a timely request for hearing. On February 23, 2016, ALJ Triana conducted a hearing at which the employer did not appear, and on February 25, 2016 issued Hearing Decision 15-UI-53748, affirming the Department's decision. On March 11, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) JM Solutions LLC employed claimant as the retail manager of its business from February 9, 2015 until December 15, 2015.

(2) The operations claimant managed for the employer included a meat and butcher shop, a grocery store, a catering business and a Friday night barbeque which claimant was required to prepare and host. When claimant was hired, the employer employed a butcher and claimant had one part-time helper during winter months and one additional part-time helper during the summer months. At the beginning of her employment, claimant was working around 45 hours per week.

(3) Around the middle or end of May 2015, the butcher stopped working for the employer. Very shortly after, the employer's owners hired a new butcher. After working only two weeks for the employer, the second butcher quit work for the employer. The employer's owners were unable to find another butcher and, by necessity, claimant assumed the butchering duties.

(4) Beginning around June 1, 2015, when claimant began performing butchering, she had no training as a meat cutter. Claimant learned by trial and error to carve various cuts of meat from animal carcasses, to operate the equipment associated with butchering, such as bone saws and meat grinders, to package cuts of meat and to smoke hams, bacon and jerky. The butchering claimant performed required heavy lifting and was physically demanding. After claimant assumed the butchering, she regularly worked approximately 55 to 60 hours per week.

(5) When claimant was performing butchering, she was scared to operate the butchering equipment due to the dangers involved and because she had not been trained in its safe operation. The employer's owners lived in California and only visited the workplace every two to three weeks for part of a work day. Although claimant told the owners she had fears about operating the equipment, they did not give her any training. At times, claimant made comments to an owner such as she did not like to use the bone saw and it "scared" her. Audio at ~16:36. Claimant sometimes asked one of the owners how to use certain pieces of butchering equipment and he would attempt to show her. From time to time, claimant asked the owners if they had been able to locate a new butcher, but they told her they had not.

(6) After claimant began to perform the butchering, she butchered up to six or seven hours on work days. Claimant began to experience numbness in her arms and became unable to close her hand into a fist during and after cutting meat or operating the butchering equipment. Claimant's back became sore. The owners were aware of claimant's physical symptoms caused by performing the butchering. Claimant mentioned some of her physical concerns to the owners, but continued to perform the butchering since the owners did not hire a new butcher and there was no one else to perform the butchering.

(7) In September or October 2015, claimant had her physical condition evaluated because she was concerned about the symptoms she experienced when butchering. The chiropractor who saw claimant performed tests to determine the cause of her symptoms. The chiropractor told claimant he did not have the expertise to evaluate her or treat her symptoms, and he thought she might have a pinched nerve or a compressed disk. He advised claimant to have an MRI. Claimant had no health insurance and could not afford to pay for an MRI. Claimant did not have the recommended MRI.

(8) From time to time between approximately June 1, 2015 and November 1, 2015, claimant continued to mention her concerns to the owners. Because of the owners' "work ethic" and their failure to make arrangements to have someone else perform the butchering when she mentioned her concerns, claimant concluded the owners thought it was the nature of her job to perform butchering duties when called upon to do so and it was futile to continue to raise her concerns with them. Audio at ~21:38.

(9) On or about November 1, 2015, claimant gave the owners a written resignation, stating she was leaving work as of December 15, 2015. Claimant decided to leave work because performing butchering was too physically demanding and causing her to experience physical symptoms, she was not trained in the safe use of the butchering equipment, and the workplace was located in a small town where there were few other employment opportunities.

(10) On December 15, 2015, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left 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 P2d 722 (2010). A claimant must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

In Hearing Decision 16-UI-53748, the ALJ concluded claimant voluntarily left work without good cause. The ALJ reasoned first that claimant did not demonstrate butchering work was unsuitable for her as required under OAR 471-030-0038(5)(b)(A) since she continued to work for 45 days after giving notice to the employer and “[i]f the work were so physically strenuous [], she could not [have] continue[d] to perform it. Hearing Decision 16-UI-53748 at 3. The ALJ alternatively reasoned that, assuming claimant’s situation was grave, based on the physical symptoms she experienced when butchering, she did not pursue reasonable alternatives to quitting, “such as talking to the owners about obtaining proper training” or “about accommodations which would have helped her perform her job without injury.” Hearing Decision 16-UI-53748 at 3. We disagree.

At the outset, the employer did not appear at the hearing and no evidence was presented to rebut the testimony of claimant. The nature of the physical symptoms claimant described after she began butchering was reasonably serious. While claimant was unable to pursue treatment for the symptoms beyond seeking an evaluation from her chiropractor due to finances, it would be inappropriate to discount the nature of those symptoms for that reason. The chiropractor’s conclusion that the symptoms were beyond his expertise to treat and could be attributable to an underlying compressed disk or pinched nerve further supports their likely severity. On this record, although the evidence was not well developed by the ALJ, it appears more likely that the existence of the symptoms would reasonably have been of grave concern to a reasonable and prudent person. That claimant was able to remain working for 45 days after she provided notice that she was quitting did not, in and of itself, demonstrate that the symptoms necessarily were not grave as the ALJ assumed. There is no indication in this record that the symptoms abated over time, or that the final 45 days before claimant left work were worked without significant physical symptoms or were other than attributable to her extraordinary efforts to continue working.

As well, claimant’s concerns over her physical safety when operating butchering equipment on which she was not trained were reasonable. The hazards of butchering generally and of operating bone saws and meat grinders specifically are well known, as is their propensity to cause physical injury if appropriate safety precautions are not taken. On this record, in the absence of evidence to the contrary, a reasonable and prudent person without formal or informal training, who was performing butchering and, of necessity, using butchering equipment would have considered her lack of training and lack of knowledge about appropriate safety precautions, to be a grave concern.

With respect to the reasonable alternatives claimant had to quitting, they must necessarily have been available to her and not have been futile for her to pursue. While claimant did not tell the owners she refused to continue butchering unless she was trained or unless accommodations were made to prevent injury to her, it appears that at least one of the owners knew how to butcher and to operate butchering equipment since claimant occasionally asked him for advice on performing butchering. Audio at ~16:36. That owner did not offer to provide or arrange for training to claimant even though she told him using the equipment “scared” her. Audio at ~16:22, ~16:36. The owners were aware of claimant’s physical problems when she was butchering, but they did not take any steps to attempt to alleviate them. Audio at ~14:35, ~18:48. Throughout the time she performed butchering, claimant repeatedly asked the owners if they had located a new butcher. Audio at ~19:20. At a minimum, the owners were on notice

of claimant's physical issues, her safety concerns at using the equipment and her desire that a trained butcher take on the butchering duties that had, by default, devolved on her and did nothing. Based on claimant's knowledge of the owners' attitudes and their reactions when she raised issues about performing the butchering, it was not unreasonable for her to conclude the owners would do nothing if she pressed further pressed her concerns on them. Audio at ~21:15. Although the ALJ concluded speaking with the owners before quitting was a reasonable option available to claimant in lieu of quitting, there is no evidence in the record, other than speculation, to suggest that claimant would have been able to obtain training, assistance or an accommodation for her physical symptoms had she continued to talk to the owners. We disagree with the ALJ's implicit conclusion that speaking further with the owners would not have been futile.

Claimant demonstrated that her situation was grave and she had no reasonable, non-futile options to quitting when she did. Claimant had good cause to leave work. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-53748 is reversed, as set out above.

Susan Rossiter and D. P. Hettle;
J. S. Cromwell, not participating.

DATE of Service: April 13, 2016

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete

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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