EO: 990
BYE: 202117

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

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VQ 005.00
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EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0006

Reversed & Remanded

PROCEDURAL HISTORY: On November 6, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective September 29, 2019 (decision # 74402). Claimant filed a timely request for hearing. On December 9 and 15, 2020, ALJ Frank conducted a hearing, and on December 23, 2020 issued Order No. 20-UI-158064, affirming the Department's decision. On December 30, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: In support of their application for review, claimant submitted written arguments on December 30, 2020, December 31, 2020, January 24, 2021, and twice on January 26, 2021. EAB did not consider claimant's December 30, 2020, December 31, 2020, or January 26, 2021 written arguments when reaching this decision because claimant did not include a statement declaring that a copy of those arguments was provided to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). Claimant's arguments also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). The employer's written argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

However, the parties may offer new information such as their written arguments or the documents submitted with their written arguments into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) Rock Supremacy, LLC employed claimant as a rock scaler for their highway safety projects beginning in spring 2019.

(2) Although claimant's home was in Colorado, claimant and other employees customarily traveled long distances between jobs, often setting up trailers at their destinations in which to reside while working.

(3) On October 3, 2019, claimant worked a full day at a job in Idaho. On or about October 4, 2019, claimant experienced a "medical episode" and did not engage in additional work in Idaho. Exhibit 3 (June 15, 2020 employer letter to the Department).

(4) After the Idaho job was finished, the employer scheduled claimant to work at the employer's "jobsite in Oakridge, OR (OR 58)." Exhibit 3 (June 15, 2020 employer letter to the Department). Claimant traveled to Oregon to work at that job.

(5) On October 7, 2019, the employer's office manager and claimant engaged in an email exchange about the office manager's request that claimant acknowledge the employer's policy regarding social media and cell phone usage. Exhibit 3 (October 7, 2019 email exchange).

(6) On or about October 14, 2019, "claimant showed up on the [Oakridge, OR] jobsite as planned but, before he could perform his duties for the day, he left claiming a medical emergency." Exhibit 3 (June 15, 2020 employer letter to the Department).

(7) On October 14, 2019, claimant went to an emergency room at a hospital near Eugene, Oregon. The examining physician diagnosed a serious, potentially fatal heart condition and recommended that claimant be admitted to the hospital. Claimant refused because he wanted to travel to Colorado to see his daughter because he thought he might die from his heart condition. After leaving the emergency room, claimant returned to the employer's jobsite and told his supervisor that he could not work for a while due to a "heart issue," which the supervisor reported to the office manager. Audio Record (December 15, 2020 hearing) at 15:25 to 16:20; 28:45 to 29:05. Shortly thereafter, claimant's sister drove claimant to his home in Colorado. While in Colorado, claimant underwent additional testing and treatment for his heart condition. Exhibit 6. Between October 14, 2019 and December 9, 2019, claimant kept in touch with one or more of his supervisors.

(8) On December 9, 2019, claimant texted one of the employer's supervisors. The text message stated, "What's up brother? I don't kno if anything's going on but I'm cleared to work." Exhibit 3 (December 9, 2019 text message exchange). A few messages later, the supervisor responded, "That's great, we have a whole bunch of work lining up this year. Just waiting for the weather to change to get started." Exhibit 3. Claimant responded, "Sounds good man!!" Exhibit 3.

(9) After the December 9, 2019 text message exchange, claimant kept in touch with one or more of his supervisors.

(10) On an unknown date in January 2020, the employer "archived" claimant in their payroll system as "no longer an employee due to no contact." Exhibit 3 (June 15, 2020 employer letter to the Department).

(11) On November 16, 2020, the employer's office manager sent claimant an email regarding the employer's refusal to provide health insurance for claimant. In that email, the manager stated, "Your employment was terminated with our company and you are not eligible for rehire." Exhibit 3 (November 16, 2020 email to claimant).

CONCLUSION AND REASONS: Order No. 20-UI-158064 is reversed and this matter is remanded for further development of the record.

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) (September 22, 2020). 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

At hearing, claimant denied that he quit work with the employer, and the employer's witness asserted that their records showed the work separation was a "no call, no show." Audio Record (December 15, 2020 hearing) at 11:00 to 11:15; 33:25 to 34:10. Order No. 20-UI-158064 found and concluded that claimant quit work on October 4, 2019, reasoning:

> After last working on October 3, 2019, claimant informed the employer on October 4, 2019 only that he could no longer work, after which he neglected to maintain contact with the employer for over two months. Because he exhibited an unwillingness to continue working, he voluntarily quit the job.

Order No. 20-UI-158064 at 3. However, the record does not support that conclusion.

On October 7, 2019, three days after claimant quit according to Order No. 20-UI-158064, claimant exchanged emails with the employer's office manager about acknowledging the employer's cell phone policy. After the Idaho job was completed, the employer scheduled claimant to work at a "jobsite in Oakridge, OR (OR 58)." Thereafter, claimant traveled from Idaho to Oregon and reported to that jobsite for work as scheduled, but before he could perform his job duties, he left the jobsite due to a medical emergency. On October 14, 2019, claimant went to an emergency room near Eugene, Oregon, where he was diagnosed with a serious heart condition. After leaving the emergency room, claimant returned to the employer's jobsite and told his supervisor that he could not work for a while due to a "heart issue," which the supervisor reported to the office manager. Shortly thereafter, claimant's sister drove him home to Colorado where he underwent additional testing and treatment for his heart condition. Claimant kept in touch with one or more of his supervisors at the employer, and on December 9, 2019, texted a supervisor that he had been "cleared to work." The supervisor responded to claimant's text by stating, "That's great, we have a whole bunch of work lining up this year. Just waiting for the weather to change to get started," to which claimant responded, "Sounds good man!!" The record shows that claimant was willing to continue to work for the employer after October 4, 2019 and through December 9, 2019.

Claimant did not return to work after leaving the jobsite in Oakridge, Oregon. Rather, on an unknown date in January 2020, the employer "archived" claimant in their payroll system as "no longer an employee due to no contact." In November 2020, the office manager emailed claimant about a health

insurance matter, and within that email, described claimant's work separation as follows: "Your employment was terminated with our company and you are not eligible for rehire." More likely than not, the work separation was a discharge that occurred on an unknown date in January of 2020 when the employer "archived" claimant in its payroll system.

Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a). "'[W]antonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c). Isolated instances of poor judgment, good faith errors, and absences due to illness or other physical or mental disabilities, are not misconduct. OAR 471-030- 0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The record contains insufficient information to determine when and whether the employer discharged claimant for misconduct. The record fails to show on what date the employer "archived" claimant as "no longer an employee due to no contact," which was likely the date of his discharge. On remand, additional inquiry is necessary to determine the date on which that occurred and whether the employer ever sent claimant a letter of separation clarifying that he was no longer an employee as of that date.

Inquiry also is necessary to determine whether the employer discharged claimant for consciously engaging in conduct he knew or should have known probably violated, or probably would result in a violation of, the standards of behavior which an employer has the right to expect of an employee. Although the record suggests that the employer discharged claimant for "no contact," claimant testified that he gave medical documentation to a supervisor before he left for Colorado, and maintained contact with one or more of his supervisors during his absence. Audio Record ((December 15, 2020 hearing) at 15:15 to 16:00; 19:30 to 20:15. Additional inquiry is necessary regarding any documentation showing claimant's absence from work was due to illness or a physical disability, whether and when he provided documentation of his medical condition to the employer, and whether and when claimant had contact with the employer during the relevant time periods. The record also fails to show when the weather changed sufficiently to allow the employer to engage in the "whole bunch of work" the supervisor told claimant the employer had lined up in December 2019, and whether the employer contacted claimant to return to work at that time, and if not, why not. Additional inquiry is also necessary to determine when claimant was physically able to return to work, and if claimant reasonably believed he had adequately communicated the reason for his absence and the status of his availability to the employer by communicating with his supervisors, rather than with anyone else at the employer. The record also fails to show whether the employer had ever communicated to claimant by email or otherwise that additional documentation of his medical condition or clarification of his availability for work was necessary before he could return to 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 further development of the record is necessary for a determination of the date of claimant's discharge and whether the employer discharged him for misconduct, Order No. 20-UI-158064 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-158064 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. P. Hettle.

DATE of Service: February 4, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-158064 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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 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 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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