EO: 200
BYE: 201829

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

028
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1242

Reversed & Remanded

PROCEDURAL HISTORY: On August 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 140909). Claimant filed a timely request for hearing. On September 22, and October 10 and 11, 2017, ALJ Janzen conducted a hearing, and on October 11, 2017 issued Hearing Decision 17-UI-94359, affirming the Department's decision. On October 27, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-94359 is reversed and this matter remanded.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he (or she) 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 the employer for an additional period of time.

Claimant was a 63 year old delivery truck driver for the employer, a nursery, for whom he worked from early June 2016 until he quit on July 5, 2017. Between June 2016 and approximately July 1, 2017, many of the vehicles and trailers claimant was assigned to use to perform his job demonstrated operating defects that caused the vehicle to be unsafe to drive and/or resulted in citations from local law enforcement authorities or DOT (Department of Transportation) weigh station inspection personnel. Exhibit 2. Although claimant continually reported the defects to the employer, he often ended up using the vehicles and trailers to perform his job before they were repaired.

On Friday, June 2, 2017, claimant was assigned to deliver several red cedars weighing 300 to 400 pounds apiece that had been loaded onto his delivery truck with the use of a forklift. Claimant

understood that there was supposed to be equipment and personnel at the delivery site for unloading the cedars. When claimant arrived there was neither. He reportedly called a supervisor, who apparently instructed him to unload the cedars any way he could. With the help of two female landscapers at the destination site, claimant unloaded the trees over a period of two hours, during which he strained his back and apparently tore some stomach muscles. On Monday, June 5, he saw a physician and was put on temporary light duty.

On June 21, 2017, after having been on light duty for a period of time, claimant was assigned to pick up some trees using a truck with a broken lift gate, which was needed to load the trees onto the truck. He had reported the defective lift gate to the employer previously, but although the lift gate had not been repaired, he was sent out on the assignment any way. Reportedly, no other trucks were available other than trucks that were deemed unsafe for other reasons. When claimant loaded the trees using the defective lift gate, he somehow reinjured his back. Claimant again was placed on light duty by his physician. While working a light duty assignment on the 28th and 29th of June, he observed what he believed to be extremely unsafe working conditions in the employees' breakroom, such as the nearby presence of toxic chemicals and the lack of potable water. On July 5, 2017, after returning to work after the July 4 holiday, claimant quit.

At hearing, claimant first asserted that he quit work because of the two work injuries he experienced in June 2017 and the related unsafe working conditions that caused them. However, later asserted that, while on light duty, observing the unsafe condition of the break room on June 28 and 29 convinced him that employer was not safe place to work. Transcript (October 6, 2017) at 11-18. The ALJ concluded that claimant's breakroom observations on June 28 and 29 was the final incident that caused claimant to quit and because claimant did not report his concerns about the breakroom before quitting, which the ALJ concluded would not have been futile, good cause for quitting work had not been shown. Hearing Decision 17-UI- 94359 at 3. The ALJ also concluded that the employer "tried to respond to each of claimant's concerns about the employer's vehicles and equipment", so it would not have been futile for claimant to continue the employment as he had, reporting unsafe conditions as he observed them. *Id.* We disagree that the record was not sufficiently developed to support that those conclusions.

The ALJ failed to clarify what, exactly, was the proximate cause of claimant's decision to quit, his work injuries or the condition of the breakroom. On remand, the ALJ should ask claimant why, if his injuries were the deciding factor, he did not quit around June 2 when he was initially injured, or June 21 when he was reinjured, and whether his physician offered him any advice on that issue? And if, at those times, claimant had already experienced several instances of unsafe vehicles, equipment and employment practices, factors he claimed supported his decision to quit, why did he wait until July 5 to quit?

Regarding the work incident on June 2, claimant said he reported the problem with moving the cedars and was told "you've gotta get 'em off. You've got another load with another driver in a little bit. Do what you have to do." Transcript (October 6, 2017) at 12. However, there was insufficient inquiry about whether claimant adequately communicated the problem to the employer, how he communicated the risk to his health and safety to the employer, and whether the employer demonstrated indifference to the problem or hazard that confronted claimant. For example, did claimant report to the employer at any time during his activities that day that moving the cedars or any other lifting activities was hurting his back, and that he did not want to continue? If so, what was the employer's response? What is the employer's recollection of the events of that day and conversations with claimant?

With regard to the lift gate incident on June 21, although the evidence shows that claimant reported the problem to the employer beforehand, the employer's mechanic asserted that there was another button and the gate was operable. Transcript (October 6, 2017) at 36-38. However, claimant explained that he had to lie down on the defective gate and reach around to accomplish the work task to avoid getting pinched, and was re-injured while doing so. Transcript (October 6, 2017) at 13. The record does not, however, show just how did the employer's equipment/unsafe practice cause the re-injury. What were the specific factors regarding how that re-injury occurred, what exactly was injured, what was claimant doing when he was injured, and how was that injury connected to the defective lift gate? What is the employer's recollection of the events of that day and conversations with claimant about the lift?

With regard to the general condition of the employer's vehicles and equipment, does claimant agree with the employer that it tried to respond to each of claimant's concerns, and if not, what alternatives did it fail to pursue, and how the employer's responses or lack thereof affected his decision to quit? Does the employer agree or disagree? The ALJ should ask these and any other follow up questions necessary to determine whether the proximate cause of claimant's work separation amounted to a grave situation for which no reasonable alternatives to quitting existed.

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 quit with or without good cause, Hearing Decision 17-UI- 94359 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-94359 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: <u>December 4, 2017</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-94359 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.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.