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BYE: 201551

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
2015-EAB-0315

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 28, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision #105025). The employer filed a timely request for hearing. On March 10, 2015, ALJ L. Lee conducted a hearing, and on March 11, 2015, issued Hearing Decision 15-UI-34957, concluding the employer discharged claimant for misconduct. On March 18, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Arrow Sanitary Service (Arrow) employed claimant as a commercial driver from September 22, 2014 to December 1, 2014.

(2) The employer had a safety policy it expected drivers to follow when they operated a commercial vehicle in reverse. The policy was identified by the acronym "GOAL", which stood for "get out and look." Transcript at 17. Under the policy, whenever a driver "lost control of the vehicle" described as "anytime [a driver] lost routine, or rhythm [during] the normal workday" or "was outside of the vehicle for an extended period" he (or she) was expected to exit the vehicle and do a walk around before proceeding in reverse to determine if it was safe to proceed. Transcript at 39-40. The employer also had a "repeater accident" policy under which a driver was terminated if he was involved in three preventable accidents within a twelve-month period. Transcript at 12. Claimant was aware of the employer's "GOAL" and "repeater accident" policies.

(3) On October 30, 2014, claimant was driving a sanitation truck picking up garbage along a route when a garbage cart failed to properly attach to the truck lift. When claimant raised the lift, the cart was thrown through his vehicle and onto a parked vehicle, damaging it. Although the accident was attributable in part to a faulty lift, claimant was considered at fault because he "forgot" to close the door on the other side of his vehicle through which the cart was thrown. Transcript at 23.

(4) On October 31, 2014, at the end of his shift during which he used an unfamiliar vehicle, claimant parked that vehicle and applied the air brake, as he did for his usual vehicle, before going home. Over the weekend the air pressure in the braking system receded, eventually causing the vehicle to roll down an incline and strike another truck. Claimant was counseled for not also applying a manual brake necessary for the vehicle he had used although he had not been so trained.

(5) On November 25, 2014, claimant was assigned a flatbed truck to pick up garbage carts in a residential neighborhood. While en route to a street address, he realized he had slightly passed his destination. He stopped his vehicle for a few seconds to double check the address, checked both rearview mirrors and turned his head to look behind the vehicle without thinking about exiting the vehicle to look. He then reversed his vehicle "without realizing that there was...a car behind him" and backed over the hood of the vehicle behind him causing property damage.

(6) On December 1, 2014, the employer discharged claimant for violating its "GOAL" safety and repeater accident policies on November 25.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant, but not for misconduct.

ORS 657.176(2)(b) requires a disqualification from unemployment insurance benefits if the employer suspended 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.

There was no dispute that the employer discharged claimant under its repeater accident policy following his third accident on November 25. Consequently, because that incident triggered the employer's decision to discharge claimant, it was the proximate cause of the discharge and is the proper focus of the misconduct analysis.

In Hearing Decision 15-UI-34957, after finding claimant was aware of the employer's "GOAL" policy, but "assumed that checking both side view mirrors and turning his head was sufficient" and "had not thought to exit the truck himself or to have his passenger do so to visually look at the rear of the truck", the ALJ concluded that claimant's conduct on November 25 was wantonly negligent, reasoning, in pertinent part,

> Claimant was aware of GOAL, but disregarded it as a regular practice because he had observed other drivers who seemingly disregarded the practice…claimant knew or should have known that he needed to avoid another accident or risk being fired…claimant's decision to disregard GOAL and rely solely on the side view mirrors…was wantonly negligent

Hearing Decision 15-UI-34957 at 2, 4, 5. However, the record fails to show that claimant consciously disregarded GOAL either as a regular practice or on November 25. At hearing, after admitting he was aware of the GOAL safety policy but had driven with supervisors "that didn't do it every single time", claimant explained, "I didn't question it 'cuz they were my supervisors, and did I do what I did because of that? No, not necessarily...I thought I was safe...I honestly thought that I was clear back there." Transcript at 35-36. Although we agree with the ALJ's finding that on November 25 claimant "had not thought to exit the truck himself or to have his passenger do so to visually look at the rear of the truck", we disagree with her conclusion that he was wantonly negligent for that reason.

In a discharge case, the employer bears the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that claimant *consciously* engaged in conduct that he knew or should have known would violate the employer's expectations. Here, in the absence of evidence showing that at the time in question on November 25 claimant was conscious of the employer's expectation to "get out and look" behind his vehicle before reversing, and for no good reason, failed to do so, misconduct has not been shown.

Although the employer may have good reason to discharge claimant, it failed to establish that it did so for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 15-UI-34957 is set aside, as outlined above.[1]

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

DATE of Service: <u>May 7, 2015</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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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[1] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.