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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-0609

Order No. 18-UI-111092 Reversed – Late Request for Hearing Allowed, No Disqualification
Order No. 18-UI-111181 Reversed – No Overpayment

PROCEDURAL HISTORY: On March 30, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 121916). On April 19, 2018, decision # 121916 became final without claimant having filed a timely request for hearing. On May 10, 2018, the Department served notice of an administrative decision, based on decision # 121916, concluding that claimant was overpaid \$247 in unemployment insurance benefits and was liable to repay that amount to the Department (decision # 100153). On May 15, 2018, claimant filed a late request for hearing on decision # 121916 and a timely request for hearing on decision # 100153. On June 8, 2018, ALJ Scott conducted two hearings. On June 11, 2018, ALJ Scott issued Order No. 18-UI-111092, dismissing claimant’s late request for hearing. On June 13, 2018, ALJ Scott issued Order No. 18-UI-111181, affirming decision # 100153. On June 18, 2018, claimant filed applications for review of Order Nos. 18-UI-111092 and 18-UI-111181 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 18-UI-111092 and 18-UI-111181. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0609 and 2018-EAB-0610).

FINDINGS OF FACT: (1) Laborworks, Inc., a temporary employment agency, employed claimant as a production worker for approximately two hours on February 22, 2018.

(2) Claimant had prior experience in warehouse and production work. The employer assigned claimant to work at a jerky production plant in a “float” position. Audio recording at ~ 32:20. Claimant reported to work and was given plastic protective gear, which included boots, plastic gloves and a white coat. Audio recording at ~ 40:45. Paper masks to cover her mouth and nose were available, and claimant used one. She was put on a production line, where the work involved placing “gobs and gobs of bloody meat” on a conveyor belt and flattening it. Audio recording at ~ 21:10.

(3) The majority of claimant's coworkers did not speak much English, and claimant did not speak Spanish, so they were unable to effectively communicate. Claimant was placed alongside a Spanish-speaking coworker who was assigned to train her how to do the work. Claimant did not understand the coworker and had difficulty figuring out what she wanted claimant to do.

(4) At one point within the first couple of hours of work, claimant started to choke. She felt she could not cough because she did not want to cough on the meat and could not cough into her hands because they were covered in blood. Tears began to pour out of claimant's eyes. Claimant asked coworkers where the restroom was so she could cough and take care of herself. She had difficulty communicating with anyone because they spoke different languages. One predominantly Spanish-speaking coworker said in elevated tones, "just wait wait wait, wait for break." Audio recording at ~ 22:00.

(5) Claimant felt unable to wait for a break. She began to leave the production line and removed her gloves. She was stopped by another employee, who spoke English. She asked the employee where the restroom was and he indicated it was on the other side of the production plant, but she could not leave the production line because she would have to remove the protective gear and that the break was in 15 minutes. He asked if she needed to wipe her eyes. Claimant said she really needed to use the restroom. He said she could use the restroom at break time, and gave her something to use to wipe her face.

(6) Claimant wiped her eyes, put her plastic gloves back on, and returned to the production line. After she resumed working, bloody meat juice was slung onto her face and nearly hit her eye. There was no protective face shield gear available that would protect her eye area from blood. Claimant was unable to wipe her face because her gloves were bloody and she did not have anything to use to wipe her face.

(7) Claimant had not been told who the supervisor was, did not know where to go or who to speak with about her safety concerns. She could not communicate with the majority of her coworkers because of the language barrier, and did not know anyone at the jerky production facility with whom she could discuss her concerns. At break, claimant quit her job and left the workplace. She did not tell anyone she quit until she contacted the employer a couple of days after she left.

(8) After quitting her job, claimant filed weekly claims for benefits for the weeks of February 18, 2018 through March 3, 2018 (weeks 8-18 to 9-18). The Department paid claimant \$247 in benefits for those weeks.

CONCLUSIONS AND REASONS: We disagree with the ALJ that claimant's late request for hearing was denied. Claimant voluntarily left work with good cause, and was not overpaid benefits.

Late Request for Hearing. In Order No. 18-UI-111092, the ALJ dismissed as untimely claimant's request for a hearing on decision # 121916, the decision concluding that she was disqualified from receiving benefits for voluntarily leaving work. The ALJ decided to do so, however, only after she conducted a full hearing on the merits of the decision. Thus, in actual fact, the ALJ allowed claimant's request for a hearing. The conclusion the ALJ reached in Order No. 18-UI-111092 – that claimant failed to show good cause for filing a late hearing request – is therefore inconsistent with the record. EAB has repeatedly held that it is plain error to dismiss a request for hearing or a request to reopen a hearing after a hearing on the merits has been conducted. In such cases, EAB has concluded that the requirements of due process can only be met if EAB considers the merits of the administrative decision at issue. *See,*

e.g., Appeals Board Decision, 10-AB-3722 (December 3, 2010); Appeals Board Decision 2014-EAB-1665 (October 31, 2014); Appeals Board Decision 2016-EAB-1281 (November 17, 2016). Consistent with our reasoning in those cases, claimant's late request for hearing is allowed, and we will determine whether claimant should be disqualified from receiving benefits for voluntarily leaving work.

Voluntary Leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she 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 her employer for an additional period of time.

Claimant voluntarily left work because the working conditions were unsafe for her. She was exposed to animal blood, was not permitted to relieve herself or use the restroom when she needed it, did not have protective gear to protect her eyes from the animal blood that was slung around the production line, did not have materials at hand to use to wipe blood from her face or eyes if needed, and was unable to effectively communicate with her coworkers about the work, the facility, or her needs. No reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would continue working under those conditions. While claimant left work without exploring alternatives to leaving, given the nature of the work, the fact that claimant was a temporary worker who had already missed a shift and had only worked two hours, and the unchangeable circumstances associated with doing the work, the record fails to show by a preponderance of the evidence that the employer might have been able or willing to accommodate claimant's concerns had she voiced them. Claimant therefore quit work due to a grave situation and appears to have had no reasonable alternatives to quitting when she did. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

Overpayment. ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657.

Claimant was deemed ineligible for benefits based on the Department's and ALJ's conclusions that she voluntarily left work without good cause during the week of February 18th through February 24th, was disqualified from receiving benefits that week and the following week (weeks 8-18 and 9-18), and was therefore overpaid \$247, the amount of benefits she received during those two weeks. Based upon our conclusion, above, that claimant was *not* disqualified from receiving benefits because of her voluntary leaving, however, claimant was not overpaid, and she is therefore not liable to repay those benefits to the Department.

DECISION: Order Nos. 18-UI-111092 and 18-UI-111181 are set aside, as outlined above.

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

DATE of Service: June 27, 2018

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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