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

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0136

Reversed & Remanded

PROCEDURAL HISTORY: On December 20, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 64450). Claimant filed a timely request for hearing. On January 17, 2017, ALJ Wipperman conducted a hearing, and on January 20, 2017 issued Hearing Decision 17-UI-75170, affirming the Department's decision. On February 2, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-75170 should be set aside, and this matter remanded.

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.

The ALJ concluded that claimant voluntarily left work without good cause, reasoning that although claimant was understandably frustrated and dissatisfied with the manner in which he was paid for warranty work, the "record does not show that claimant completed specific warranty repair tasks that were denied" and he was willing to "continue working for an additional two months for the employer after giving notice." Hearing Decision 17-UI-75170 at 3. We disagree.

First, claimant did not continue working for the employer after initially giving notice because he thought his situation was not grave, he continued working in order to give the employer notice of his intent to quit and, at its request, time to evaluate his concerns before he ultimately left work over them. Audio

recording at ~ 8:55. That claimant gave notice of his intent to leave work, and was willing to give the employer time to resolve his concerns prior to quitting work, do not mean that the reason he quit work did not amount to a grave circumstance. The Court of Appeals has repeatedly held since 2005 that when an individual leaves work, the "good cause" analysis should focus on the time the claimant left work, and not on the point in time at which he gave notice of his intent to quit work, particularly where, as here, events that occur during the notice period reinforce his decision to quit work. *See accord Early v. Employment Dep't.*, 247 Or. App. 321, 360 P.3d 725 (2015); *J. A. W. (Werth I) v. Employment Dep't.*, 237 Or. App. 520, 240 P.3d 86 (2010); *Constantine v. Employment Dep't.*, 200 Or. App. 677, 117 P.3d 279 (2005). Second, the record fails to show that claimant completed specific warranty repair tasks that were denied because it was not fully developed and additional evidence is therefore required.

Claimant testified, generally, that approximately 50% of the work he performed was warranty work and that he was not paid for approximately 50% of the warranty work he performed, meaning that claimant's allegation is that he did not receive pay for approximately 25% of the work he performed for the employer and that it was not his fault that he was underpaid, and the employer did not specifically refute claimant's testimony on those points. If true, we believe that a reasonable and prudent person who, through no fault of his own, is not paid for a significant portion of the labor he performs would, in all likelihood, consider that to be a grave situation and conclude that he has no reasonable alternative but to quit work to avoid being subjected to the ongoing harm of being underpaid for his labor. The issues outstanding in this case are, therefore, whether or not claimant was paid for all of his labor (and, if not, what portion was unpaid) and whether or not being underpaid was attributable to claimant.

On remand, the ALJ should ask claimant to explain the basis of the percentages he listed. Although claimant testified in the last hearing that he did not have access to his work orders or warranty claims since his work separation, the ALJ should ask claimant to provide as much information as possible based on recollection about a couple of instances where he was not paid for the warranty work he had performed. For example, whether claimant remembers one or more jobs and can relate what happened when he received the assignment – when did claimant verify that the work was eligible for payment, how many days later did he commence the work, how many days later did he complete the work, how many days later did he submit a claim for the work, when did he learn that he would not be paid for the work, did he learn why he would not be paid, what changed between the time he verified the job was eligible for payment and the time he learned it would not be paid, when did that change occur, what did he do when he learned that he would not be paid, and, if he reported the problem to the employer, who did he report it to and what did that person tell him.

The ALJ should ask claimant to provide additional details about how he tracked the percentages he testified about during the first hearing, how he calculated them, who he told about the figures, and what they said. The ALJ should ask claimant for additional details about his September 2016 conversation with the owner. The ALJ should ask claimant, generally, during his 26 years of employment with the employer, what percentage of warranty work he was usually paid for in any given period. If claimant's answer reveals that claimant usually received less that 100% of the warranty work pay he claimed throughout his employment, the ALJ should ask claimant whether something changed that caused him to believe that the situation had become grave, and, if so, what that was and why claimant considered it grave. The ALJ should ask claimant if he used the new claims software the employer implemented in October 2016 before quitting work, and, if so whether he noticed any changes to the percentage of work for which he was paid.

The employer's office manager and service director, and, according to claimant, the owner, all seemed to tacitly acknowledge that claimant was not necessarily paid for all of the warranty work he did. The office manager indicated that the new software improved things, the service director testified that he had discussions with claimant about not getting paid and sometimes disputed the manufacturer's denials, and the owner told claimant he thought claimant was paid for about 80% of the warranty work he did. Given that testimony, the ALJ should ask the employer's witnesses what the industry standards are with respect to paying technicians for warranty work, and, generally speaking, for what percentage of warranty work the employer's technicians are paid. The ALJ should also ask the employer whether claimant's percentages accurately reflect the frequency with which claimant received pay for warranty work, and whether claimant's percentages were typical or atypical amongst the employer's technicians.

The employer's office manager testified that the employer's procedure with respect to warranty work required that the technician and service manager verify that a repair (or part) was covered by the warranty before the technician commenced work, and that the manufacturer's designation of what was or was not covered did not change mid-repair. Audio recording at ~ 25:00. Claimant testified that he did verify that work was covered prior to commencing it and that coverage could change between the point at which claimant verified the work and the point at which claimant completed the work and should have been paid for it, resulting, effectively, in claimant being required to provide free labor to the employer's customers. Audio recording at ~ 14:00, ~ 18:00. The ALJ did not follow up sufficiently with either party about that issue.

On remand, the ALJ should ask claimant whether he verified that work was eligible for payment before commencing each job, and, if not, why not, and how frequently he did do any verification. The ALJ should ask claimant how far in advance of doing the work or completing the work claimant typically did the verification. The ALJ should ask claimant and the employer whether the service manager also verified in advance that the work was eligible for payment, in accordance with the procedure the office manager described. Given claimant's growing concerns about being underpaid for warranty work, the ALJ should ask claimant and the employer what, if anything, they did to mitigate the problem or attempt to ensure that claimant only performed warranty work that was eligible for payment.

Finally, claimant and the service manager suggested that claimant regularly reported to the manager or the assistant service manager when he was not paid for warranty work, and the service manager testified that his job involved investigating and sometimes disputing the manufacturer's decisions that work was not covered under a warranty or was paid at a lesser rate than the work should have been paid. *E.g.* Audio recording at ~ 9:00, ~ 13:45, ~ 35:00, ~ 38:45. The ALJ should ask both parties to explain examples of the grounds upon which claimant was not paid for some of the work he performed. The ALJ should ask both parties whether claimant and/or the service manager made errors when verifying that work was eligible for payment that resulted in claimant doing work that was not eligible for payment, and, if so, what kind of errors those were and what they did to prevent them. The ALJ should ask claimant to provide some examples, anecdotal since claimant lacks access to the documents themselves, of situations where he verified the work was eligible for payment and the manufacturer changed its policy before he completed the work or claimed payment for it, and then allow the employer to respond. The ALJ should follow up with both parties with any additional questions necessary to establish whether claimant's failure to receive pay for the warranty work he performed was attributable

to claimant, and, if so, what proportion was attributable to claimant rather than to the employer or to the manufacturer's policy changes.

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 had good cause for quitting work, Hearing Decision 17-UI-75170 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-75170 is set aside, and this matter remanded for further proceedings consistent with this order.[1]

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

DATE of Service: <u>February 21, 2017</u>

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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[1] **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-75170 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.