EO: 200
BYE: 202015

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-0558

Reversed & Remanded

PROCEDURAL HISTORY: On May 1, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 111628). Claimant filed a timely request for hearing. On May 31, 2019, ALJ Frank conducted a hearing at which the employer did not appear, and on June 7, 2019, issued Order No. 19-UI-131303, affirming the Department's decision. On June 17, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lehigh Hanson Services LLC employed claimant as an excavator operator from October 1, 2018 until March 28, 2019.

(2) In 2006, claimant sustained an on-the-job injury and was awarded worker's compensation benefits. As a result of this injury, worker's compensation rated claimant as having a permanent brain disability of 40 percent. Subsequently, claimant participated in the preferred worker program because his disability prevented him from returning to pre-injury employment. After the employer hired claimant, claimant understood that he should show his preferred worker card to the employer if issues arose about his work performance.

(3) Before he was hired, claimant told a supervisor that he was unwilling to work for the wage that the employer was offering. The supervisor offered claimant one dollar more per hour and agreed to a schedule of pay raises to follow. The supervisor told claimant that he was hired subject to a sixty-day probationary period, during which the employer could discharge claimant for cause. The probationary period was over on or around December 1, 2019. Claimant understood that the employer was going to give him his first raise on December 1.

(4) During his employment, claimant extracted rock while his excavator was positioned on a thirty-foot high wall of loose sediment. Claimant had many "close calls" when the excavator almost tipped over. Audio at ~22:04. The undercarriage of the excavator was worn out. Claimant complained to the employer about the undercarriage, but the employer kept putting off repairing it. Claimant thought both

factors made his job dangerous. Claimant's nerves were "in tatters." Audio at ~22:07. Over time, the stress claimant experienced from the job made it hard for him to focus on performing it safely.

(5) During his employment, a supervisor often called claimant to his office to discuss claimant's work performance. Claimant felt harassed. The employer never issued a disciplinary warning to claimant. The stress that claimant experienced further distracted him from his work.

(6) On December 2, claimant asked his supervisor if he was going to receive the pay raise he had been promised. The supervisor told claimant that he would look into it. On December 3, the employer held a "stand down safety meeting," which closed the entire plant, ostensibly because claimant had picked up an agate while standing next to the high wall. Audio at ~11:50. Claimant and other employees had been picking up agates in this manner since claimant was hired. Claimant was unable to find any policies that prohibited picking up agates as he had done. Claimant thought his supervisor was harassing him. At around this time, claimant showed his preferred worker card to the supervisor. Claimant and the supervisor discussed claimant's status as a preferred worker. At the end of the discussion, the supervisor told claimant, "I don't care" and gave the preferred worker card back to claimant. Audio at ~26:50.

(7) During the week of December 3, 2018, claimant again asked the supervisor if he was going to receive the raise that the supervisor had promised. The supervisor told claimant that he had never promised that claimant would receive a raise at the end of his probationary period. The supervisor told claimant that his raise, if any, would come at the end of six months of employment. Claimant told the supervisor that was not their agreement.

(8) Sometime around approximately late December 2018, after claimant had confronted his supervisor about receiving a raise and had shown the supervisor his preferred worker card, an employer representative told claimant, "I will build a case against you." Audio at ~29:03. Claimant interpreted the statement to mean that the employer was going to find reasons to discharge him. At around that time, the employer representative told claimant that if the employer discharged him the discharge would be on his work record. Audio at ~24:08.

(9) Beginning around late February and continuing until around mid-March 2019, claimant's excavator had a faulty pump and was leaking oil on the pit floor. Claimant notified the employer of the problem. The employer fixed the problem around March 14.

(10) Sometime during the week of March 14 through 23, 2019, claimant's supervisor called claimant to his office and showed claimant a handwritten list of claimant's alleged performance deficiencies since December 1, 2018. At that time, the supervisor also blamed claimant for the oil that spilled from the excavator before the pump was repaired. The supervisor then told claimant that if he had one more problem, "I will move to have you written up." Audio at ~16:50. The supervisor told claimant that, at that time, he would get claimant's union representative and the employer's upper management involved. Claimant interpreted this comment to mean that the supervisor wanted to have him discharged.

(11) On March 28, 2019, claimant's supervisor again called claimant to his office. The supervisor gave claimant a printed list of the same performance deficiencies that had appeared on the handwritten list a week earlier. The supervisor told claimant that he was "moving to see" if he could have claimant discharged based on deficiencies appearing on the list. Audio at ~18:09. The supervisor did not have the

authority to discharge claimant, and a manager who was superior to the supervisor needed to make the discharge decision. The supervisor asked claimant if he wanted to say anything in response to the listed incidents. Claimant told the supervisor that the employer was responsible for the spilled oil on the pit floor, and not him, because he had notified the employer of the faulty pump and the employer had delayed fixing the problem. The supervisor responded, "That's bullshit." Audio at 23:39. Claimant then stated, "I'm done" and left, intending to quit work. Audio at ~23:40.

(12) On March 28, 2019, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work, but additional evidence is needed to determine whether the leaving was or was not for good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." OAR 471-030-0038(4) (December 23, 2018). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A resignation to avoid what would otherwise be a discharge for misconduct or potential misconduct is not good cause for leaving work. OAR 471-030-0038(5)(b)(F).Claimant had a permanent brain disability of forty percent, which is a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with an impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment would have continued to work for their employer for an additional period of time.

Order No. 19-UI-131303 concluded that claimant voluntarily left work and first reasoned that claimant left work to avoid being discharged. However, since it was not shown that the discharge would have been for misconduct, the order further concluded that claimant was not disqualified from benefits under OAR 471-030-0038(5)(b)(F). As to this conclusion, the order is correct.

Order No. 19-UI-131303 also determined that claimant did not show good cause for leaving work to avoid a discharge that was not for misconduct. The order reasoned that a discharge that was not for misconduct or good cause did not constitute of grave situation and the absence of those factors "served to lessen the likelihood of claimant's being fired." Order No. 19-UI-131303 at 5. The order further reasoned that even if claimant considered his situation grave, he had the reasonable alternative of "pleading his case to the other decision-makers" who would participate the decision to discharge him, rather than leaving work when he did. Order No. 19-UI-131303 at 5. The record does not support this conclusion, and additional evidence is needed to reach a decision in this case.

At the outset, additional information is needed to determine the reason or combination of reasons that claimant left work. At times in his claimant's testimony it appeared that he may have left work to avoid being discharged, or due to harassment, dangerous working conditions, or the impacts of stress. The record should be developed to show which of these reasons caused claimant to leave work and which did not.

To the extent claimant left work to avoid being discharged, additional information is needed to determine whether he left for good cause. For example, *McDowell v. Employment Dep't*., 348 Or 605, 236 P3d 722 (2010) held that a claimant had good cause to quit work to avoid being discharged, not for misconduct, when the discharge was imminent, inevitable, and would be the "kiss of death" to claimant's future job prospects. *Dubrow v. Employment Dep't.*, 242 Or App 1, 252 P3d 857 (2011) held that a future discharge did not need to be certain for a quit to avoid it to qualify as good cause; likelihood is not dispositive of the issue but it does bear on the gravity of the situation. Here, the record does not show why claimant thought upper manager would agree with the recommendation of his supervisor to discharge him, when claimant thought his discharge would occur, or the stigma that would result to claimant's future job prospects from having a discharge on his employment record. The record also does not show why claimant did not approach an employer representative other than his supervisor to try to stop the discharge.

To the extent claimant may have left work due harassment, dangerous working conditions, stress, or other circumstances, additional information is also required. For example, the record should be developed as to specific incidents supporting each reason, the harms or negative consequences that claimant sustained from those incidents, and the steps claimant took to resolve those incidents short of quitting work. The record should also be developed as to the negative consequences claimant thought would occur to him from each reason if he did not leave work. The record also lacks information about the stress claimant experienced, and whether or not the stress was associated with claimant's disability.

The record should be further developed as to the impact of claimant's forty percent brain disability on his perceptions of incidents or circumstances in the workplace, his reactions to workplace conditions, and his decision-making processes, including his decision to leave work. For example, the record does not show what work claimant performed before his brain injury, or whether claimant was unable to return to that work. The record does not show what specific way(s) his brain injury affected him, or the effect(s) his brain injury had on his ability to do his work, cope with stress, or respond when he felt harassed. The record should also be developed as to the supervisor's apparent disregard of claimant's preferred worker status when claimant displayed the card, what effect claimant thought producing the card would have, and whether the supervisor's response factored into claimant's decision to leave work.

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 had good cause to leave work, Order No. 19-UI-131303 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 19-UI-131303 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: <u>July 24, 2019</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-131303 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

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

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
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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