EO: 200
BYE: 201539

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

153
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1822

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 22, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141917). Claimant filed a timely request for hearing. On November 20, 2014, ALJ S. Lee conducted a hearing, and on November 25, 2014 issued Hearing Decision 14-UI-29290, affirming the Department's decision. On November 29, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) KO Custom Fab, Inc. employed claimant from June 10, 2010 until October 2, 2014, last as shop foreman.

(2) The employer expected claimant to verify that all trucks leaving the employer's yard on deliveries complied with federal and state weight limitations. The employer generally expected claimant to perform this weight verification by confirming that each shipment loaded on a truck had a ship order and that the total of the weight shown on all the ship orders did not exceed the legal limit. Sometimes, the employer did not require a separate ship order when the shipped items were a "partial order," which was a small load that completed a previous shipment to a customer and which was accounted for under the customer's previous ship order. The employer also expected claimant to follow the instructions of his supervisors. Claimant understood these expectations.

(3) In January 2014, the employer acquired its first truck and trailer that were required to stop at highway weigh stations. On September 5, 2014, a truck and trailer that claimant had verified was within weight limitations stopped at a weigh station where it was determined that the truck and trailer were overweight. Until this time, neither claimant nor the employer was aware that the combined weights of the truck and trailer were considered together, and not separately, to determine if a truck and the trailer it was hauling met weight limitations.

(4) On approximately September 6, 2014, the employer's owner met with claimant to discuss the incident on September 5, 2014. The owner told claimant during that meeting, "Don't ever overload my trucks again." Transcript at 8, 28.

(5) On September 6, 2014 or shortly after that day, the owner noticed that the truck that had been pulling the trailer on September 5, 2014 did not have a brake controller installed on it. The owner approached claimant and told him that the truck was legally required to have a brake controller before it could haul the trailer and asked claimant to install one. After September 5, 2014 through October 1, 2014, the employer's business was unusually busy shipping items to customers. Due to the pace of shipping, claimant did not have the time to install the controller and was unable to remove that truck from service for the time needed to do so. Claimant researched the legal requirements for truck brake systems and determined that that the installation of a brake controller was not required. Claimant took the information he had obtained through his research to the employer's project manager. Claimant did not install the brake controller and did not directly tell the owner that he had not done so.

(6) On October 1, 2014, claimant was preparing a load of several different shipments for hauling on the flatbed of the truck and on the trailer it was going to haul. One of these shipments was a partial order, and claimant did not generate a separate ship ticket for it. Instead, claimant determined the weight of that partial order by taking the weights for the items shipped in it from the "master ship list" that had been sent to the customer with the first delivery. Transcript at 32. Ship tickets were included with all the other shipments in that load. When claimant added together the weights of all the shipments in the load to determine if the total load complied with weight limitations, he made a mistake and did not consider the combined weight of the truck and trailer, as he had learned he needed to do on September 5, 2014. Claimant allowed the truck and trailer to leave the employer's yard. On October 1, 2014, the truck and trailer entered a weigh station and the driver of the load was cited for a combined load that exceeded weight limitations.

(7) On October 1, 2014, claimant called the owner to notify him that the truck and trailer were determined to have been overweight earlier that day. When the truck returned to the employer's yard, the owner inspected it and saw that a brake controller was not installed on it.

(8) On October 2, 2014, the employer discharged claimant for allowing a truck exceeding weight limitations to leave the employer's yard and for failing to install a break controller on the truck as instructed.

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 has

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-29290, the ALJ concluded that claimant's failure to accurately gauge the weight of the truck and trailer on October 1, 2014 was misconduct. The ALJ reasoned that claimant was aware that the employer required a ship ticket for each shipment in a load to accurately calculate its weight and his failure to create one for the partial order included with the October 1, 2014 load was wantonly negligent since claimant "merely guessed at the weight rather than using the steel book." Hearing Decision 14-UI-29290 at 4. The ALJ also appeared to conclude that claimant's mistake in failing to take account of the combined weight of the truck and trailer was wantonly negligent because he was aware that the weight needed to be calculated in a manner that "ensure[d] that the truck was not overloaded. " *Id.* The ALJ further concluded that even if it a brake controller was not legally required on the truck, claimant's failure to install it by October 1, 2014 was wantonly negligent because claimant "had been given a clear instruction and failed to do as instructed." *Id.* We disagree.

While the employer's owner on several occasions referred to the employer's protocol that "ship tickets" be prepared for all shipments in a load, he also testified that there were exceptions to that requirement where claimant needed to consult the "steel book" to determine the weight of the shipped items based on their dimensions. Transcript at 5, 6, 10, 20, 21. Aside from asserting that claimant had the "tools" available to accurately calculate the weight of a load, the owner did not detail how claimant was aware of any requirement to consult the "steel book" and affirmatively stated that he "did not know" if claimant knew how to use those "tools," including, presumably, the "steel book." Transcript at 19. The owner simply contended that, because claimant was a foreman and management employee, he did not need to "spell out every little thing" for claimant. Transcript at 9. It is not clear on this record that the employer ever plainly communicated its expectations to claimant about the steps that he was to take to ensure that he correctly calculated the weight of a load. When asked if claimant's testimony that ship tickets were not uniformly required for partial orders was accurate, the owner also gave a confusing response that did not clearly dispute claimant's testimony, but defaulted to the position that claimant "did have the ability to get ship tickets made up [for the partial order]." Transcript at 47-48. Given the owner's testimony, the employer did not meet its burden to show that claimant's failure to generate a ship ticket for the partial order on October 1, 2014 or that claimant's failure to consult the "steel book" to determine the weight of the items included in that partial load violated the employer's expectations.

Claimant generally agreed that, as shop foreman, he was expected to take reasonable steps to ensure that he verified that a load complied with legally mandated weight standards before allowing a load to leave the employer's yard. Transcript at 24-25. Rather than merely "guessing" at the weight of the partial load, as the ALJ asserted, claimant based his estimate on the weights shown on the "master ship list" for the items in the partial load. There is no evidence in the record, and the owner did not contend, that claimant's action in calculating the weight of the partial load from the master list was unreasonable or even that it achieved a less accurate result than if he had generated a new ship ticket for that partial load or consulted the "steel book." There also was no evidence in the record that the missing ship ticket caused claimant to incorrectly calculate the weight of the total load hauled on October 1, 2014. The only evidence as to the source of claimant's error was from claimant, who attributed it to his "mistake" in forgetting to take account of the fact that he needed to combine the weights of the shipments on both the truck and the trailer before he determined whether the total load was within legal weights. Transcript at 33, 44. EAB has consistently held that mistakes or inadvertent lapses of the type claimant

made in failing to remember that he needed to consider the combined weights of both the truck and trailer are not, in and of themselves, sufficient to show the level of awareness needed to establish that claimant's behavior was willful or wantonly negligent and that it was misconduct. *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 willful or wantonly negligent); *Marina V. Berlanchenko* (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 willful or 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 willful or 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). Because the employer did not present any evidence of claimant's conscious mental state at the time he made the mistake in calculating the weight of the load, and did not attempt to rebut his statement that it was a mere mistake, the employer did not meet its burden to show that claimant's error was willful or wantonly negligent or that it constituted misconduct.

With respect to claimant's failure to install the brake controller on the truck, the owner did not rebut claimant's contention that the employer was extremely busy making deliveries from the time when the owner asked claimant to install the controller until October 1, 2014 and it would have interfered with the owner's scheduled deliveries to remove the truck from service for installation. Transcript at 34, 36. The owner also did not directly rebut that he told claimant, when they discussed the installation of the brake controller, that he was under the impression the employer was legally required to install the controller before it could use the truck to haul the trailer. Nor did the owner rebut claimant's testimony that, before claimant allowed the truck to perform any hauling, he researched whether installation of a brake controller was legally required and gave copies of what he had learned to the employer's project manager. Transcript at 35, 36. Under the circumstances, it was reasonable for claimant to conclude that the owner's instruction to him about the brake controller was predicated on the owner's belief about legal requirements and that, given the unusually large volume of shipments, the owner would permit him to delay installing the controller if it was not legally required. In addition, the reasonable inference that the employer should have drawn from claimant providing his research materials to the project manager was that he was justifying his delay in installing the brake controller and that, unless told otherwise, claimant was not going to promptly install it due to the current volume of the employer's shipments. That claimant made an attempt to communicate his intentions to the employer and took the actions that he did to meet the employer's reasonable business needs shows that he was not indifferent to the consequences

of that behavior on the employer's reasonable objectives. *See* OAR 471-030-0038(1)(c). On the facts, the preponderance of the evidence shows that claimant's behavior in delaying the installation of the brake controller was not a willful or wantonly negligent violation of the employer's expectations. Claimant's behavior was not misconduct.

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

DECISION: Hearing Decision 14-UI-29290 is set aside, as outlined above.

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

DATE of Service: January 20, 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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