EO: 700
BYE: 201833

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

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1251

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 101628). Claimant filed a timely request for hearing. On October 18, 2017, ALJ S. Lee conducted a hearing, and on October 20, 2017 issued Hearing Decision 17-UI-95086, reversing the Department's decision. On October 30, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument that contained information not offered into evidence at the hearing. OAR 471-041-0090(2) (October 29, 2006) allows EAB to consider new information if the party offering it shows, among other things, that factors or circumstances beyond the party's reasonable control prevented it from presenting the information during the hearing. The employer contended in its argument that it did not present the new information as a result of its inexperience in dealing with unemployment insurance hearings, its belief that the ALJ would have access to documents that it had previously submitted to the Department, its failure to realize the ALJ would not "fact-check" claimant's testimony at hearing and the discomfort of its hearing representative in speaking up during the hearing. However, many parties participating in unemployment insurance hearings are inexperienced as to the hearing process, and the October 4, 2017 notice of hearing sent to the parties plainly stated in two places that the ALJ would consider at hearing only the documents enclosed with that notice, and that if a party desired the consideration of other documents, copies of those documents needed to be sent to the ALJ and the other parties prior to the hearing. October 4, 2017 Notice of Hearing at 1, 6. We cannot discern the basis for the employer's belief that the ALJ would perform "fact-checking" independent of examining the parties at hearing, and neither that nor the employer's representative's discomfort were grounds to admit new information from the employer into the record. In sum, the employer did not show that factors or circumstances beyond it reasonable control prevented it from offering the information that it sought to present by way of its written argument, and EAB therefore considered only information admitted into evidence during the hearing.

FINDINGS OF FACT: (1) Velocity Sports Equipment, Inc. employed claimant as a production worker from August 2014 until August 15, 2017.

(2) When the employer hired claimant, claimant was living in La Pine, Oregon in a house that he had built himself. At that time, the employer's workplace was in Sunriver, Oregon, which required claimant to commute approximately 24 miles to work one-way. In April 2017, after having lost its lease, the employer relocated the workplace to Sisters, Oregon. The commute from claimant's home in La Pine to Sisters was 61 miles and, one way, took claimant approximately one and a half hours during spring and summer 2017.

(3) To reach the workplace in Sisters, claimant took Highway 97 from La Pine until he reached Bend and then, at Bend, connected with Highway 20 to reach the workplace. Both highways were two-lane paved roads. The commute between La Pine and Sisters required claimant to traverse two mountain passes. The winters around La Pine, Bend and Sisters were harsh. The driving conditions that claimant expected to encounter during a winter commute between La Pine and Sisters included significant accumulations of snow and ice on the roads. Claimant expected his commute in winter would take significantly more time than in spring and summer and would be more dangerous.

(4) As of the relocation of the workplace to Sisters, claimant was working 10 hour shifts four days per week. Claimant discussed with the employer's owner that he disliked the one and a half hour one-way commute he needed to take to reach work from his home. The employer looked into whether it could afford to install a shower at the workplace in Sisters that would enable claimant to stay overnight at work, avoid a commute of approximately three hours every work day, and require claimant to commute round trip only once each work week. The employer concluded it could not afford to do so.

(5) Sometime before August 15, 2017, claimant decided that the round trip commute of approximately three hours between his home in La Pine and the workplace in Sisters had become "just too much" after he had been making the commute for four months, and the commute would become longer and more hazardous in winter driving conditions. Audio at ~10:43. Claimant decided that he was going to leave was going to leave work and notified the employer that he was leaving effective August 15, 2017. Claimant did not consider moving from La Pine to a residence located nearer to the Sisters workplace because he owned the La Pine residence and had built it.

(6) On August 15, 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 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.

At hearing, the employer's witness largely agreed with claimant's description of the miles he needed to commute, the time it took him to commute in spring and summer road conditions and the expected road conditions of snow and ice during the winter. Audio at ~16:48, ~18:21, ~18:45, ~20:50. A round trip commute each work day of approximately three hours under good road conditions would be onerous as a matter of common sense. Under the anticipated winter road conditions that claimant described and the employer did not dispute, the commute would be significantly more onerous and more dangerous, also as a matter of common sense. The preponderance of the evidence in this record shows that claimant's commute to work constituted a grave circumstance.

As to reasonable alternatives to quitting work, there do not appear to have been any. Claimant was correct that making a request to have the employer change his schedule would not have lessened the distance or driving time needed for him to commute his work. Audio at ~13:15. It was undisputed that claimant would not have been allowed to perform work for the employer at any other location that in the workplace in Sisters. Audio at ~12:36. The employer was not able to install amenities in the workplace that would have allowed claimant to stay overnight at the workplace and avoid making a daily commute. Audio at ~20:06. While claimant had the ability to move from La Pine to a residence closer to the Sisters workplace, it was not reasonable to expect him to do so given that he had built and owned his residence in La Pine, given the lack of evidence that claimant could have secured an affordable residence nearer to Sisters, and given that he would have had to continue making the unreasonably long commute for a significant period of time in order to have completed such a move. It is therefore more likely than not that claimant did not have reasonable alternatives to leaving work when he did.

Claimant showed good cause for leaving work. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-95086 is affirmed.

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

DATE of Service: <u>November 27, 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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