

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0570**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On April 24, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 104329). Claimant filed a timely request for hearing. On May 15, 2018, ALJ Shoemake conducted a hearing, and on May 21, 2018 issued Order No. 18-UI-109766, concluding claimant was an employee of Cabana Boy Pool Works and voluntarily left work with good cause. On May 31, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered Cabana Boy's argument when reaching this decision, but only to the extent that it was relevant and based upon the hearing record. ORS 657.275; OAR 471-041-0090 (October 29, 2006). EAB did not consider the new information Cabana Boy provided in its argument; Cabana Boy may present that information for consideration at the hearing on remand, providing that Cabana Boy complies with the instructions the Office of Administrative Hearings provides in its notice of hearing regarding submission of documentary evidence.

**CONCLUSIONS AND REASONS:** This matter is set aside, and remanded for additional proceedings.

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" for leaving "work" 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). 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.

In Order No. 18-UI-109766, the ALJ found as fact that Cabana Boy "employed" claimant to perform pool service and maintenance work, and concluded that claimant had good cause to quit "work" with Cabana Boy to accept an offer of work with a different employer. See Order No. 18-UI-109766 at 1, 2. We agree with the ALJ that claimant's reasons for ending his job satisfy the definition of "good cause"

as restated, above, and therefore would be a non-disqualifying separation from “employment.” However, that definition only applies to “employees” in “subject employment” who leave “work,” and the record developed at the hearing fails to establish whether or not claimant was an employee in “subject employment” when he worked for Cabana Boy.

“Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a) (August 3, 2011). An “employee” is “any person, including aliens and minors, employed for remuneration or under any contract of hire, written or oral, express or implied, by an employer subject to this chapter in an employment subject to” ORS chapter 657. “Employment subject to” ORS chapter 657 does not include independent contractors. ORS 657.040. Additionally, ORS 657.044 provides:

(1) As used in this chapter [ORS chapter 657], “employment” does not include service performed for:

(a) A corporation by corporate officers who:

(A) Are directors of the corporation;

(B) Have a substantial ownership interest in the corporation; and

(C) Are members of the same family.

(b) A corporation by an individual who is the sole corporate officer and director of the corporation and who has a substantial ownership interest in the corporation.

(c) A limited liability company by a member, including members who are managers, as defined in ORS 63.001.

(d) A limited liability partnership by a partner as described in ORS chapter 67.

(2)(a) The exclusion under subsection (1)(a) or (b) of this section is effective only if the corporation elects not to provide coverage for the individuals described respectively in subsection (1)(a) or (b) of this section.

(b) The election must be in writing and is effective on the first day of the current calendar quarter or, upon request, on the first day of the calendar quarter preceding the calendar quarter in which the request is submitted.

\* \* \*

(4) As used in this section, “members of the same family” means persons who are members of a family as parents, stepparents, grandparents, spouses, sons-in-law, daughters-in-law, brothers, sisters, children, stepchildren, adopted children or grandchildren.

The record developed by the ALJ established that it is more likely than not that claimant was not an independent contractor when he performed services for Cabana Boy, but claimant testified that he accepted the job to become a “partner” with Cabana Boy. Audio recording at ~ 20:30. One of Cabana Boy’s witnesses testified that claimant “was a minority partner, bought a minority partner interest in Cabana Boy.” Audio recording at ~ 26:20. The record therefore establishes that claimant likely had some sort of partnership interest in the Cabana Boy business and worked for the business in that capacity. The record does not, however, show whether the business was a corporation and claimant was a corporate officer, whether the business was a limited liability company of which claimant was a

member, whether there was a limited liability partnership, or whether the exclusions set forth in ORS 657.044 otherwise should or should not apply to the services claimant performed.

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 or not claimant's work with Cabana Boy was as an "employee" in "subject employment," Order No. 18-UI-109766 is reversed, and this matter is remanded for development of the record.

On remand, we recommend that the Office of Administrative Hearings provide notice of the remand hearing to the Oregon Employment Department so the Department may have a representative appear to testify regarding the subject employment issue. We further recommend that the parties submit documentation of any partnership agreements, articles of incorporation, documentation of the business's limited liability status, and the like, into the record, as such evidence might be dispositive of the issue on remand.

**DECISION:** Order No. 18-UI-109766 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: July 5, 2018**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-109766 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

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