

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1815

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85861). Claimant filed a timely request for hearing. On November 19, 2014, ALJ Kirkwood conducted a hearing, and on November 20, 2014 issued Hearing Decision 14-UI-29069, affirming the Department's decision. On November 25, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) PCC Structurals, Inc. employed claimant as a furnace operator from October 25, 2014 until September 22, 2014. The employer operated a foundry in which, among other things, its furnace operators reduced metals to molten form.

(2) The employer expected that in the process of melting metals, its furnace operators would initially set its furnaces at 200 kW power for approximately four hours until the metal placed in them was "red hot" or "glowing red." Transcript at 18, 23. The employer expected that, during this initial phase, the metal would remain in solid form and the pot containing the metal would remain full. The employer then expected its operators to maintain the charge in the furnace and the "red hot" metal for another approximately four hours to allow the furnace liner to cure. At the end of the "four hour hold," the employer expected its operators to increase the power to the furnace to continue the process of melting the metal. The employer's policies did not state its expectations if, during the initial phase of the melting process, the metal became molten and settled in liquid form to less than a full pot. Claimant was aware of the employer's expectations.

(3) On September 11, 2014, when claimant arrived to start his graveyard shift, the furnace operator he relieved told him that he had just completed the initial phase of the melting process and that the "glowing red" metal was ready to begin the "four hour hold." Claimant checked the heat log for the furnace and determined that the metal in the furnace had been heating for approximately four hours at 400 kW power. Transcript at 23, 26. Claimant then visually inspected the pot of metal in the furnace to confirm that it had reached the "glowing red" stage. Claimant saw that the pot was less than one-half full and concluded that beneath the solid metal on the top of the pot the remaining metal was molten. Claimant had on four or five occasions observed other experienced furnace operators handle an unexpected melting of metal at this stage and salvage the melting process by depositing additional cold metal in the pot to bring it to a full level and then increasing the charge to the furnace to account for the decrease in temperature caused by adding the cold metal. Claimant added a can of cold metal to the furnace and increased the power to the furnace to 500 kW. Claimant's lead worker saw what he had done and asked claimant for an explanation. After claimant explained, the lead worker consulted with a supervisor and they both told claimant to add another can of metal to the pot and continue with the four hour hold when the metal reached "glowing red."

(4) Sometime on or after September 11, 2014, the employer determined that claimant had acted in violation of its expectations by turning up the power in the furnace during the four hour hold and not complying with the employer's policies during the melting process. On September 22, 2014, the employer discharged claimant for those reasons.

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. 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-29069, the ALJ concluded that claimant engaged in misconduct on September 11, 2014 when he added additional metal to the pot and increased the power to the furnace. Although the ALJ agreed that the employer's policies did not address how claimant should have corrected the problem of molten metal settling to the level of less than a full pot, the ALJ concluded that it was wantonly negligent of claimant to have "attempted to problem solve by himself" and not to have sought the assistance from a supervisor. Hearing Decision 14-UI-29069 at 4. We disagree.

At the outset, the employer's witness did not rebut claimant's testimony that the employer's policies did not state what claimant should have done to safely resolve the situation that he confronted on September 11, 2014 when the metal melted before the "four hour hold" was to begin. Transcript at 23, 25. Instead, the employer's witness asserted that claimant should have "used [his] discretion [to] turn the power down" to the furnace after adding additional metal. Transcript at 42. However, the employer did not challenge, or attempt to challenge, claimant's testimony that it was an accepted practice among the employer's furnace operators to resolve the problem of molten metal in the pot as claimant did on September 11, 2014, by adding additional cold metal and increasing the power to the furnace.

Transcript 23, 25, 36, 38, 40, 41. Given that many of the operators that claimant had observed engaging in this practice were more experienced than claimant, and they had apparently done so without adverse safety consequences or disciplinary measures, it was not wantonly negligent of claimant to have adopted their approach and not to have sought a supervisor's assistance. Transcript at 40. In addition, claimant's testimony was unrebutted that his lead worker and his supervisor saw the actions he had taken on September 11, 2014 and, rather than correcting him, instructed him to add another can of cold metal to the pot and to continue the melting process. Transcript at 24. It appears that these supervisors condoned the actions that claimant took on September 11, 2014. On these facts, we therefore disagree with the ALJ and conclude that it was not wantonly negligent of claimant to reasonably think, based on his past experience and observations, that he knew how to address the issue of molten metal in the pot before the "four hour hold" and it was not wantonly negligent of him to have taken the steps that he did on September 11, 2014.

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

DECISION: Hearing Decision 14-UI-29069 is set aside, as outlined above.

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

DATE of Service: January 12, 2015

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.

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