

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

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1175

Reversed & Remanded

PROCEDURAL HISTORY: On June 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 120527). Claimant filed a timely request for hearing. On June 23, 2014, ALJ Lohr conducted a hearing, and on June 26, 2014 issued Hearing Decision 14-UI-20460, affirming the Department's decision. On July 7, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-20460 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings.

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. *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).

In Hearing Decision 14-UI-20460, the ALJ concluded that claimant was convicted of speeding, and "claimant's excessive speed while driving a company truck was, at best, careless or negligent."¹ Based

¹ Hearing Decision 14-UI-20460 at 3.

on those findings, the ALJ concluded that “there is sufficient evidence to conclude that by disregarding the posted speed limit, claimant acted with at least ‘indifference to the consequences of [his actions]’ as required to establish *wanton* negligence.”² However, claimant testified that he did not consciously exceed the speed limit, or violate the employer’s expectations “on purpose.” Audio Record ~ at 27:16 to 27:57. The ALJ did not ask claimant questions about the final incident such as why claimant allegedly exceeded the speed limit, where the incident took place, what claimant was doing at the time he received the citation, if and when claimant saw the posted speed, how long he was allegedly driving over the speed limit, if he had an alarm in his vehicle to alert him if he exceeded the speed limit, the driving conditions, or what claimant was thinking when he allegedly exceeded the speed limit. Absent such inquiries, we cannot determine if claimant consciously engaged in conduct he knew or should have known probably violated the employer’s expectations, or if he was indifferent to the consequences of his actions. We therefore cannot determine if the alleged violation of the employer’s safe driving expectations were willful or wantonly negligent.

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’s conduct was 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, Hearing Decision 14-UI-20460 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 14-UI-20460 is set aside, and this matter remanded for further proceedings consistent with this order.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 14-UI-20460 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: August 5, 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 court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

² Hearing Decision 14-UI-20460 at 3 (emphasis in original).

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