

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0636

Reversed & Remanded

PROCEDURAL HISTORY: On April 20, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 74759). Claimant filed a timely request for hearing. On May 29, 2018, ALJ Snyder conducted a hearing, and on June 6, 2018 issued Order No. 18-UI-110803, affirming the Department's decision. On June 25, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not in the record, and identified certain witnesses whom claimant contended would corroborate aspects of his hearing testimony. The EAB does not generally consider new information offered for the first time on review. EAB has remanded this matter for a hearing, for further development of the evidentiary record on certain issues. Claimant may attempt to call these witnesses to testify and offer this new information during the remand hearing, and the ALJ will at that time determine whether either is non-duplicative of information already in the record, relevant to the issues on which the matter has been remanded and should be considered.

CONCLUSIONS AND REASONS: Order No. 18-UI-110803 is reversed and this matter is remanded for further development of the record.

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) (January 11, 2018). 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-110803, the ALJ concluded that claimant voluntarily left work without good cause. Among other things, the ALJ reasoned that, although claimant testified that he left work due to the unsafe condition of the van that he was assigned to drive, including that its speedometer and fuel gauge did not function, claimant did not persuasively rebut the testimony of the manager that he had never required claimant to drive the van and did not know that claimant was doing so when the gauges were not working. Order No. 18-UI-110803 at 2. The ALJ also found that claimant did not persuasively rebut the manager's testimony that he had the alternative of driving the employer's fully functional and safe box truck rather than the allegedly unsafe van. Order No. 18-UI-110803 at 2. As such, the ALJ further reasoned that claimant did not show, as required to avoid disqualification, that he faced "a situation so grave that he had no reasonable alternatives to leaving work." Order No. 18-UI-110803 at 2. However, the ALJ did not develop the record sufficiently at hearing to support the conclusion that claimant voluntarily left work without good cause.

At hearing claimant discussed various dissatisfactions he had with the employer when he quit work, including a lack of safety due to non-functioning gauges in the van he drove in the mornings, concerns over the rural nature of part of his route, a recent scheduling change that allegedly required him to drive during rush hour and extend the length of his shift until 7:00 p.m. and recently being accused by managers of taking hour long lunches and not diligently working during his afternoon shifts. The ALJ should make a sufficient inquiry of claimant to determine the proximate cause that he decided to leave work when he did and the final straw that precipitated his decision to leave work. If any reasons other than the non-functioning gauges were a significant contributing factor to claimant's decision to leave work, the ALJ should explore those reason(s) sufficiently to determine whether alone or in combination they presented a situation of gravity for claimant for which he had no alternative but to leave work.

With respect to the van, the ALJ should confirm that the only non-functioning gauges were the speedometer and the fuel gauge and if claimant contends other gauges were non-functional or there were any other conditions that made the van unsafe, what those conditions were. The ALJ should inquire of claimant whether the manager's testimony that claimant had the discretion to drive the box truck or another fully functioning and safe vehicle instead of the van with the defective gauges was correct. Audio at ~ 24:11. If no, the ALJ should further ask claimant to explain what factors prevented him from driving the box truck or a safe vehicle equipped with functioning gauge at all times, including during the mornings. If yes, the ALJ should ask claimant why he still chose to drive the van and to describe the circumstances that prevented or discouraged him from using the box truck or another fully equipped vehicle throughout his workday in preference to the van. As appropriate, the ALJ should elicit relevant information on the same issues from the employer.

The ALJ should inquire of the employer's witness how and when the employer first became aware that the gauges in the van were not consistently functioning, why and when the employer decided to "deadline" the van rather than having its gauges repaired and to explain why the employer did not repair the faulty gauges in the interim between when it first became aware and when it decided to "deadline" the van. Audio at ~25:32. The ALJ also should ask more specific questions of claimant than she did at the hearing to determine if claimant raised safety concerns about the van with his manager other than in the pre and post-trip inspection reports he completed, including approximately when he did so, how he did so, what he told the manager and the response of the manager. The ALJ should follow up the information that claimant provides with the employer's witness, including inquiring how the manager could have thought that no employee was driving the van with non-functioning gauges when claimant's

pre and post inspection reports indicated otherwise, how frequently the gauges in the van supposedly malfunctioned and the reason that the van was not removed from the employer's fleet due to the non-functioning or intermittent functioning of its gauges.

The ALJ also should explore with claimant the hazards that he experienced from the non-functioning gauges in the van and the risks of driving the van on his route. The ALJ should ask claimant to describe any specific harms he sustained from driving the van with non-functioning gauges such as, for example, inadvertently speeding, being issued tickets, having accidents or near-accidents, running out of fuel in rural or remote parts of his route, etc. The ALJ also should follow up on claimant's testimony at hearing that his travelling in rural areas on dirt roads that were outside his GPS signal in the van with the non-functioning gauges "sent [his] anxiety through the roof." Audio at ~ 9:36. The ALJ should ask claimant what he feared and the nature of his concerns. The ALJ should ask claimant to describe the anxiety symptoms he experienced and how, if at all, they interfered with his work or personal life. The ALJ should further inquire into any medical evaluation or treatment claimant sought for the anxiety symptoms, when he did so, any diagnosis he received and what forms of treatment, if any, that he received. The ALJ's inquiry should be sufficient to enable a determination of whether claimant's anxiety constituted a grave circumstance and if it was a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h).

Finally, the ALJ should have pursued information that is more specific from both claimant and the employer's witnesses as to whether and how many times claimant complained or tried to complain to the employer's human resources department about the issues that caused him to quit. The ALJ should ask claimant how many times he complained or tried to complain to the employer's human resources department, when he tried to make that contact, what phone number(s) he called, what topic(s) he wanted to discuss, if he was able to speak with a human resources representative, the substance of what was discussed, what intervention he wanted from a human resources representative and the response, if any, from the human resources representative. The ALJ should inquire of the employer's witness(es) if the employer has any record of claimant having called the human resources department, the date of the call, the reason for the call, what action claimant wanted from human resources and the response, if any, from the human resources department. As appropriate, the ALJ should follow up the information that is elicited to determine whether claimant reasonably pursued the alternative of contacting the employer's human resources department.

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); *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 claimant had good cause to leave work when he did, Hearing Decision 18-UI-110803 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 18-UI-110803 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: July 27, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No.18-UI-11083 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.