

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1075**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work for the employer without good cause (decision # 122858). Claimant filed a timely request for hearing. On August 17, 2017, ALJ Shoemake conducted a hearing, and on August 25, 2017 issued Hearing Decision 17-UI-91182, concluding that claimant had good cause to voluntarily leave work. On September 8, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument to EAB that contained a great deal of information that it did not present during the hearing. The employer did not explain why it was unable to offer this new information at the hearing or otherwise show that it was prevented from doing so by factors or circumstances beyond its reasonable control as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider the employer's new information when reaching this decision.

**FINDINGS OF FACT:** (1) Marathon Construction Services LLC employed claimant from February 27, 2014 until May 29, 2017, last as a superintendent on the Cook building component of its Mississippi Avenue project. The Mississippi Avenue project involved the construction of two apartment buildings, one called the Cook building and the other called the Fremont Building. The Fremont building component of the Mississippi Avenue project also had a superintendent.

(2) Claimant was 57 years-old. Claimant has had three surgeries on his back. Before becoming employed by the employer, claimant returned to school for vocational training in construction management since he was no longer safely able to perform physical labor without jeopardizing his health.

(3) Sometime around June 2016, the employer wanted to commence work on the Mississippi Avenue project. The employer asked claimant and another employee to assume the superintendent positions on the Mississippi Avenue project. Claimant and that employee had previously worked for the employer on other projects, and both had experienced serious difficulties on those projects because they were inadequately staffed and "totally undermanned." Audio at ~17:56. Claimant and that employee created

a “matrix” showing the positions that they thought needed to be created and filled for successful completion of the Mississippi Avenue project, including a project manager, a project engineer, two building superintendents, separate foremen for each building, and laborers. Claimant and the employee met with the employer and presented the matrix they had prepared. Claimant and the employee told the employer that they would accept positions as the superintendents of the Cook building and the Fremont building, respectively, only if the employer agreed to follow the matrix and staff the Mississippi project in accordance with its requirements. The employer agreed. Based on the employer’s commitment, claimant and the employee assumed the superintendent positions.

(4) By approximately July 2016, the employer had not hired an adequate number of laborers to perform the work needed on the Mississippi project. In July 2016, claimant opened a fence for a steel delivery because there were no laborers on the project. Claimant sustained an umbilical hernia when doing so. The physician who treated claimant told him he likely would need surgery to repair the hernia if his physical exertions caused the herniated area to expand.

(5) In approximately August 2016, the employer reassigned the project engineer for the Mississippi Avenue project, which was one of the positions listed on the matrix, to another of its projects in Vancouver, Washington. The project engineer position for the Mississippi Avenue project was empty and remained unfilled for four months. Although the employer had hired a project manager for the Mississippi Avenue project sometime after the project began, he did not work at the job site as claimant and the other superintendent had envisioned. The employer did not fill all the foreman positions shown in the matrix and did not retain the two that it hired.

(6) Around August 2016, claimant began regularly contacting the employer’s vice-president of construction to complain about the removal of the project engineer, the inadequacy of management staffing for the Mississippi Avenue project and the lack of laborers. The vice-president did not disagree with claimant and told claimant the employer was unable to find suitable applicants to hire. Around December 27, 2016, the employer hired a new project engineer for the Mississippi Avenue project.

(7) Around April 2017, claimant was performing work using a forklift because no laborers were present on the job site. Claimant hurt his back while doing so. In the absence of laborers, claimant often needed to perform tasks that required physical exertions or were physically demanding.

(8) As of May 2017, the employer had been unable to hire the full complement of staff that the matrix for the Mississippi Avenue project required. The project was substantially understaffed. Sometime around May 26, 2017, the superintendent for the Fremont building was required to take time away from work to deal with a personal situation. That superintendent left for claimant a “massive list” of tasks to complete in his absence since, given the employer’s understaffing, claimant was the only person available to handle those tasks. Audio at ~15:08. Combined with the tasks that claimant needed to complete on the Cook building during this same period of time, claimant thought that he was not able to cover for the absent superintendent. The employer’s vice-president of construction called claimant that day and asked claimant if he needed help in handling the upcoming tasks of the Fremont building superintendent in addition to his own. Claimant told him he would get back to him.

(9) On May 28, 2017, claimant called the vice-president about the list left by superintendent for the Fremont building. Claimant told the vice-president, “There’s no way I can do this,” meaning his own

duties and those of the other superintendent. Audio at ~13:16. The vice-president told claimant he would be at claimant's job site on Monday morning, May 29, 2017, to look at the list the other superintendent had left for claimant.

(10) On May 29, 2017, claimant and the vice-president met at the job site for the Cook building. Claimant began to discuss the overall understaffing on the Mississippi Avenue project and the effects it was having on him. Claimant asked the vice-president, "What are you going to do?" Audio at ~12:00. The vice-president told claimant he was going to help him. Claimant knew that one of the tasks of the other superintendent that needed to be completed that day required using a forklift and claimant knew the vice-president was not certified to drive a forklift, and also that the vice-president would be unable to perform other of the tasks that needed to be completed. Claimant became angry because he thought the real problem was due to the employer's failure to adequately staff the Mississippi Avenue project, and the vice-president's efforts could not overcome that problem. Claimant told the vice-president that five or six more employees needed to be hired for the Mississippi Avenue project and stated, "You guys have screwed us [claimant the other superintendent] so bad [by not complying with the staffing levels set out in the matrix]. I'm out of here. See you later." Audio at ~15:08. Claimant decided to quit work to avoid harming himself by continuing to try to perform physical tasks that should have been performed by non-management employees or laborers.

(11) On May 29, 2017, 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 he proves, by a preponderance of the evidence, that he had 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). Claimant had a history of back injuries and surgeries, permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h). A claimant with those impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairments would have continued to work his employer for an additional period of time.

Claimant quit work to avoid physical injury since, given the understaffing on the Mississippi Avenue project, he often needed to perform physical labor despite being a management employee. Claimant had already injured himself twice when performing physical tasks that properly should have been performed by non-management level employees. Because of the persistence over time of the inadequate staffing on the project and claimant's overall responsibility for the progress of the Cook building component of the project, it was reasonable for him to assume that the need for him to perform physical tasks was not isolated and likely would recur. The employer's lack of staffing created a grave circumstance for claimant since he reasonably inferred that it would likely lead to his physical injury. As well, the employer's witness readily conceded at hearing that the employer was chronically understaffed on the project, that claimant regularly sought to have that understaffing addressed and rectified, and that the employer had not done so during the almost year-long period claimant worked on the Mississippi

Avenue project. Audio at ~27:37, ~30:32, ~35:23. On this record, since the employer had not responded to claimant's many complaints about staffing but contended that, despite its best efforts, it could not hire the additional staff that was needed, no reasonable alternatives existed to claimant leaving work when he did. Accordingly, a reasonable and prudent 57 year old with a history of back issues and surgeries would have left work when claimant to avoid injuring himself in the future.

Claimant had good cause for leaving work when he did. He is not disqualified from receiving unemployment insurance benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 17-UI-91182 is affirmed.

J. S. Cromwell and D. P. Hettle.

**DATE of Service: October 12, 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](http://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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