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

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EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0381

Reversed & Remanded

PROCEDURAL HISTORY: On February 15, 2018, the Oregon Employment Department (the Department) served notices of two administrative decisions; one concluding claimant quit working for Alliance Concrete Enclosures Inc. without good cause (decision # 73048), and the other concluding claimant quit working for Bradleys Excavation Inc. without good cause (decision # 74029). Claimant filed a timely request for hearing on each decision. On March 22, 2018, ALJ Scott conducted separate hearing on decisions # 73048 and # 74029. On March 26, 2018, the ALJ issued Orders No. 18-UI-105974 and No. 18-UI-105976 concluding that the evidence as to whether claimant quit or was discharged by the employers, and therefore whether the work separations were disqualifying, was in equipoise, and that claimant therefore was not disqualified from benefits because of the work separations. On April 16, 2018, the Department filed timely applications for review of Order Nos. 18-UI-105974 and 18-UI-105976 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 18-UI-105974 and 18-UI-105976. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0381 and 2018-EAB-0382, respectively).

EAB considered the Department's written argument in reaching this decision.

CONCLUSIONS AND REASONS: Order Nos. 18-UI-105974 and 18-UI-105976 are set aside, and the matters remanded for further development of the record.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving; if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a

discharge.[1] ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work, which is defined, in pertinent part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee.[2] Likewise, ORS 657.176(2)(c) requires a disqualification from benefits if claimant quit work without good cause, which is defined, in pertinent 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.[3]

The ALJ found as fact that claimant's employment with both employers ended on September 29, 2017.[4] The ALJ concluded that claimant's work separations were not disqualifying, reasoning that because the parties "flatly contradicted" each other's assertions and "neither party was more credible than the other," "the evidence stands in equipoise" and was therefore insufficient to establish that claimant's work separations should be disqualifying.[5] The Department requested review of the ALJ's orders, arguing that although "[t]he parties disagreed regarding the ultimate separation type . . . one party or the other ultimately decided there was no longer a relationship otherwise [claimant] would still be employed," and "the Administrative Law Judge erred in this determination by failing to fully develop the record to make a determination of the type of separation in this case." [6] We agree with the Department.

The consolidated record shows that the employer in Case No. 2018-UI-79357, Alliance Concrete Enclosures Inc. and in Case No. 2018-UI-79365**,** Bradley Excavation Inc. were both owned by the same principals and managed by Vice President SB. Audio Record, Case No. 2018-UI-79365, ~0:00 to 1:30. At hearing, SB presented evidence, and the ALJ found as fact, that the employers were both busy all through August and September of 2017 and had work available for claimant, that SB called claimant on his cell phone approximately six to ten times from the middle of August through September, did not reach claimant "live" on those occasions, and so on each occasion left claimant a voice message telling him he had work available for him and requesting a return call.[7] Claimant presented evidence, and the ALJ also found as fact, that SB had claimant's correct cell number, that cell phone was in service throughout the time in question, that claimant's voice mailbox was set up, and that claimant checked his messages regularly because he wanted to work but did not receive any alleged messages from SB.[8] The ALJ further found that because the employers did not receive any return calls from claimant, and

[1] OAR 471-030-0038(2) (August 3, 2011).

[2] OAR 471-030-0038(3)(a).

[3] *See* OAR 471-030-0038(4); *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000).

[4] Order Nos. 18-UI-105974 and 18-UI-105976 at 1.

[5] *Id.* at 3.

[6] *See* Department's written argument.

[7] Order Nos. 18-UI-105974 and 18-UI-105976 at 2.

[8] *Id.*

claimant allegedly did not receive SB's voice messages, the employers concluded that claimant quit, and claimant concluded he had been discharged.

On remand, the ALJ should inquire, and parties should be prepared to present evidence regarding, what the parties' respective cell phone records show about any calls made or received between the parties during the weeks in question, specifically the dates, times and length of the calls in question, not only to determine the accuracy of the parties' testimony on this issue but also to more accurately determine the most likely date of the work separation. The ALJ should also inquire of the employers regarding whether its time records show the dates on which claimant last worked for either employer leading to his final paycheck and verification regarding the date of that paycheck. The ALJ should also inquire if SB's cell phone to which claimant allegedly made his calls to inquire about available work had a voice mail box set up in August and September 2017.

The intent of this decision is not to constrain the ALJ to asking only questions related to the specified subject matter. Therefore, in addition to asking the questions suggested, the ALJ should ask any follow-up questions she deems necessary or relevant to the nature of claimant's work separations and whether or not they should be disqualifying. The ALJ should also allow the parties to provide any additional relevant and material information about the work separations, and to cross-examine each other as necessary. Should it become clear to the ALJ during the remand hearing that claimant either quit work or was discharged, the ALJ should conduct a full and fair inquiry into whether the discharge or voluntary leaving were disqualifying events.

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 the nature of claimant's work separations and whether or not they were disqualifying, Order Nos. 18-UI-105974 and 18-UI-105976 are reversed, and these matters are remanded for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order Nos. 18-UI-105974 and 18-UI-105976 or return these matters to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

DECISION: Order Nos. 18-UI-105974 and 18-UI-105976 are set aside, and these matters remanded for further proceedings consistent with this order.

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

DATE of Service: <u>May 17, 2018</u>

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