

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0282

Hearing Decision 18-UI-104350 Reversed & Remanded
Decisión de Audiencia 18-UI-104350 Revocada y Remitida para Otra Audiencia

Hearing Decision 18-UI-104352 Affirmed ~ Late Request to Reopen Denied
Decisión de Audiencia 18-UI-104352 Confirmada ~ Petición Atrasada para Volverse a Abrir es Negada

PROCEDURAL HISTORY: On October 23, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with Mr. Truck Wash without good cause (decision # 120515). On October 24, 2014, the Department served notice of another administrative decision assessing a \$3,228 overpayment, \$484.20 monetary penalty and 24 penalty weeks (decision # 195031). Claimant filed timely requests for hearing on both decisions. For unknown reasons, the Office of Administrative Hearings (OAH) did not process claimant's request for hearing on decision # 120515 or send him a notice of hearing. On November 7, 2014, OAH served notice of a hearing on decision # 195031 scheduled for November 21, 2014, at which time claimant failed to appear. On November 26, 2014, ALJ S. Lee issued Hearing Decision 14-UI-29462, dismissing claimant's request for hearing on decision # 195031 for failure to appear. On December 16, 2014, Hearing Decision 14-UI-29462 became final without claimant having filed a timely request to reopen the hearing. On January 5, 2018, claimant resubmitted his request for hearing on decision # 120515 and filed a late request to reopen the November 21, 2014 hearing on decision # 195031. On February 22, 2018, ALJ S. Lee held two hearings, and on March 2, 2018, the ALJ issued Hearing Decision 18-UI-104350, affirming decision # 120515 and concluding that claimant voluntarily left work without good cause, and Hearing Decision 18-UI-104352, denying claimant's late request to reopen the hearing on decision # 195031. On March 19, 2018, claimant filed timely applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 18-UI-104350 and 18-UI-104352. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0282 and 2018-EAB-0284).

FINDINGS OF FACT: (1) Claimant received notice of the November 21, 2014 hearing and did not attend the hearing because he was enrolled in a training program in Washington and forgot about it. Claimant received notice of Hearing Decision 14-UI-29462, which dismissed his request for hearing on

decision # 195031; he did not contact OAH about the decision or follow up on it because he assumed the case would ultimately be resolved in his favor.

(2) In January 2015, claimant contacted the Department and had a conversation in which they discussed the overpayment at issue in decision # 195031. Between January 2015 and December 2017, claimant contacted the Department or spoke with Department employees on at least nine occasions. Many of those calls included discussions of the overpayment or penalties at issue in decision # 195031. He did not file a request to reopen the November 21, 2014 hearing until January 5, 2018, over three years after the deadline to request to reopen expired.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's late request to reopen the hearing on decision # 195031 must be denied. We disagree with the ALJ that claimant voluntarily left work without good cause, however, and conclude that the matter must be set aside and remanded for development of the record.

Late request to reopen. ORS 657.270(5) provides that any party who failed to appear at a hearing may request that it be reopened, and that the hearing may be reopened if the party files the request within 20 days and shows good cause for failing to appear. Claimant did not meet the 20-day deadline to request reopening, because the deadline for claimant to request reopening of the November 21, 2014 hearing on decision # 195031 expired on December 16, 2014.

ORS 657.875 provides that the 20-day deadline may be extended a reasonable time upon a showing of good cause. "A reasonable time" is defined as seven days after the circumstances that prevented a timely filing ceased to exist. OAR 471-040-0041(3) (February 10, 2012). As early as January 2015 claimant knew he had missed a hearing and knew he had an overpayment that he had to repay. He did not request reopening until January 2018, three years later. Because claimant waited three years to request reopening, he did not meet the seven-day "reasonable time" requirement. He is therefore not entitled to reopen the hearing on decision # 195031, and his request to reopen is denied.¹

Voluntary leaving. 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). OAR 471-030-0038(5)(b)(A) states that "[l]eaving work without good cause includes, but is not limited to, [l]eaving suitable work to seek other work."

The ALJ found as fact that claimant quit his job "because he felt the pay and lack of benefits were not enough to keep the position." Hearing Decision 18-UI-104350 at 1-2.² The ALJ ultimately concluded that although the wages were low and claimant had previously received benefits, claimant "made the

¹ If on remand or in further proceedings it is determined that claimant was not disqualified from receiving unemployment insurance benefits because of his work separation from Mr. Truck Wash during the weeks covered in decision # 195031, the existence or amount of the overpayment, and any penalty calculations based upon the overpayment amount, are subject to modification by the Department.

² To any extent he did quit work due to the lack of protective equipment the quit was without good cause because he did not discuss his concern with the employer or give the employer the opportunity to resolve the concern, which was a reasonable alternative to quitting under the circumstances described at the hearing.

position suitable by accepting it,” and therefore left suitable work to seek other work, which is leaving without good cause. *Id.* at 4. We disagree.

It is unrefuted on the facts of this case that claimant did not knowingly agree to work under any particular terms of employment. In fact, on the one day he performed services for the employer in exchange for remuneration, he thought he was attending an unpaid orientation to determine what the working conditions were.³ Claimant therefore did not implicitly make the position suitable by accepting it, and the record suggests the work might not have been suitable for claimant in light of his work history and prior earnings.

ORS 657.190 provides that factors to consider when determining whether any work is suitable for an individual include, among other things, “the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual.”⁴ In order to determine whether or not unskilled, minimal paying labor was or was not suitable for claimant, the ALJ was required to inquire further.

Claimant identified perceived risk to his health and safety. Did claimant suffer adverse health effects during his shift of work? Were there any other conditions that he felt posed a risk to his health or safety, and what were they? Did claimant have the physical fitness needed to perform the work at Mr. Truck Wash? Did claimant have any prior education, training, or certifications in any other field of work? What was claimant’s work experience before working for Mr. Truck Wash, for example, when he worked at Safeway, what was his job? Did he usually work in unskilled labor jobs, or was he a skilled worker? Claimant testified his previous job paid \$24 or \$25 per hour. What rates of pay did his other, prior jobs pay him? How many years had he been working for rates of pay exceeding \$20 per hour? How long had claimant been unemployed prior to trying the job with Mr. Truck Wash? How far was the job located from claimant’s residence? Were there jobs in his customary field of work? Were they near his residence? What was the job market like? What were claimant’s prospects for securing skilled work paying over \$20 per hour within a reasonable distance of his residence? On remand, the ALJ should ask these and any other questions she deems necessary to determine the suitability of the work for claimant, and inquire of the employer or any other party to the extent she deems necessary.

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 the work claimant left to

³ The record conclusively establishes that claimant was employed by the employer and did in fact perform services for remuneration; claimant’s performance of the work under the circumstances described did not, however, mean that he was aware of or knowingly accepted terms of employment that had not been made clear to him prior to doing so.

⁴ ORS 657.195 also provides that work is not suitable if the position is vacant due to a labor dispute, if the remuneration, hours or other conditions are substantially less favorable to the individual than those prevailing for similar work in the locality, or if claimant would be required to join or resign from a labor organization. However the record does not suggest that these factors are relevant to the suitability of the work at Mr. Truck Wash for claimant.

seek other work was, or was not, suitable, Hearing Decision 18-UI-104350 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 18-UI-104350 is set aside, and this matter remanded for further proceedings consistent with this order. Hearing Decision 18-UI-104352 is affirmed.

***DECISIÓN:** Decisión de la Audiencia 18-UI-104350 se pone a un lado, y esta materia se remite para otros procedimientos constantes con esta orden. Decisión de la Audiencia 18-UI-104352 queda confirmada.*

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

DATE of Service: April 11, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 18-UI-104350 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:** La falta de cualquier partido de aparecer en la audiencia en la remisión no reinstalará el 18-UI-104350 de la decisión de la audiencia ni volverá esta materia a EAB. Solamente un uso oportuno para la revisión de la decisión subsecuente de la audiencia hará esta materia volver a 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.

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***NOTA:** Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.*

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.