

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0695

Reversed & Remanded

PROCEDURAL HISTORY: On May 3, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 83826). Claimant filed a timely request for hearing. On June 1, 2016, ALJ Menegat conducted a hearing, and on June 2, 2016, issued Hearing Decision 16-UI-60941, affirming the Department's decision. On June 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record in reaching this decision.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-60941 should be reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further development of the record.

Claimant worked as a customer service representative for the employer, Romaine Electric, in its Portland store. The employer sold electrical system parts such as starters and alternators. In claimant's experience, he often was required to pull parts, some weighing around 55 pounds, off shelves as part of his job. On March 13, 2016, claimant injured his shoulder while at home. Claimant, who had missed a substantial amount of work for various reasons prior to his injury, reported to the employer what had occurred and that he was unable to work given the condition of his shoulder and while undergoing physical therapy. At the time, only two employees manned the customer service desk, interacting with customers or taking orders over the phone or online - claimant and his supervisor, Brown. However, Brown had suffered a heart attack in February 2016 and had his own health issues that interfered with his ability to work. Claimant's absence from work caused hardship for both Brown and the employer because there were times when no one was available to work at the customer service desk while claimant was off due to his shoulder. Claimant's absence put pressure on Brown to work when he could not and the employer lost business and customers because no one was available to occupy the customer service desk.

On March 25, 2016, claimant's medical provider sent the employer contradictory medical statements dated that same day. In one, claimant's provider certified that claimant was "fully incapacitated." Audio Record ~ 17:00 to 18:00. In the other, he certified that claimant was authorized to "return to full duty"

on March 26, 2016. Exhibit 1. Claimant was aware only of the first certificate deeming him “fully incapacitated.” Audio Record ~ 30:45 to 31:30. After March 25, claimant continued to notify the employer by phone messages that he was unable to work and undergoing therapy. When claimant did not return to work by March 30, 2016, the employer decided that it needed counter help and needed to hire another employee if claimant did not return. That day, the employer’s human resources manager (Sample) emailed claimant a letter stating,

“The purpose of this memo is to determine what your employment status is with Romaine Electric. You have been absent from work for almost 3 weeks... You have been contacting your supervisor Russ Brown by leaving messages that you were not able to be into work and did not know when you would be returning.... It is important... we need to know whether you want to continue to be an employee of Romaine so we can continue on. Please contact Russ and myself of your decision regarding your employment by Friday April 1, 2016.”

Audio Record ~ 15:00 to 17:00. Claimant responded that same day that he was “fighting a shoulder injury”, being treated with physical therapy and did not know when he would be able to return to work. Exhibit 1. Sample responded, also that same day,

“Your last doctor statement says that you can return back to full time duties. We are taking the word of your doctor. If you can’t then you need to provide another doctor statement saying how long that you are going to be gone. This can’t go on.”

Exhibit 1. Claimant attempted to do so, and believed that the provider’s medical assistant was sending a note to the employer, but claimant later learned the assistant had not. On March 31, Sample prepared a summary of all of claimant’s recent absences and discussed it with Brown. On April 5, 2016, having not received anything from his provider, believing that he could not perform his job, thinking that the employer was threatening him with termination and was undergoing hardship due to his absence, claimant notified Sample “with regret that [he] need[ed] to quit” because “my shoulder is not letting me do my normal work.” Exhibit 1. The next day, the employer accepted his resignation.

This matter comes before EAB to determine whether claimant should be disqualified from receiving unemployment insurance benefits because of his separation from work. In the Department’s initial determination, after finding that claimant quit because he believed the employer pressured him to do so following an extended absence from work due to a non-work related injury, its authorized representative concluded claimant voluntarily left work without good cause because claimant’s reason for quitting wasn’t sufficiently grave that it left him with no reasonable alternative but to quit. Decision # 83826. The ALJ agreed, reasoning that claimant had the reasonable alternatives of obtaining a clarifying note from his medical provider regarding when he could physically return to work or inquiring of the employer if he could return to work in a limited capacity that would not aggravate his shoulder or interfere with his rehabilitation. Hearing Decision 16-UI-60941 at 3.

However, the employer presented evidence that it was losing customers and business due to claimant’s absence and the absence of sufficient counter help. Audio Record ~ 26:45 to 29:00. Sample testified that the situation had deteriorated to the extent that the employer was prepared to hire another employee to remedy the situation. Audio Record ~ 32:00 to 33:00. Under OAR 471-030-0038(2), if the employee could have continued to “work” for the same employer for an additional period of time, the work

separation is a voluntary leaving; if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2) (August 3, 2011). “Work” means the continuing relationship between an employer and an employee. OAR 471-030-0038(1)(a). For a continuing employment relationship to exist, there must be some future opportunity for the employee to perform services for the employer. *See Appeals Board Decision, 97-AB-873, June 5, 1997.* No continuing relationship exists if the employer does not have an expectation that a service will be performed. *Appeals Board Decision, 02-AB-2040, October 15, 2002.*

Here, there was insufficient inquiry by the ALJ regarding whether, under the circumstances, claimant, in fact, had a future opportunity to work for the employer if he had not returned to work immediately. For example, if claimant had provided an updated provider’s note stating he was completely disabled and remained unable to return at that time, would the employer have been willing to allow him to take more time off work to recover from his injury or perhaps was it going to replace him because it needed another employee and claimant had had a history of extended absenteeism? If the latter, then under our prior cases the work separation may have been properly characterized as a discharge with a different set of rules and line of inquiry relevant. For example, if the separation was in fact a discharge, what expectations did claimant violate, were they communicated to him and if so, were his violations of those expectations willful or wantonly negligent?

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 the nature of the work separation, and claimant’s eligibility for benefits based on the outcome of that inquiry, Hearing Decision 16-UI-60941 is reversed, and this matter is remanded for further development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-60941 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.

DECISION: Hearing Decision 16-UI-60941 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: July 27, 2016

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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