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BYE: 201752

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-1344

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 142506). Claimant filed a timely request for hearing. On November 6, 2017, ALJ Amesbury conducted a hearing, and on November 9, 2017 issued Hearing Decision 17-UI-96617, affirming the Department's decision. On November 17, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant asked EAB to postpone its review of this case until claimant can "secure discovery to prove his assertions without question." Claimant's Written Argument at 3. Claimant did not assert what evidence he planned to obtain through "discovery," or why he did not already obtain such evidence and offer it at hearing. Claimant also submitted new information with his argument that he did not offer at hearing. Claimant provided no explanation of the relevance of the new information or reason why he did not offer it at hearing.

EAB may consider new information that is not part of the hearing record if the information is relevant and material to EAB's determination and the party offering the information demonstrates that circumstances beyond the party's reasonable control prevented it from offering the information at the hearing. OAR 471-040-0090 (October 29, 2006). Because claimant did not explain the relevance of the new information he provided or planned to provide and did not explain why he did not offer it at hearing, claimant did not show that the information is relevant and material to EAB's determination or that circumstances beyond claimant's reasonable control prevented claimant from offering the information at hearing. Therefore, EAB considered claimant's written argument only to the extent it was based on the record and denies claimant's requests to consider new information and postpone review of this case to allow claimant time to submit new information.

FINDINGS OF FACT: (1) RL Bishop Construction, Inc. employed claimant from mid-May 2017 until May 26, 2017 as a truck driver.

(2) On May 21, 2017, claimant went to his work site and inspected his truck for the day. Claimant observed that six or seven of the 12 tires appeared as though they did not meet the minimum legal tread depth for safe tires. Exhibit 2 at 5. Claimant considered the tires unsafe, but drove the truck.

(3) On May 22, 2017, claimant showed the treads he considered unsafe to the employer's owner. Claimant thought the owner intended to have the tires replaced. The owner contracted with a tire service to maintain the employer's tires. The tire service inspected the tires each Saturday and repaired or replaced them if necessary. Claimant drove the truck that day.

(4) On May 24, 2017, claimant drove for the employer again and the trainer who rode with claimant told claimant he could haul six to seven loads to the assigned location during his shift. Claimant was dissatisfied with the trainer's comment because he calculated the time to travel the distance at a safe speed and did not believe he could safely deliver more than five or six loads in one shift. On May 24, claimant delivered five loads. Claimant did not complain to the employer about how many trips the trainer told him he could complete in one shift. The owner did not direct drivers to complete a certain number of loads and expected them to "go at their own pace," depending on wait times to load, traffic and other factors. Transcript at 30. The employer was satisfied with the work performance of another driver who regularly completed five loads per day. The owner did not tell claimant he would be discharged if he did not complete more than five loads per day.

(5) On May 24, 2017, claimant noticed that the quarry overloaded his truck. Claimant did not offload any of his load when he saw he was above the legal permissible weight. The employer did not direct drivers to drive overweight.

(6) On May 25, 2017, claimant was unable to work due to illness.

(7) On May 26, 2017, claimant sent the employer an email stating that he quit work because he would not drive a truck with unsafe tires and would not drive too fast or overload his truck.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude claimant voluntarily left work without 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.

Claimant quit because he did not want to drive a truck that had poor tread on the tires, and refused to drive too fast or overweight. We find claimant's testimony credible as to the condition of the tires on his truck because of the detailed testimony he provided based, in part, on the notes he took about the condition of the tires on May 21. See Exhibit 2. Moreover, claimant mentioned the poor condition of

the tires to the owner, who appeared to agree the tires looked like they should be replaced. Claimant faced a grave situation because he was assigned to drive a truck that did not have a safe amount of tread on some of the tires. However, claimant had the reasonable alternative of waiting until Saturday, May 27, to see if the tire service repaired or replaced the tires. If not, claimant could have complained to the owner again or asked to drive a different truck with suitable tire tread. Thus, to the extent claimant quit work due to having to drive a truck with unsafe tires, claimant failed to show that he had no reasonable alternative but to leave work when claimant did.

To the extent claimant quit work on May 26 because he perceived the employer as requiring him to drive too fast or with too heavy a load, claimant did not show that those conditions posed a grave situation for him when he quit. Claimant argued in his written argument that many of the truck weight tags from the period in question would show the trucks were overweight. Claimant's Written Argument at 3. However, what is relevant is whether the employer required claimant to drive overweight trucks, and not whether other employees perhaps did so. It is undisputed that claimant's trainer, and not the owner, encouraged claimant to complete six to seven loads per day and to drive over weight. Claimant did not show that the owner ever required him to do so. The record does not show that claimant faced any adverse employment action when he completed only five loads, or that the trainer instructed him to overload his truck. If claimant's trainer had reprimanded claimant for completing only five loads or refusing to overfill his truck, claimant could have complained to the owner. The persuasive evidence shows that claimant did not complain to the owner about those matters until he quit. Based on the employer's testimony that it had received no violations for the past ten years, we do not find that it would have been futile for claimant to discuss his concerns with the owner first as a reasonable alternative to quitting. *See* Transcript at 24-25.

Claimant did not have good cause to voluntarily leave work when he did. He therefore is disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 17-UI-96617 is affirmed.

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

DATE of Service: <u>December 20, 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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