

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0829

Reversed & Remanded

PROCEDURAL HISTORY: On May 11, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 84556). Claimant filed a timely request for hearing. On June 20, 2017, ALJ Amesbury conducted a hearing, and on June 21, 2017 issued Hearing Decision 17-UI-86181, affirming the Department's decision. On July 11, 2017, Hearing Decision 17-UI-86181 became final without a timely application for review having been filed with the Employment Appeals Board (EAB). On July 12, 2017, claimant filed a late application for review.

LATE APPLICATION FOR REVIEW: ORS 657.270(6) allows a 20-day period after the date a hearing decision was issued for parties to file an application for review. ORS 657.875 allows that period to be extended a reasonable time upon a showing of good cause. "A reasonable time" is seven days; "good cause" is when "factors or circumstances beyond the applicant's reasonable control prevented timely filing." OAR 471-041-0070(2) (March 20, 2012). Although claimant did not submit a written statement explaining the reason for his late filing in this case, it seems apparent based upon the timing and appearance of the faxed applications for review claimant submitted to EAB that it is more likely than not that he experienced technical difficulties faxing the documents that were beyond his reasonable control, and therefore had "good cause" to extend the filing period. He successfully faxed the application for review three minutes after the deadline, which was within a "reasonable time." Claimant's late application for review is, therefore, allowed.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-86181 should be reversed, and this matter remanded for additional evidence.

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). Where the gravity of the situation experienced by the individual results from his or her own deliberate actions, to determine whether good cause exists, the

actions of the individual in creating the grave situation must be examined in accordance with the provisions of section (4) of this rule. OAR 471-030-0038(5)(f). 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 did not have good cause for leaving work because he “made no effort to work out a solution with employer that would have allowed claimant to continue his employment, and did not offer evidence of any efforts to obtain alternative transportation.” Hearing Decision 17-UI-86181 at 2. The ALJ found, without explanation, that claimant’s situation was not grave, and, in the alternative, to any extent it might have been that claimant failed to pursue “reasonable alternatives” “such as using public transportation, purchasing a second vehicle, or making other transportation arrangements.” In order for any alternatives to have been “reasonable,” however, they must have been possible, feasible, and claimant must have known about them. We disagree that the record supports the ALJ’s conclusions, and conclude that additional evidence is required before we can reach a determination as to whether or not claimant had good cause for quitting work when he did.

At all relevant times, claimant resided in Medford, Oregon and commuted weekly to Eugene, Oregon to work, residing with family in Eugene during the work week and driving home on the weekends. Eugene is located 167 miles from Medford and takes less than three hours to drive.¹ Claimant generally drove an employer-owned truck between Medford and Eugene. On December 22, 2016, claimant drove the employer-owned truck home to Medford for the weekend, expecting to return to work on Monday, December 26, 2016. Claimant became ill over the weekend, however, and called in sick to work. Claimant remained ill on December 27, 2016 and again could not work. The employer required the work truck in Eugene, and sent two employees to Medford to pick up the truck from claimant’s residence. The employer told claimant he could either inventory his tools and allow the tools to remain on the truck and be lended to his coworkers, or he could remove his tools from the truck before his coworkers retrieved it. Claimant chose to remove his tools. Claimant’s coworkers retrieved the truck, at which time one employee told claimant he would have to find his own way to work when he resumed working because the truck was needed in Eugene. Claimant quit work rather than returning to Eugene.

In order to determine whether or not claimant had good cause to quit working, the ALJ must ask additional questions about what claimant knew and was told about his use of the truck once he recovered from his illness and was ready to resume work. What did claimant understand his coworker to mean when the coworker told claimant to find his own way to work when he recovered his health? What did claimant understand the coworker to mean when he said that the truck was needed in Eugene? Did claimant ask the coworker what he meant or ask any other questions of the coworker? Did the coworker specifically say that claimant would never again be allowed to drive the truck between Medford and Eugene? Did the coworker have any supervisory authority over claimant? Did the coworker suggest he was speaking on behalf of someone who did? Did the coworker have managerial authority at the employer’s business or was speaking on behalf of someone who did? Did the coworker make staffing decisions or allocate the employer’s resources (such as trucks, tools or assignments)? Did the employer’s business have managers, owners or foremen at its business? Did any of them supervise claimant? Did claimant call any of them to ask about the truck? Was claimant told that he would have

¹ See <https://www.mapquest.com/directions/from/us/or/eugene/to/us/or/medford>

to make his way back to Eugene by himself when he recovered and then would be given use of the truck again, or was claimant told that he was not going to be allowed to use the truck again? Who originally gave claimant use of the truck to drive back and forth between Eugene and Medford? Did claimant contact that person to ask whether or not he would ever be allowed to use the truck to drive between Eugene and Medford again? Had claimant ever failed to return the truck to Eugene, or left the truck in Medford, because he was taking time off work for illness or any other reason? If so, what did the employer tell him about doing that? Had claimant ever been prohibited from taking the truck from Eugene to Medford in the past? If so, how did he commute back and forth between Eugene and Medford on any of those occasions? How much did it cost to drive between Eugene and Medford?

It appears on the record developed so far that claimant's primary barrier to returning to work after December 27th was that he was in Medford with his tools and thought there was no feasible way for him to get his tools to Eugene where he needed them to work. That means that claimant created the gravity of his own situation by removing his tools from the truck on December 27th, and the ALJ must ask claimant about his actions in creating the grave situation. Why did claimant need his tools to work in Eugene? The employer was going to allow other employees to borrow claimant's tools; could claimant have borrowed someone else's tools? How did claimant transport his tools to work in Eugene before his first day of work when he began working for the employer? Why could claimant not have done the same thing in December 2016 when he was ready to return to work? Why did claimant remove his tools from the truck before his coworkers came to retrieve the truck? The employer gave claimant the option to inventory his tools and leave them on the truck for others to use while he was absent, why did claimant not choose that option? Did claimant consider what it would mean to remove his tools from the truck in terms of his ability to return to work? What was so grave about the prospect of others using his tools that he chose to remove them, knowing the difficulty he would have transporting his tools back to Eugene? How much would it have cost claimant to ship the tools to Eugene, or rent a pickup truck or moving van to drive the tools to Eugene? What public transportation options did claimant explore? Could claimant afford to purchase a second vehicle? Were there any other transportation arrangements he could have made? Did claimant ask the employer for any assistance or ask someone if they had any ideas that might help him with his problem returning to work? Assuming that the employer would have allowed him to start using the truck again to commute between Medford and Eugene once he recovered from his illness, could claimant have gotten a ride or taken a bus to Eugene once to pick up the truck and then used it to transport his tools back to Eugene?

It appears on this record that, to a certain extent, claimant created the gravity of his own situation by taking a job in Eugene when he resided in Medford, which means that claimant's actions in creating that grave situation must be explored to determine whether or not he had good cause to do so. Why did claimant take a job in Eugene when he resided in Medford? What were the terms under which he agreed to take that job? Did the employer promise him use of a work truck as an employment condition or part of his remuneration or benefit package? Did claimant and the employer discuss any terms under which he would be allowed to use the truck to drive between Eugene and Medford? Did claimant and the employer put any limitations on claimant's use of the truck, such as a stop date or perfect attendance? Had claimant used the work truck to drive between Medford and Eugene the entire time he worked for the employer? The illness that prevented claimant from working on December 26th and December 27th might also be said to have created some gravity, about which the ALJ should also inquire.

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 or not claimant had good cause for quitting work, Hearing Decision 17-UI-86181 is reversed, and this matter is remanded for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-86181 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 17-UI-86181 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: August 7, 2017

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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