EO: 200
BYE: 201920

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

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0176

Order No. 19-UI-123745 Affirmed
No Disqualification
Order No. 19-UI-123746 Affirmed
No Overpayment or Penalties

PROCEDURAL HISTORY: On December 31, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 131325). On January 2, 2019, the Department issued notice of an administrative decision assessing a $532 overpayment, $79.80 monetary penalty, and four penalty weeks (decision # 200252). Claimant filed timely requests for hearing on both administrative decisions. On January 30, 2019, ALJ M. Davis conducted a hearing at 1:30 p.m. on decision # 131325 at which the employer did not appear, and at 2:30 p.m. on decision # 200252 at which the employer appeared. On January 31, 2019, the ALJ issued Order No. 19-UI-123745 affirming decision # 131325, and Order No. 19-UI-123746 reversing decision # 200252. On February 19, 2019, the employer filed applications for review of Order No. 19-UI-123745 and Order No. 19-UI-1213746 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 19-UI-123745 and 19-UI-123746. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-0175 and 2019-EAB-0196).

In its application for review, the employer asserted that although the ALJ excluded documents the employer offered into evidence at 2:30 p.m. hearing because claimant contended that he had not been provided copies of them prior to the hearing, the employer now had in its possession a certified mail receipt showing that claimant's wife received those documents on the day of the hearing. The employer also submitted a written argument that included some of the documents it offered at the hearing, and additional documents.

With respect to the documents that the employer offered at the 2:30 p.m. hearing, however, the employer failed to provide the certified mail receipt. Assuming the employer's representation about the receipt is accurate, the documents still may have been delivered to claimant after the hearing had commenced or not in time to allow claimant a reasonable opportunity to review them. In addition, the employer's

witness at hearing stated that she was able to testify about the contents of the documents instead of having them entered in evidence at the hearing, and she did so at length. Audio of 2:30 p.m. hearing at ~9:20, ~23:57 *et seq*. For these reasons, the ALJ did not err in failing to admit the employer's documents offered into evidence at the hearing, and EAB will not consider them on review.

With respect to the additional documents and information the employer presented to EAB with its written argument, the employer failed to certify that it provided its argument to the other parties as required by OAR 471-041-0080(2) (October 29, 2006). In addition, the employer did not show that it was prevented by factors or circumstances beyond its reasonable control from appearing at the 1:30 p.m. hearing, and offering the documents and information into evidence at the hearings, as required by OAR 471-041-0090(2) (October 29, 2006). For these reasons, EAB also did not consider the employer's additional documents and information when reaching this decision.

Claimant also submitted a written argument that contained information and documents not offered during the hearings, and, like the employer, claimant failed to show that he was prevented by factors or circumstances beyond his reasonable control from offering the documents and information into evidence at the hearings as required by OAR 471-041-0090(2). For these reasons, EAB also did not consider claimant's additional information and documents when reaching this decision.

Work Separation - Order No. 19-UI-123745

FINDINGS OF FACT: (1) Paladeni Concrete, Inc. employed claimant from approximately June 2018 until November 30, 2018, last as a journeyman concrete mason.

(2) Sometime before November 20, 2018, the employer had a crew working on a job in a building constructed around 1901. Claimant was on that crew. Claimant believed that asbestos had been used in the construction of the building. At safety meetings, the general contractor on the project warned workers about the presence of unabated asbestos in the building and the dangers of exposure to it. The employer's owner was aware of claimant's concerns about asbestos, and claimant told the owner that proper precautions to limit workers' exposure to asbestos were not being taken on that job. As time passed while working on the job, claimant became increasingly concerned about his exposure to asbestos because he thought its presence was pervasive in the building.

(3) On November 20, 2018, while claimant was working at the job site, some workers on the project inadvertently blew asbestos in his face. Afterward, claimant felt sick, could not stop coughing and had difficulty breathing. Claimant told the supervisor that he was going home early and would not be reporting for work the next day, November 21, 2018, because he felt ill. Claimant did not report for work on November 21, 2018.

(3) Beginning on November 22, 2018, which was Thanksgiving, claimant tried to contact the employer's owner. Claimant was concerned about his exposure to asbestos at the job site and left at least one message for the owner asking if he could be assigned to work at one of the employer's other job sites, where he did not risk being exposed to asbestos. Claimant made several additional attempts to contact the owner, by voice and by text, on and after November 22. Claimant left several voicemail messages and text messages for the owner. The owner did not respond to claimant's messages. Claimant was scheduled to work next on November 26, 2018.

(4) On November 26, claimant did not report for work, but went to the union hiring hall to seek different work because the owner had not responded to his many messages. Claimant informed the union that he had been exposed to asbestos while working for the employer. The union referred claimant to Zavala Construction for work and advised claimant to see a physician. Claimant contacted Zavala. However, claimant continued trying to reach the owner to discuss his concerns about asbestos and determine if he could be reassigned.

(5) On approximately November 28, 2018, a physician evaluated claimant for asbestos exposure. At that time, claimant was still having breathing difficulties. The physician prescribed an inhaler for claimant. The physician advised claimant that symptoms from asbestos exposure often had a delayed onset. The physician told claimant to continue monitoring his condition for symptoms of asbestos exposure and to avoid further exposure by staying away from workplaces where asbestos was present. On November 29, 2018, claimant began working for Zavala. As of that time, the employer's owner still had not responded to any of the messages claimant had left for him since November 22.

(6) On November 30, 2018, the owner called and spoke to claimant. The owner told claimant that he wanted to meet with claimant and try to work things out on Monday, December 3, 2018. Claimant agreed to do so. Later that day, claimant realized he was scheduled to work for Zavala on December 3, 2018 and would not be able to meet with the owner. Later that day, claimant sent a text message to the owner stating that he had prior commitments in the upcoming week and would not be able to keep the scheduled meeting. Claimant told the owner he would contact him in the future if he needed work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

The employer contended that claimant left work on November 20, 2018 when he stated that he was not going to report for work on November 21. Audio of 2:30 p.m. hearing at ~28:55. Claimant contended that he did not quit work and the employer did not discharge him. Audio of 1:30 p.m. hearing at ~7:34. Thus, the first issue in this case is the nature of claimant's work separation. 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. OAR 471-030-0038(2)(a) (January 11, 2018). 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. OAR 471-030-0038(2)(b).

We disagree with the ALJ's conclusion in Order No. 19-UI-123745 that the work separation was a discharge. There is inadequate evidence in the record to support the ALJ's conclusion that claimant stopped reporting for work because the employer was not willing to allow him to continue working. Claimant left work on November 20, determined that he was not going to work on November 21 due to illness, and we infer that he had decided that he was not going to report for work again until he had spoken with the owner about reassignment to a different job site. Neither party suggested that the employer ever told claimant that he was discharged, terminated, fired or the like.

Although the employer did not contact claimant in response to his messages until November 30, the Thanksgiving holiday weekend intervened and likely accounted for some of the delay. By calling claimant on November 30 and requesting to meet with him to try to work things out, the owner was expressing that the employer wanted to maintain the employment relationship. However, by first agreeing to attend the meeting and then, in essence, refusing to attend and stating he would contact the

owner if he needed future work, claimant was expressing an unwillingness to continue working for the employer at that time. Because claimant was the first party to unambiguously manifest an intention to end the work relationship, the work separation was a voluntary leaving on November 30, which was the date that claimant refused to meet with the owner.

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.

Claimant testified that the building in which he was working as of November 20 was not a "safe work environment," it was "filled with asbestos," which was making him sick, and a physician had advised him not to continue working in that building. Audio of 2:30 p.m. hearing at ~39:53, ~40:02, ~42:07, ~47:00; Audio at 1:30 p.m. hearing at ~9:07, ~16:00. Given the magnitude of claimant's concern about asbestos exposure and his attempt to transfer to a different job site before taking the actions that severed the employment relationship, we infer that claimant quit due to concerns over asbestos exposure if he continued to work at the same job site.

Claimant's testimony about his concerns over asbestos exposure on the job site seemed sincere. Notably, the employer's witness did not categorically state that there was no asbestos in the building at issue, and by her questions suggested only that claimant had not notified the employer of asbestos and had not brought it up at safety meetings. Audio of 2:30 p.m. hearing at 43:20. However, claimant disputed the accuracy of the witness's suggestions, and it appeared that the witness's testimony was based on hearsay rather than personal knowledge. Claimant's first-hand evidence is entitled to greater weight than the hearsay testimony of the employer's witness. Moreover, even if there was no asbestos or insufficient asbestos in the building to create a legitimate health risk, the record fails to show that claimant's concerns about possible asbestos exposure were unfounded or unreasonable.

On this record, and in light of the lack of persuasive evidence to rebut claimant's testimony, claimant's possible exposure to asbestos in the workplace likely constituted a grave situation for him. By informing the owner of his concerns over asbestos, bringing up the issue of unabated asbestos at safety meetings and with his union, and asking the owner to transfer him to a job in where he would not encounter asbestos, claimant reasonably explored the options available to him in lieu of quitting. A reasonable and prudent person, exercising ordinary common sense, would have considered his circumstances objectively grave and would have left work due to them.

Claimant showed good cause for leaving work when he did. He is not disqualified from receiving unemployment insurance benefits based on his work separation from the employer.

Overpayment and Penalties - Order No. 19-UI-123746

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), Order No. 19-UI-123746, which concluded that claimant was not assessed an overpayment, monetary penalty or penalty weeks, is **adopted**.

DECISION: Order No. 19-UI-123745 and Order No. 19-UI-123746 are affirmed.

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

DATE of Service: March 21, 2019

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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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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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