EO: 200
BYE: 201706

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0522

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 143528). Claimant filed a timely request for hearing. On April 20, 2016, ALJ Menegat conducted a hearing, and on April 28, 2016 issued Hearing Decision 16-UI-58410, affirming the Department's decision. On May 4, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted an "additional evidence request" in which he asked EAB to consider certain documents he offered as exhibits during the hearing and which the ALJ declined to admit. Claimant also submitted a written argument in which he presented new information not offered into evidence during the hearing. However, claimant failed to show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond his reasonable control prevented him from offering that new information during the hearing. For this reason and given EAB's disposition of this matter in claimant's favor, EAB need not and does consider claimant's additional evidence request or the new information he sought to present.

CONCLUSIONS AND REASONS: (1) OMI Inc. of Oregon employed claimant as a trainee collections worker from June 24, 2013 until February 12, 2016. The employer operated a wastewater facility.

(2) Before August 2015, claimant developed concerns about the failure of his supervisor and the plant manager to comply with the employer's safety protocols. Claimant was particularly concerned that workers were being instructed to enter wet wells or other "confined spaces' without proper training, and the supervisor and the plant manager were not completing the employer's required safety checklist before telling the workers to enter them. Claimant believed that, as a result, he and other employees were subjected to unsafe working conditions. Claimant had spoken to his supervisor and the plant manager of his concerns, but they did nothing. In early August 2016, a member of the employer's

regional leadership visited the plant at which claimant worked. Claimant raised his safety concerns with the person in leadership. Nothing came of claimant's contact with the regional leader.

(3) On October 30, 2015, claimant's supervisor told claimant he could not leave for home until he cleaned four thousand feet of sewer line. To clean that sewer line, claimant was required to drive a forty foot tanker truck down a residential street, insert a hose through manholes in the street pavement until the sewer line was reached, and perform the cleaning. The cleaning system was pressured at three thousand pounds per square inch, and if a worker lost control of the hose it and its nozzle could cause serious bodily injury. Cleaning sewer lines was usually performed by a team of two workers, but claimant's coworkers were off work, and he would need to perform the work alone. Claimant told his supervisor that the work was a "dangerous operation" and he could not safely perform it without help from a coworker. Transcript at 6. The supervisor did not listen to claimant's protests. The supervisor told claimant he had to perform the work before he could go home. Claimant performed the sewer cleaning.

(4) Sometime in approximately late December 2015 or early January 2016, claimant's supervisor was training a new hire. The supervisor told the new hire to descend thirty feet from a railing to a four foot diameter wet well and to go into the wet well and clean some valves in it. The new hire was also instructed to enter other confined spaces that day. The new hire was not trained about proper procedures for entry into confined spaces, such as air monitoring or in the use of retrieval and rescue equipment. The supervisor did not go through the employer's safety checklist before he had the new hire enter the wet well. Claimant concluded the supervisor was violating the employer's safety protocols and subjecting the new hire and any other employees he instructed to enter a confined space to dangerous conditions. Claimant raised this occurrence with the supervisor and the plant manager, but they did not listen to him.

(5) Sometime in approximately early January 2016, claimant filed a complaint with Oregon Occupational Safety and Health Administration (OSHA) about the circumstances under which the new hire had been instructed to enter the wet well in early January 2016. Sometime around January 6, 2016, the employer received a letter from OSHA stating that it had been notified of alleged safety hazards in the workplace and instructing the employer to investigate those allegations and to report back the results of its investigation.

(6) Sometime after January 6, 2016, members of the employer's central safety management visited the workplace to investigate the alleged facts underlying the OSHA complaint. The plant manager led the safety managers on a tour of the locations where the alleged incidents had occurred. Claimant observed the plant manager "bypassing" the location that had been most dangerous for the new hire, and not allowing the safety managers to assess the true level of the hazard to the new hire. Transcript at 14. Claimant concluded the plant manager was trying to deceive the safety managers and to conceal from them the extent of the safely violations. Sometime later in January 2016, another member of regional leadership visited the workplace. Claimant brought up his safety concerns with him, but nothing was done to address them.

(7) On January 29, 2016, the plant manager held an employee meeting. At that meeting, the plant manager held up a safety checklist for entry into a confined space that claimant had recently completed and stated he was not going to reprimand that employee (i.e., claimant) even though he had used an

obsolete checklist form that had been superseded. Claimant thought the plant manager might be attempting to deter employees from using the required checklists by suggesting that he should reprimand the employee who had used the form. Claimant then asked the plant manager where the current safety forms were located because, although it was supposedly company policy to complete one before entry into a confined space, he had not seen one for months. The plant manager did not respond to claimant's question, but instructed claimant to go to his office for a private discussion. Claimant asked if the safety manager could be present as a witness to the conversation. The plant manager would not allow that. Claimant refused to attend the meeting with the plant manager.

(8) As of January 29, 2016, after the safety meeting, claimant had heard nothing about the progress of employer's investigation of his OSHA complaint and no corrective steps had been taken in response to the complaint. Based on the manner in which the plant manager had handled safety management's work site tour earlier in the month, claimant concluded the employer's investigation into safety violations was a "complete sham" and nothing would come of it. Transcript at 12. Claimant thought that the plant manager and his supervisor were going to continue disregarding the employer's safely protocols and subjecting employees to dangerous working conditions. On that day, claimant notified the employer he was quitting work effective February 12, 2016.

(9) On February 5, 2016, one of the employer's senior vice-presidents visited the worksite and conducted meetings of all employees. The purpose of the meetings was to solicit feedback from employees about the employer's management, working conditions and, among other things, workplace safety concerns.

(10) On February 12, 2016, claimant voluntarily left work. At the time claimant left work, the employer had not taken any actions in response to claimant's OSHA complaint or the results of its internal investigation.

(11) Sometime after claimant left work, the employer discharged claimant's supervisor because its investigation had revealed, among other things, the supervisor's violation of the employer's confined space safety protocols.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant voluntarily left work with good cause.

In Hearing Decision 16-UI-58410, the ALJ concluded that although claimant was "being directed to work under less than safe conditions" and "sometimes dangerous conditions," he did not show good cause for leaving work when he did. Hearing Decision 16-UI-58410 at 3. The ALJ reasoned that claimant should have pursued alternatives before deciding to quit, including filing complaints with management or the human resources department, or seeking further assistance through OSHA. *Id.* We disagree.

Notably, the employer did not dispute at hearing that the plant manager and the supervisor subjected claimant and other employees to unsafe working conditions, and its later discharge of that supervisor for condoning safety violations tends to corroborate claimant's position that safety violations were ongoing. While the ALJ inferred there were alternatives claimant should reasonably have pursued before quitting, those alternatives were not reasonable under the circumstances. The plant manager and claimant's

supervisor were actively ignoring safety protocols and instructing employees, including claimant, to act in ways that jeopardized their well-being and safety. They were the immediate authorities over the facility at which claimant worked and over claimant. The plant manager had already acted to deceive management about his safety violations and to subvert the employer's investigation of the OSHA complaint. At the time he decided to quit, claimant had waited approximately a month for the employer to respond and correct the unsafe conditions he had pointed out and nothing had been done and no action taken by the employer. On these facts, it was not unreasonable for claimant to conclude that the plant manager's subterfuge had been successful, the employer's management had been deceived and the plant manager and the supervisor were likely to continue in their unsafe practices. A reasonable and prudent person, exercising ordinary common sense, would not have continued to work in the potentially unsafe conditions that claimant alleged for an indefinite period of time while he waited for the employer's management, human resources or OSHA to intervene, if they did so at all. Given the degree of risk that claimant described, and which the employer did not contest, a reasonable and prudent person would have left work immediately when the employer had not taken corrective action within approximately one month after the filing of the OSHA complaint.

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

DECISION: Hearing Decision 16-UI-58410 is set aside, as outlined above.

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

DATE of Service: <u>June 17, 2016</u>

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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