

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0409

Order No. 20-UI-149311 Affirmed – Disqualified
Order No. 20-UI-149309 Affirmed – Overpayment, No Penalties

PROCEDURAL HISTORY: On March 27, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause and was disqualified from receiving benefits effective December 1, 2019 (decision # 83218). On March 30, 2020, the Department served notice of another administrative decision, based on decision # 83218, assessing a \$2,114 overpayment, \$317.10 monetary penalty, and 14 penalty weeks (decision # 193862). Claimant filed timely requests for hearing on both decisions.

On April 23, 2020, the Office of Administrative Hearings (OAH) mailed notice of a consolidated hearing scheduled for May 4, 2020. On May 4, 2020, ALJ Meerdink conducted the consolidated hearing, and on May 6, 2020 issued Order No. 20-UI-149311, affirming decision # 83218, and Order No. 20-UI-149309, modifying decision # 193862 and assessing a \$2,114 overpayment, but no penalties. On May 21, 2020, claimant filed applications for review of both orders with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. Orders No. 20-UI-149309 and 20-UI-149311. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2020-EAB-0408 and 2020-EAB-0409).

FINDINGS OF FACT: (1) Bishop Orchards employed claimant from mid-2019 to December 5, 2019.

(2) At all relevant times, claimant had eight fractured vertebrae, five of which had been surgically fused. He could neither sit for extended periods of time nor stand for more than 10 or 15 minutes at a time. Claimant was also missing a thumb. Claimant's right knee "has been blown out three times," and he has had two knee surgeries. Transcript at 51. Claimant was also epileptic.

(3) At all relevant times, claimant was part of the preferred workers program. Through that program, the employer received a new chair, an anti-fatigue mat, and a motorized adjustable-height desk for claimant to use while working. The employer assigned claimant work consistent with his physical abilities, which could be performed while using a chair as well as while standing.

(4) The employer hired claimant to work for its production operation rolling marijuana cigarettes, and paid him \$15.50 per hour for that work. Claimant was proficient at rolling marijuana cigarettes.

(5) In November 2019, the employer ceased its production operations and did not plan to resume those operations until approximately April 2020. Between November 2019 and April 2020, the employer had only harvesting work available.

(6) Harvesting work involved bucking cannabis in the morning and trimming it in the afternoon. Employees performing harvesting work were paid based upon the weight of the product they processed. Employees were paid a minimum of \$12.00 per hour, but could earn up to \$20.00 per hour if they processed greater weights. Employees could choose to work morning shifts, afternoon shifts, or both.

(7) When the employer changed its operations from production to harvesting, the employer offered employees, including claimant, the choice of being laid off until production operations resumed in the spring, or to transfer to harvesting work. Claimant chose to do the harvesting work. He expressed concern to the employer that he would be able to perform enough bucking and trimming work to continue earning \$15.50 per hour. The employer agreed to pay claimant at that rate for three weeks as he became accustomed to the new work.

(8) Within three weeks, claimant was performing enough bucking and trimming work to earn approximately \$14.75 per hour for those tasks. On December 5, 2019, the employer met with claimant to tell him that he was earning close to his previous hourly wage, and that the employer was not going to continue paying him at his previous hourly rate because he had adequately acclimated to the new tasks.

(9) Claimant felt that the employer had not trained him enough, he “physically couldn’t keep up,” and he was dissatisfied with his pay. Transcript at 50. Claimant thought his harvesting work was only fast enough to earn \$10.75 per hour, and that he was not going to be able to process enough product to entitle him to a higher wage. He had asked more experienced people to tell him what he was doing wrong and show him “some tricks”; he received some help, but they did not have much time to help him without reducing their own production rates and earning less money. Transcript at 49.

(10) Claimant had difficulty using the scissors because of his missing thumb. He also thought that his need to use a chair while working interfered with the speed of his work and limited his harvesting pay potential. He felt “frustrated” because he thought the employer had lied to him about the work and his pay. Transcript at 56. Claimant thought the employer had taken advantage of his preferred worker status to “max[] out” his benefits and then reduced his wage from the higher set hourly wage he earned rolling cigarettes to the lower harvesting rates. Transcript at 75.

(11) The December 5, 2019 conversation between claimant and the employer was “heated” and involved yelling; claimant used some foul language. Transcript at 68. After that conversation, claimant loaded the chair, filing cabinet, and anti-fatigue mat that had been provided to the employer for his use by the preferred worker program into his truck. Claimant told the employer that he “was taking the layoff” until the production work resumed in the spring. Transcript at 65, 71. The employer disagreed that claimant had been laid off, and indicated that the fact he was taking the preferred worker program items with him suggested that he did not plan to return at all. Claimant did not return to work after December 5, 2019.

(12) On December 14, 2019, claimant filed an initial claim for unemployment insurance benefits. Claimant's weekly benefit amount was \$151.00.

(13) When claimant filed his initial claim for benefits, the Department required him to disclose work separations and explain why he was no longer working. Claimant notified the Department that he was no longer working for the employer because the employer had laid him off due to a lack of work.

(14) Claimant filed weekly claims from December 8, 2019 through March 21, 2020 (weeks 50-19 through 12-20). Based upon claimant's weekly claims, and because he had reported that his work separation was a layoff, the Department paid claimant \$2,114 in benefits for those weeks.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause and was disqualified from receiving benefits effective December 1, 2019. Claimant was also overpaid benefits in the amount of \$2,114 that he is liable to repay.

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) (December 23, 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).

In November 2019, the employer offered claimant the choice to be laid off work or to transfer to a harvesting job. Claimant chose to accept the transfer, and continued working for the employer without interruption. On December 5, 2019, claimant chose to leave his job with the employer. At that time, the employer had continuing harvesting work available to claimant. Because claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving.

The fact that the employer offered to lay claimant off work in November if he had wanted to be laid off does not change the nature of the work separation in this case. First, that offer was to lay him off work when the employer ceased production operations. The employer did not offer to lay him off work if or because he did not like or felt like he could not adequately perform the harvesting work. Second, even if claimant had "accepted" the employer's layoff offer, the work separation would still likely have been considered a voluntary leaving for purposes of unemployment insurance benefits. "Work" is defined as the continuing relationship between an employer and employee, and is not defined by the specific position the employee holds. OAR 471-030-0038(1)(a). Because the employer had continuing "work" available for claimant at the time of the layoff, even though it was harvesting work rather than the production work claimant preferred, the work separation would still have been a voluntary leaving under OAR 471-030-0038(2)(a).

For those reasons, the work separation in this case was a voluntary leaving.

Voluntary leaving. 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). "[T]he reason must be of such gravity that

the individual has no reasonable alternative but to leave work.” OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). Claimant had physical impairments that were 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.

Claimant voluntarily left his job in part because he believed his pay had been reduced by over \$5.00 per hour below what he had made doing production work. Claimant did not have good cause to quit for that reason. Claimant had earned \$15.50 per hour doing production work, and the employer had continued to pay him the same rate while he acclimated to the harvesting work. Within three weeks, claimant’s harvesting work production was high enough that he was earning only approximately \$1.00 per hour less than he previously had earned. Under those circumstances, the small reduction in pay was not a grave situation, particularly where, as here, claimant had the opportunity to earn a higher pay rate over time as he became more and more acclimated to the work and could buck and trim a greater amount of product.

Claimant also felt frustrated over his perception that the employer had lied to him and taken advantage of his preferred worker benefits. However, claimant did not establish that the employer lied to him or took advantage of his benefits, nor did he establish that the employer’s conduct toward him or with respect to the preferred worker program was a grave situation that necessitated he quit work on December 5th.

Finally, claimant testified that he left work because he was physically incapable of doing the harvesting work.¹ However, claimant did not establish that it was more likely than not that he was incapable of doing the work. At the time he quit his job, he had performed harvesting work for three weeks. Although he struggled with the scissors because of his missing thumb, and felt that having to sit while working slowed his production rate, thereby decreasing his pay potential, claimant successfully performed the work, to the employer’s satisfaction. Within a three-week period, he improved his production rates significantly enough to earn \$14.75 per hour doing harvesting work, which was \$2.75 per hour more than the employer’s minimum pay rates for harvesting work and less than \$1.00 per hour less than he had made rolling cigarettes. Claimant’s ability to learn the harvesting tasks and achieve that level of proficiency in only three weeks suggests that claimant was, more likely than not, physically capable of doing the harvesting work he was performing at the time he quit work. Claimant did not face a grave situation because of the effect his physical impairments had upon his ability to do the work.

For those reasons, claimant did not establish that he quit work with good cause. He is therefore disqualified from receiving benefits effective December 1, 2019.

¹ Claimant testified that he sought treatment at the emergency room several times while employed by the employer because his back hurt after work, and once because he fell off a stool. Transcript at 60-61. However, although claimant took a day off work after falling, claimant could not provide the dates of any such incidents at the hearing, did not report the incidents to the employer beyond mentioning it in passing a couple times, did not ask to adjust his duties to less strenuous ones, did not significantly adjust his work schedule or take significant periods of time off work, and did not file worker’s compensation claims related to his ER visits. The record therefore does not show that claimant’s physical pain or injuries were related to the particular duties claimant had to perform either bucking or trimming product, and the evidence has not established that claimant was physically incapable of performing the harvesting work at issue without experiencing injury or undue pain.

Overpayment. Only unemployed individuals who are not disqualified from benefits are eligible to receive unemployment insurance benefits. *See* ORS 657.155(1)(e). 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. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.*

Although claimant was disqualified from receiving benefits at all relevant times because of his voluntary leaving, the Department paid claimant \$2,114 in unemployment insurance benefits based upon his report to the Department when he filed his initial claim for benefits that he had been laid off by the employer. For the reasons set forth above, for the purposes of unemployment insurance benefits, claimant actually quit his job. Because he quit his job, he was disqualified from receiving benefits, and he was not eligible to receive the \$2,114 he was paid. Claimant's report to the Department that he was laid off work was false. Regardless of claimant's knowledge or intent in falsely reporting to the Department that he was laid off work by the employer, his false report caused the overpayment. Claimant therefore is liable to either repay the \$2,114 to the Department or have that amount deducted from any future benefits otherwise payable.

Conclusion. Claimant quit work without good cause, is disqualified from benefits effective December 1, 2019, and is liable to repay the \$2,114 overpayment to the Department.

DECISION: Orders No. 20-UI-149309 and 20-UI-149311 are affirmed.

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

DATE of Service: June 23, 2020

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.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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 فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف 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 دستور العمل 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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El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.