

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0674

Reversed and Remanded

PROCEDURAL HISTORY: On February 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #161904). Claimant filed a timely request for hearing. On March 20, 2014, ALJ Lohr conducted a hearing, and on April 21, 2014 issued Hearing Decision 14-UI-15679, affirming the Department's decision. On April 24, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB on April 24, 2014. Claimant failed to certify that he provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090. We therefore did not consider the written argument claimant submitted on April 24, 2014. *See* ORS 657.275(2).

We considered the written arguments claimant submitted on April 28, 2014 and April May 19, 2014. However, the argument claimant submitted on April 28, 2014 contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-15679 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings consistent with this order.

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) 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. 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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An act is isolated if the exercise of poor judgment is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). An isolated act cannot be excused as mere poor judgment if it creates an irreparable breach of trust in the employment relationship, or otherwise makes a continued relationship impossible. OAR 471-030-0038(1)(d)(D).

In Hearing Decision 14-UI-15679, the ALJ found that, “[u]nder policies and procedures,” diving supervisors such as claimant were required to “report equipment malfunctions or other commercial diving ‘mishaps’ to the employer within 24 hours,” and to “remain with the diving crew on a vessel during a diving operation.”¹ The ALJ also found that several divers reported to the employer that claimant had not reported diving mishaps, including an “equipment malfunction,” and had not followed the “dive plan” and allowed a diver to stay underwater “too long.”² The ALJ also found that claimant had engaged in a physical altercation with divers, and did not report the above incidents to the employer within 24 hours.³ The ALJ also found that claimant’s dive crew reported that claimant failed to remain on their vessel during a diving operation, and that claimant had falsified his time sheets and submitted dive charts containing false dive times.⁴ The ALJ found that the employer discharged claimant for “failing to report diving mishaps, failing to follow the dive plan, and falsifying dive charts and time records.”⁵

Based on those findings, the ALJ determined that the employer discharged claimant for “multiple failures to follow the employer’s written policies and procedures governing diving procedures.”⁶ Asserting that claimant had “multiple explanations for his conduct,” the ALJ summarily concluded that the employer “established by a preponderance of credible evidence that claimant’s actions amounted to a

¹ Hearing Decision 14-UI-15679 at 1.

² *Id.* at 2.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 3.

wantonly negligent, if not willful, disregard of the employer's interest.”⁷ The ALJ concluded that claimant's conduct could not be excused as an isolated instance of poor judgment because his conduct was “unsafe and dishonest” and created an irreparable breach of trust in the employment relationship and otherwise made a continued employment relationship impossible.⁸

We first disagree with the ALJ's findings that claimant failed to report an equipment malfunction and a physical altercation with other divers. At hearing, the employer's vice president testified that claimant failed to report a diver's helmet filling with water, and claimant's physical altercation with a diver. Transcript at 5, 6. Claimant testified that he reported both incidents. Transcript at 25, 27, 29. The evidence regarding that issue was, at best, equally balanced. Thus, the record does not show by a preponderance of the evidence that claimant failed to report those incidents.

We also disagree with the ALJ's finding that under policies and procedures, diving supervisors were required to remain with the diving crew on a vessel during a diving operation. Although the employer testified that claimant must follow Association of Diving Contractors International safety procedures, workers' compensation law, and the employer's “safety manuals,” the ALJ did not inquire about what the safety procedures and manuals require. Transcript at 10, 18. Thus, the ALJ failed to conduct a sufficient inquiry into whether claimant knew or should have known he was required to work on the boat when the crew was diving. Without such inquiry, we are unable to determine if claimant knew or should have known his failure to remain on the boat would violate the employer's expectations, or if he was permitted to record time he was not on the boat as work time. Nor can we determine, if necessary, whether claimant's conduct was an isolated instance of poor judgment or good faith error, and not misconduct.

We also disagree with the ALJ's findings that claimant failed to follow the dive plan, allowed a diver to stay underwater too long, and falsified the dive time, and the ALJ's conclusion that claimant's conduct was a willful or wantonly negligent violation of the employer's expectations. The ALJ did not conduct a sufficient inquiry into the facts necessary for consideration of those issues. The ALJ did not establish what the employer's expectations were regarding diving procedures, claimant's knowledge of those expectations, or what occurred during that alleged incident. The ALJ did not ask claimant about the allegations, thus not affording him the opportunity to explain, deny or admit to the allegations. Absent such inquiries, we cannot determine whether claimant engaged in the alleged conduct, let alone that he did so willfully or with wanton negligence. Nor can we determine, if necessary, whether claimant's conduct was an isolated instance of poor judgment or good faith error, and not misconduct.

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 the record developed at 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); *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 was discharged for misconduct, Hearing Decision 14-UI15679 is reversed and this matter is remanded for further development of the record.

⁷ Hearing Decision 14-UI-15679 at 4.

⁸ *Id.*

DECISION: Hearing Decision 14-UI-15679 is set aside, and this matter remanded for further proceedings consistent with this order.

Tony Corcoran and J.S. Cromwell, *pro tempore*;
Susan Rossiter and D. E. Larson, not participating.

DATE of Service: May 28, 2014

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.