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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0412

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 31, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80116). Claimant filed a timely request for hearing. On March 3, 2014, ALJ Clink conducted a hearing, and on March 13, 2014, issued Hearing Decision 14-UI-12279, affirming the Department's decision. On March 7, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained new information that she did not present at the hearing. Because claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering the new information during the hearing, EAB did not consider it. *See* ORS 657.275(2); OAR 471-041-0090 (October 29, 2006). EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Do It Best Corporation employed claimant as a warehouse worker from August 31, 2000 until December 13, 2013. One of claimant's duties was to unload trailers that entered the employer's distribution center by entering the interior of the trailer with a forklift.

(2) To protect workers who entered trailers from injury, the employer required trailers to remain stationary while they were being unloaded. The employer expected claimant to chalk the tires of each trailer and to lock out each trailer before entering the trailer to unload it. Chalking meant placing a plate in front of the trailer tires to block them from rolling if the trailer was inadvertently towed. Locking out the trailer meant placing a physical lock on the front end of the trailer to prevent a tractor from hooking up to the trailer and trying to move it. Claimant was aware of the employer's expectations.

(3) On June 4, 2013, a driver removed a trailer that had been unloaded and brought in a new trailer for claimant to unload. The driver chalked the new trailer but did not lock it out. The driver opened the rear door to the trailer before he left to complete paperwork. When claimant finished the work she was doing, she started unloading the trailer without locking it out. Claimant was not aware that she had failed to lock out the trailer. Claimant's normal routine was to lock out a trailer before she opened the trailer doors and, because the driver had opened the doors of this trailer, claimant overlooked that she had not yet locked the trailer out before starting to unload it. After this incident, the employer issued a warning to claimant for violating its safety rules and suspended claimant from work for three days.

(4) On December 13, 2013, claimant's lead was assisting her by locking out trailers that claimant needed to unload on an expedited basis. Claimant was preoccupied with completing the unloading of three trailers by the end of the day. The lead had chalked but neglected to lock out one of those trailers. Claimant started unloading that trailer before it was locked out because she assumed the lead had locked it out. Claimant was not aware that the trailer was not locked out before she started to unload it.

(5) On December 13, 2013, the employer discharged claimant for violating its safety policies by failing to lock out the trailer on that day.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-12279, the ALJ concluded that claimant engaged in misconduct when she failed to lock out the trailer before starting to unload it on December 13, 2013. The ALJ reasoned that "claimant's failure to follow the line lock policy was something within her control" and her behavior was therefore wantonly negligent. Hearing Decision 14-UI-12279 at 3. We disagree.

There is no evidence in the record, and the employer did not contend, that claimant's behavior in failing to lock out the trailer on December 13, 2013 was willful. The issue for purposes of a misconduct determination is whether claimant's behavior met the standard for wantonly negligent behavior. Both parties described claimant's failure on December 13, 2013 as an "oversight." Transcript at 12, 13, 19, 21, 25. EAB has repeatedly held that, without additional evidence, a claimant's inadvertent lapses or mistakes do not show the conscious state of mind necessary to establish wanton negligence. *See Guadalupe Villasenor* (Employment Appeal Board, 12-AB-0229, February 23, 2012) (absent evidence claimant was aware she was making a mistake at the time she made it, her conduct was not conscious and was not wantonly negligent); *Marina V. Berlachenko* (Employment Appeals Board, 11-AB-0810,

March 24, 2011) (absent evidence claimant was conscious that she was failing to be careful, her failure was not wantonly negligent); *Paul A. Klinko* (Employment Appeals Board, 11-AB-0777, March 17, 2011) (absent evidence clamant was conscious of his failure to perform a task, the failure was not wantonly negligent); *Lisa D. Silveira* (Employment Appeals Board, 10-AB-1426, June 14, 2010) (absent evidence claimant was aware of her failure to perform a routine task, her failure was not wantonly negligent); *Debra L. Rutschman* (Employment Appeals Board, 10-AB-1155, May 14, 2010 (absent evidence claimant was conscious she was making an error, her error in dispensing medication was not wantonly negligent); *Deborah A. Munhollon* (Employment Appeals Board, 10-AB-1949, May 14, 2012) (absent evidence claimant's failure to read a restricted delivery label was conscious, her failure was not wantonly negligent); *Eli A. Justman* (Employment Appeals Board, 10-AB-1022, May 13, 2010) (absent evidence claimant's failure to review his calendar was conscious, his missing an appointment was not wantonly negligent); *Joshua A. Osborn* (Employment Appeals Board, 10-AB-1979, May 13, 2010) (absent evidence claimant's failure to be careful and accurate in cash handling was conscious, his failure was not wantonly negligent); *Sean N. Wiggins* (Employment Appeals Board, 10-AB-0840, May 4, 2012) (absent evidence claimant's failure to document a test was conscious, her failure was not wantonly negligent); *Salvador Ramirez* (Employment Appeals Board, 10-AB-1924, April 29, 2010) (absent evidence claimant's failure to fill a vehicle with the correct fuel was conscious, his failure was not wantonly negligent).

There is no evidence in the record suggesting or tending to suggest that claimant was aware at the time she entered the interior of the trailer on December 13, 2013 that she had not locked the trailer out. There is therefore no evidence that claimant's behavior was conscious at the time claimant violated the employer's expectations. Absent evidence of claimant's conscious state of mind, the employer has not met its burden to establish that claimant's behavior met the threshold for wanton negligence.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-12279 is set aside, as outlined above.

Susan Rossiter and D. E. Larson;
Tony Corcoran, not participating.

DATE of Service: <u>April 15, 2014</u>

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 website at http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page.
Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.