

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0150**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On December 4, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work with good cause (decision # 125737). The employer filed a timely request for hearing. On January 16 and January 25, 2019, ALJ Frank conducted a hearing, and on February 1, 2019 issued Order No. 19-UI-123865 reversing the Department's decision. On February 8, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information not presented during the hearing. Claimant did not show, as required by OAR 471-041-0090(2) (October 29, 2006), that factors or circumstances beyond his reasonable control prevented him from offering this information at the hearing. However, given EAB's disposition of this matter, claimant may offer this and other information or documents for consideration on remand and it will be admitted into evidence if the ALJ determines it is relevant to the issues on which this matter has been remanded. If any party wishes to offer additional documents for consideration at the remand hearing, that party is advised to follow all instructions set out on the notice of the remand hearing, including that any additional documents must be provided to the other parties and the ALJ prior to the date of the scheduled hearing.

**FINDINGS OF FACT:** (1) Nexgen Team LLC employed claimant as a lube driver from November 2016 until October 5, 2018.

(2) On May 19, 2017, while driving one of the employer's delivery trucks to Eugene, Oregon, a police officer issued a citation to claimant because that truck exceeded the maximum allowable axle weight limit.

(3) On approximately September 26, 2018, claimant was assigned to drive a truck that he believed was loaded with more weight than it was legally allowed to haul. Claimant did not drive that truck.

(4) On approximately September 27, 2018, claimant met with the lube manager (GD) and another member of management (RG). During that meeting, claimant told the managers that he was quitting work effective October 5, 2018.

(5) On October 5, 2018, claimant voluntarily left work.

**CONCLUSIONS AND REASONS:** ALJ Order No. 19-UI-123865 is reversed and this matter is remanded for further proceedings.

In Order No. 19-UI-123865, the ALJ concluded that claimant voluntarily left work without good cause. Although claimant testified at hearing that he resigned because the employer required him to haul loads that exceeded the maximum weights allowed by law, the ALJ rejected that testimony. The ALJ reasoned that the employer “deprived this assertion of all credibility,” as allegedly evidenced by packing slips and other documents admitted into evidence as Exhibit 1. Order No. 19-UI-123865 at 2. The ALJ also discounted claimant’s testimony about why he quit work because claimant allegedly could not provide specific examples of hauling unlawful loads when the ALJ asked him to do so at hearing and allegedly did not raise the issue of the unlawful loads when he resigned. Order No. 19-UI-123865 at 2. However, there is insufficient evidence in the record to support the conclusions that the ALJ reached, and this matter must be remanded for further development of the evidentiary record.

With respect to the packing slips in Exhibit 1, none was connected to claimant on its face. As well, none included a truck number, so the driver assigned to haul the load and maximum lawful weight that the truck could have hauled on the day shown on the packing slip was not clear. The ALJ should ask if claimant drove the truck that delivered each packing slip load, if the initials “MP” at the bottom of each packing slip indicated that claimant delivered that load and, if not, how it was determined that claimant delivered the loads represented by each packing slip in Exhibit 1. The ALJ should also ask if the same truck was used to deliver each load represented by the packing slips in Exhibit 1, whether or not claimant delivered each of those loads using truck #584 and, if not, to identify, by packing slip, the truck used to deliver that load. The ALJ should inquire how the employer identified the truck used to deliver each packing slip load and how the employer determined the maximum weight that the particular truck was lawfully allowed to haul. The ALJ should ask the employer to describe how it determined the weight of each packing slip load that was handwritten on each packing slip. The ALJ should ask how it was determined that on August 1, 7, 15, 22 and 29 the only loads (and weight) that were hauled or delivered by claimant in his truck were represented by the packing slips for the products shown to have been delivered on the respective dates and that there was no other weight on the truck.<sup>1</sup>

The ALJ should ask if claimant agrees that the only product he hauled for those days was shown on the packing slips in Exhibit 1, and, if not, how much additional product he thinks he hauled or delivered, the total weight of that additional product and on what he bases his estimate. The ALJ should also inquire whether the employer actually weighed claimant’s truck or used other means to assess its loaded weight before claimant began his daily deliveries and if so, what the truck was shown to actually weigh on the dates indicated on the packing slips in Exhibit 1 and, if the employer did not assess the total weight of

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<sup>1</sup> Exhibit 1 shows that eight loads were delivered on August 1; three loads were delivered on August 8; seven loads were delivered on August 15; nine loads were delivered on August 22; and six loads were delivered on August 29. It should be noted that the total weight of the load allegedly delivered on August 29, correctly added, is 7093 pounds and not the 7143 that was listed on Exhibit 1 at p. 4.

the truck, why it did not. As these areas of inquiry suggest, the ALJ should make every effort to determine if the employer's contentions about the total weight of claimant's truck for each of the days evaluated in Exhibit 1 is accurate and a reliable estimate.

We disagree with the ALJ that claimant was unable to provide specific examples of being expected to drive his truck and make deliveries when the weight of its load exceeded the maximum allowed by law. At hearing, the ALJ did not ask claimant to give any such examples and interrupted claimant when it appeared that claimant was going to describe complaints he made to the employer about his truck being overweight prior to September 26, 2018. Audio of January 31, 2019 hearing (Audio 2) at ~11:26. The ALJ should develop the evidence more fully about claimant's concerns that the employer expected him to drive an overloaded truck. The ALJ should ask claimant to describe or approximate the number of times he was expected to drive an overweight truck, when those incidents occurred, how claimant knew or what made him suspect that the truck was overweight, by how much was the truck overweight, if claimant complained to the employer, the substance of the complaint, and the employer's response. The ALJ should also ask claimant what steps, if any, he took to avoid driving an overweight truck such as requesting the off-loading of some product and the result of that request. As appropriate, the ALJ should follow up claimant's testimony to develop the evidence to determine if claimant explored reasonable alternatives before deciding to quit work on September 27, 2018. The ALJ should further inquire as to whether it was claimant's or the employer's responsibility to ensure that the truck he drove was not overweight and the employer's protocols for ensuring that an overweight truck was not sent out on the road. As well, the ALJ should inquire about the nature of claimant's concerns about being required to drive a truck that exceeded the maximum weight lawfully allowed.

At hearing, the ALJ cut claimant off when it appeared that he was going to discuss one or more reasons for leaving work in addition to being required to drive overweight trucks. Audio 2 at ~11:26. The ALJ should develop the evidence appropriately as to claimant's intended testimony. The ALJ also did not follow up on claimant's testimony that at the September 27 meeting at which he resigned he brought up that it had taken the employer a long time to get new tires for his truck. Audio 2 at ~10:40. The ALJ should develop the evidence sufficiently to determine if claimant had other complaints about the condition of this truck, including its tires, and whether those complaints contributed to his decision to quit work. If so, the ALJ should elicit sufficient evidence to determine if claimant's circumstances due to these other concerns were grave, when they arose, what made them grave, when if at all claimant brought them to the employer's attention, and the employer's response.

In connection with the September 27 meeting at which claimant resigned, the ALJ should make a sufficient inquiry to determine how that meeting came about, what its initial purpose was, what was said by the participants at the meeting, and how it came about that claimant resigned during that meeting. As well, the ALJ failed to follow up on claimant's testimony that on September 25, two individuals discussed that claimant's truck was going to be overweight the next day and did not seek a fuller description of that discussion. Audio 2 at ~8:20. The ALJ should also inquire as to the positions of those individuals, how claimant was aware of the substance of their discussion, and whether the employer agrees with claimant's description of their discussion.

With respect to the weight of the truck claimant was scheduled to drive on September 26, the ALJ should inquire of claimant on what he based his belief that the truck was overweight and how overweight he thought it was. The ALJ should inquire of the employer whether it has any business records showing the total weight of the truck that claimant was assigned to drive on September 26,

including but not limited to scale receipts or packing slips and the maximum allowable hauling weight for that truck. If the employer does not offer those records into evidence on remand, the ALJ should inquire into its reason(s) for not doing so. As well, the ALJ should determine if the employer agrees that claimant declined to drive the truck to which he was assigned on September 26, the reason he gave to the employer for declining, the employer's response, and the substance of any further discussion between claimant and the employer on September 26. As appropriate, the ALJ should develop the evidence about whether or not there were reasonable and feasible alternatives available to claimant short of quitting work on September 27.

At hearing, claimant also brought up a trip he made for deliveries to Grants Pass sometime in July 2018 in which he testified that he was not supplied a manifest or placards. Audio 2 at ~12:35. The relevance of claimant's statements about this trip to his decision to leave work is not clear. The ALJ should ask claimant if the lack of a manifest and placards contributed to his leaving work, why their absence was a grave situation, if he complained to the employer about the lack of a manifest or placards, and, if so, the employer's response. The ALJ should develop the evidence sufficiently to determine if the lack of a manifest and placards was one time occurrence or happened on other occasions.

With respect to Exhibit 3, the citation that was issued to claimant on May 19, 2018 for having an overweight truck, the employer discounted its significance because it was single axle overload, not a total vehicle overload, and claimant was able to adjust the load at a scale so that hauling it would be lawful. Exhibit 3 at 2. The ALJ also accepted without examination the statement in Exhibit 3 that claimant had control over how his truck was loaded and the weight of each axle. The ALJ should have but did not follow up the statement in the employer's explanation that it was the driver's responsibility to load his truck correctly and to distribute evenly the weight of the load. Exhibit 3 at 2. The ALJ should ask the parties if they agree that claimant was responsible for loading his truck and ensuring that each axle was not overloaded, who actually loaded claimant's truck on that occasions (and others), and how claimant was supposed to have exerted control over loading his truck and the weight over each axle. The ALJ should also inquire how claimant knew or should have known that the truck axle was overloaded on May 19 and whether the employer took steps to determine the total vehicle weight and weight distribution per axle before the truck went out on the road for deliveries. That ALJ should develop the evidence as to whether claimant informed the employer of the citation before the hearing, when and how he did so, the employer's reaction, and whether the employer or claimant paid the citation.

At hearing, the employer's witness, after first testifying that he did not know why claimant might have been unhappy at work, then testified at some length that claimant was disgruntled at work because of some changes to business operations. Audio at ~16:00. The ALJ should have, but did not, follow up with that witness about the discrepancy in his testimony, and with claimant about whether he was unhappy at work for the reasons that the employer cited, if claimant ever mentioned those reasons to the employer, or if those reasons contributed significantly to claimant's decision to leave work.

Finally, the ALJ stated in Order No. 19-UI-123865 that he discounted the credibility of claimant's hearing testimony because on September 27 claimant allegedly did not state that he was resigning due to the expectation that he would drive a truck that was loaded to a weight in excess of the maximum allowed by law. Order No. 19-UI-123865 at 2. However, whether or not claimant cited the weight of his truck as a reason for his resignation was disputed at hearing. Audio 2 at ~11:40, ~12:15, ~21:16. Despite this inconsistency in the hearing testimony, the ALJ decided the case based in part on claimant's character without having heard testimony from claimant's character witness. Audio of January 16, 2019

hearing (Audio 1) at ~3:46. Given that the ALJ ultimately decided this matter on his assessment of the respective credibility of the parties, as a matter of fundamental fairness, he should have allowed testimony from claimant's witness as to claimant's reputation for truth as well as testimony from the witness as to any knowledge he may have about credibility of the employer or employer's witness or the accuracy of their testimony.

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 he deems necessary or relevant to the nature of claimant's work separation and whether or not it should be disqualifying. The ALJ should also allow the parties to provide any additional relevant and material information about the work separation, and to cross-examine each other as 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 claimant voluntarily left work for good cause, Order No. 19-UI-123865 is reversed, and this matter remanded for further development of the record.

**DECISION:** Order No. 19-UI-123865 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:** March 15, 2019

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-123865 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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# Understanding Your Employment Appeals Board Decision

## English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

## Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

## Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

## Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

## Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

**Khmer**

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**Laotian**

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**Arabic**

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**Farsi**

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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